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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CONCURRENT JURISDICTION WITH CALIFORNIA NORTHERN DISTRICT COURT

TWO MINERS & 8000 ACRES OF LAND
T.W. ARMAN and JOHN F. HUTCHENS,
real parties in interest), "Two Miners"
Plaintiffs
v.
UNITED STATES OF AMERICA
Defendant
Corporeal violation of private property right
TAKINGS CLAIM JUST COMPENSATION

Court of Federal Claims No. 09-207 L
Honorable Judge Christine O. C. Miller

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT, JUSTICE REQUIRED (Also filed pursuant to RCFC 14(c)(1)(A).) and pursuant to CERCLA section 113)

TO DEFENDANT UNITED STATES OF AMERICA AND ITS ATTORNEYS OF RECORD:

Plaintiffs hereby move this Court for leave to file the attached Second Amended Complaint. Pursuant to Federal Rule of Civil Procedure, Rule 15. **LEAVE TO FILE OVERSIZE, &c.** For the reasons set forth in the accompanying Memorandum, Plaintiff respectfully requests that this Court grant him leave to file the Second Amended Complaint because it will clarify the dispute between the parties and will not cause any prejudice. **NO NEED FOR REDACTION** The Motion shall be based upon this Notice, the attached Memorandum of Points and Authorities, a copy of the proposed Second Amended Complaint for Just Compensation.

DATED: December 14, 2010; signature: 

CHINOOK SALMON LOST & FOUND s/ JOHN F. HUTCHENS, AUDITOR GENERAL

MEMORANDUM IN SUPPORT OF MOTION & SECOND AMENDED COMPLAINT

I. Grounds for Granting Leave to Amend. By petitioner's original writ this matter is brought and According to Federal Rule of Civil Procedure 15, "a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served…[o]therwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). Where leave of the court is sought, Rule 15 states, "[L]eave shall be freely given when justice so requires." Id. In Foman v. Davis, the Supreme Court held that [i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given." Foman v. Davis, 371 U.S. 178, 182 (1962). In Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc., the Court stated that "the court must be very liberal in granting leave to amend a complaint," noting that "[t]his rule reflects an underlying policy that disputes should be determined on their merits, and not on the technicalities of pleading rules." Advanced Cardiovascular Sys., Inc. v.SciMed Life Sys., Inc., 989 F.Supp. 1237, 1241 (N.D. Cal. 1997). **ERRORS; SUMMARY JUDGMENTS.**

Granting this request would be consistent with the "underlying policy that disputes should be determined on their merits, and not on the technicalities of pleading rules." Advanced Cardiovascular Sys., 989 F.Supp. at 1241. **MOTION FOR RULING ON THE MERITS.**

Given the aforementioned circumstances, it cannot be said that Plaintiff's request reflects any "dilatory motive" on Plaintiff's part, nor would allowing Plaintiff's Motion For Leave To File A Second Amended Complaint impose any undue prejudice upon defendant SEC. Foman, 371 U.S. at 182. Similarly, there has been no undue delay by Plaintiff in amending the complaint. Granting Plaintiff's Motion For Leave To File A Second Amended Complaint would leave the case management schedule unchanged, and would provide the defendant UNITED STATES and the Court with important and useful information. Please see: www.ironmountainmine.com

The Court may recall that it dismissed the previous second amended complaint for lack of subject matter jurisdiction after striking Iron Mountain Mines, Inc. from the complaint.

Accordingly, Mr. T.W. Arman, sole owner of Iron Mountain Mines, Inc., in recognition of the unfair and unjust coercive monopoly of admitted attorneys denying Mr. Arman the right to represent his wholly owned corporation, elected to convey the land, the only asset of the corporation, into his own name. This he did on October 28, 2009. **ABSOLUTE ORIGINAL PROPRIETOR**

In order to fully apprise the Court of the nature of the wrongful taking, petitioner has waited until all relevant facts could be compiled to fully inform the Court of the errors and mistakes.

Therefore, this second amended complaint caption only includes the real parties in interest.

Petitioner further asserts that the stricken second amended complaint was misconstrued as petitioners had expressly waived torts in favor of equitable resolution, as is our right. **BAILMENT**

Petitioner alleges that the taking was without a lawful basis. Nevertheless, since defendant was misled by their employees with false information that induced the President, the Congress, and the Eastern District Court of California to act and deprive these petitioners of vested rights, the actual lawfulness of the action is irrelevant to these petitioners, it is simply a fact. **TRESPASSERS.**

STATEMENT OF CLAIM, LOCATORS RIGHTS OF PRIORITY OF POSSESSION

Petitioners are entitled to relief because they are the owner & operator of Iron Mountain Mines, with vested and accrued existing rights of the locators, including all of the rights, privileges, and immunities of patent title, including all of the rights, privileges, and immunities of the Morrill agricultural college land grants, military scrip bounty warrant freehold estates, land in lieu of land by patent title to the Pearson B. Reading Buenaventura Mexican Land Grant, and General Mining Law patents in servient heritage thereto. **EPA INVADED UNDER FALSE CLAIMS.**

§ 26. Locators' rights of possession and enjoyment; exclusive right.

§ 29. Patents; …the affidavits required made by authorized agent conversant with the facts.

§ 30. Adverse claims; judicial determination of right of possession;

§ 31. Oath: agent or attorney in fact, title verified by the oath of any duly authorized agent.

§ 33. Existing rights; all the rights and privileges conferred.

§ 40. Verification of affidavits before officer authorized to administer oaths within land district

§ 51. Vested and accrued rights; by priority of possession, rights vested and accrued,

..the possessors and owners of such vested rights shall be maintained and protected in the same;

ABRAHAM LINCOLN PATENT TITLE, BOUNTY WARRANT FREEHOLD ESTATE

In California, a complaint simply alleging the ownership by plaintiff of his mining location and the claim by defendant without right of an adverse interest has been held to allege enough.

In any event the party seeking to have a trust declared must make out a case against the patentee by evidence that is plain and convincing beyond reasonable controversy." It has been held that such a suit is clearly within the jurisdiction of the federal courts, regardless of the citizenship of the parties. In proceedings under Rev.Stat. §§ 2325, 2326 to determine adverse claims to locations of mineral lands, it is incumbent upon the plaintiff to show a location which entitles him to possession against the United States This is therefore also an adverse claims proceeding.

In proper cases patentees will be held to be trustees for others equitably entitled to the land.

If the patentee bring ejectment, the trust may be set up as an equitable defense in Jurisdictions where such defenses are allowed. **PATENTEES BRING EJECTMENT! RESTITUTION!**

Where a co-owner has been excluded from the patent the patentees become trustees for him to the extent of his interest, and it seems that he need not await the issuance of patent before suing.

Laches will operate as a bar. Petitioners still request a responsive pleading to the complaint.

Legislative history indicates that a principal goal in creating section 113 was to clarify and confirm "the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." S. REP. NO. 99-11, at 44 (1985). **REMISSION, REVERSION, DETINUE SUR BAILMENT-TROVER.**

Extent of the Taking, wrongful taking under false pretense of official right; EJECTMENT.

"Two Miners" contend that the physical taking of the Brick Flat Pit produced a compensable impact on the entire Property's value. Petitioners claim that the remedial action produced two linked effects flowing from the EPA's physical occupation of the Brick Flat Pit. The first effect was the physical taking of the Brick Flat Pit itself, which continues to prevent T.W. ARMAN from commercially exploiting the Brick Flat Pit. The second effect was the diminution of the Property's overall market value due to the stigma associated with possible liability to any buyer for the CERCLA action. It should be noted that this "stigma" amounts to considerably more than a men-

tal attitude on the part of buyers. It is based upon a very real possibility that any commercial activity on the property might lead to regulatory prohibition or real physical danger. While T.W. Arman is not convinced that in fact the Property is unusable, it seems clear that a reasonably prudent buyer would consider that quite probable, and be unwilling to purchase the property at any positive price, or share in the stigma of exterminating the salmon and trout. **WE BELIEVE IN TED** Two Miners has expert testimony stating that, "the mere existence of this huge quantity of waste on the property, even in a constructed repository, creates too great a potential [CERCLA] liability for anyone to consider purchasing the land.", T.W. ARMAN WILL NOT SELL THE LAND. In summary, Iron Mountain Mines experts in the valuation of contaminated property argue that anyone buying the Property before the EPA completes the removal action and removes the sludge from the Open Pit would potentially bear liability under CERCLA for costs incurred in the removal action. **NO NEED FOR A MEMORANDUM OF UNDERSTANDING NOW! GO!** Consequently, a reasonable purchaser would discount the purchase price of the Property by at least the amount of the liability assumed in the post-removal action condition of the Property. Similarly, Iron Mountain Mines will present evidence that once the presence of hazardous waste has stigmatized property, a reasonable purchaser of said property would discount the sales price for the costs of removal of all of the offending material currently disposed in the Brick Flat Pit. Iron Mountain Mines noted that the stigma flows from the possibility of leakage of contaminants from the waste in the Open Pit and the potential "consequent liability placed upon T.W. Arman under CERCLA." **THE GOVERNMENT EVADED ITS DUTY TO DEFEND. JUST GO!** According to "Two Miners", it follows that just compensation should be the difference between the Property's pre-taking fair market value and the sum resulting from the cost of the removal of the hazardous waste in the Open Pit added to the CERCLA liability incurred. **$57,139,669.53.** The stigma associated with general contamination and burden of infamy associated with natural resource damage and fish extinction dramatically affects the entire Property's value. **$6 billion.** Hendler and Shelden permit recovery for diminution in value due to the general fear of a hazard caused by a taking, assuming that the hazard's affect on marketability is measurable. See Hendler, 38 Fed. Cl. at 625 (quoting United States v. 760.807 Acres of Land, 731 F.2d 1443, 1447 (9th Cir.

("[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation.")); see Shelden, 34 Fed. Cl. at 373. It is generally recognized that general market perception of contamination on a future development site results in the depreciation of property value. **AND WHOSE PROPERTY IS IT ANYWAY. SEE EMANCIPATION** TWO MINERS argument is that the Open Pit's taking negatively impacts the entire Property's value on the basis of the evidence. **THE TAX ASSESSOR SAYS THE VALUE IS ZERO!** In analyzing this impact, the' computations regarding the Property's diminution in value as a result of the stigma associated with hazardous waste and fish extinction. **TELL THE TRUTH!**

The Removal Action as a Special Benefit, NOT FOR MR. TED ARMAN IT WASN'T

When only a portion of private property is physically taken, the amount of compensation owed for the property of Iron Mountain Mines must be reduced by any special benefits from the government action accruing to the remainder of the property. Hendler, 38 Fed. Cl. at 1380. Special benefits are benefits which inure to the particular property suffering the taking, rather than to the general public. The United States placed a statutory lien for "unrecovered past response costs" and stated that the removal action conferred a special benefit upon the Property which we should deduct from any ultimate damages valuation, and inferred that it was justified as a "windfall" lien. **Wow, that is some amazing regulation, whole thing sounds like a windfall tax to me. JUST GO!** Such arguments, however, lead nowhere. Even if the Court accepts the government's argument that the removal action benefits the Property's value, the United States will be unable to include any evidence regarding the amount by which such benefit increases the Property's value. Thus, no offset of compensable damages for the benefits allegedly conferred by the removal action are possible. **AN OFFSET FOR THE LOSS TO MR. T.W. ARMAN'S HONOR, AND DIGNITY, AND REPUTATION, SHALL FOREVER BE ATTACHED TO THIS SOVEREIGN LAND.** Having resolved these issues, let us now turn to the determination of the Property's fair market value as a function of calculating the just compensation owed on Iron Mountain Mines. **PLEASE** This motion is also made pursuant to **RCFC 14(c)(1)(A) and CERCLA section 113.**

TREBLE DAMAGES, SEE IMPAIRMENT OF INTEREST, SEE STIGMATIC INJURY.

Just compensation for a taking under the Fifth Amendment requires that a deprived owner be put "in the same position monetarily as he would have occupied if his property had not been taken." Almota Farmers, 409 U.S. at 474 (internal citations omitted). The necessary corollary to this basic damages principle is that the Court may not place a deprived owner in a better position by a Fifth Amendment taking recovery than if the taking at issue had not occurred. **EPA BAN FOREVER.** The fair market value of the highest and best use of the Property before and after the action.

A reasonable valuation of the Property's value as a mine before the EPA's removal action estimates the Property's value based upon the 20 million plus tons of proven ore reserves plus 5 million tons of probable reserves and the assay of minerals and the prices of Gold, Silver, Copper, Zinc, Iron, Aluminum, Magnesium, Manganese, Vanadium, Titanium, Cobalt, Nickel, and other minerals and by-products at close to $18,400,000,000 (billion). Assuming the EPA estimate of mining and remediation at $1.400,000,000 (billion) is correct, The fair market value would be $17,000,000,000 (billion). Add to that a fair market value of the land surface (4,400 acres) for the future complete development (1 billion), yields a gross takings value of $18,000,000,000 (billion) of Just Compensation Valuation. Additional value of the estimated 20 billion tons of building stone available incidental to mineral resources indicates a total potential value of $72 billion.

THE U.S. COULD BE COMPELLED TO BUY IMMI, BUT TED ARMAN WON'T SELL, THEN THE DAMAGES IS THE ACTUAL INJURY TO T.W. ARMAN & THE COLLEGE.

Iron Mountain Mines calculates the fair market value of mining on the Property prior to the taking by determining the present value of the future income stream of minerals that could have mined on the Property absent the taking over a twenty year period. This methodology required an estimate of the annual production of minerals on the Property to determine the present value of the future royalty income stream. (1000 tons per hour of lost and wasted capacity since July 1977) T.W. Arman and John Hutchens assume that solution mining would have averaged annual production of 500,000 tons of mineral products and a royalty of $100,000,000 (million) per year. Multiplying projected annual production by this royalty rate, annual royalties from January 1989 until January 2009 would be $2,000,000,000. (a private party may "recover expenses associated with cleaning up contaminated sites." United States v. Atl. Research Corp., 551 U.S. 128, 131)

T.W. Arman and John Hutchens therefore believe the present value of lost mining opportunity on the Property as of January 1, 1989, to the present at $2,000,000,000. Not to mention the time.

It is well established that "comparable sales are considered by the courts to be the best evidence of fair market value, and thus preferable to other forms of valuation." Stearns Co., Ltd. v. United States , 53 Fed. Cl. 446, 458 (2002) (citing United States v. 50 Acres of Land, 469 U.S. 24 (1984)); Kirby Forest Indus. Inc. v. United States , 467 U.S. 1 (1984). Other valuation methods may prove useful, but a comparable sales methodology is a generally superior indicator of value if an active real estate market existed in the vicinity of the subject property prior to the taking. See Florida Rock Indus., Inc. v. United States , 45 Fed. Cl. 21, 35 (1999) (citing Whitney Benefits, Inc. v. United States , 18 Cl. Ct. 394, affirmed 926 F.2d 1169 (Fed. Cir.), cert. denied, 502 U.S. 952 (1991)). **MOTION TO ABOLISH MORE SENSELESS OSTENTATION AND DELAY, GRANT MR. T.W. ARMAN REMISSION, REVERSION, & DETINUE SUR BAILMENT.** Here, Iron Mountain Mines valued the Property's worth for mining since no comparable comparison was or is available, by analyzing the Property's pre-taking future income stream.

Iron Mountain Mines claims that future income stream analysis is appropriate here because the valuation of mineral interests is preferably done by determining the present value of a future income stream. Iron Mountain Mines support this view by arguing that the federal government, in its Uniform Appraisal Standards for Federal Land Acquisitions, states that, "[p]roperty having a highest and best use for mineral production may be appraised utilizing an income approach when comparable sales are lacking." Uniform Appraisal Standards at 23-24 (internal citations omitted). Iron Mountain Mines further points to Whitney Benefits, Inc. v. United States , in which the Federal Circuit approved of the use of future income stream analysis, as support for the relevance of future income stream analysis in the present case. See 962 F.2d 1169 (Fed. Cir. 1991).

MR. T.W. ARMAN – ARMAN HYDROPOWER FOR SALE, $1 TRILLION DOLLARS. Deprived miners T.W. Arman and John Hutchens are entitled to interest on just compensation awarded pursuant to Fifth Amendment takings. Stearns Co., Ltd, v. United States , 53 Fed. Cl. 446, 466 (2002) (citing Kirby Forest Indus. v. United States , 467 U.S. 1 (1984)). Thus, an award to T.W. Arman and John Hutchens with compounded prejudgment interest from the date of the

taking until the date of the judgment is proper. See Id. (citing United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 (1947); Miller v. United States, 223 Ct. Cl. 352, 360 (1980). We date the taking as having actually accrued as of March 9 th , 2007, as the day the EPA project manager and/ or the site operator replaced the gate at the property entrance and refused to provide T.W. Arman with the key or code. Previously the EPA and its contractors had not interfered with T.W. Arman's possession and enjoyment of the property, and the EPA has always averred that it makes no claim to a right of possession of the property, and the project manager has publicly proclaimed as recently as this year that Mr. Arman is free to do whatever he wants with the property, because he is the owner. **YOU CAN'T TAKE IT WITH YOU, NOT HOTEL CALIFORNIA.** Petitioners appreciate every indulgence extended by the court in consideration of the overly verbose or turgid pleadings, and petitioners further acknowledge the courts tolerance of any inadvertence in the pleadings such as referring to the lost mining opportunity as a commencement of the takings, an reasonable misunderstanding of the meaning of a takings, and when the facts of the case indicate otherwise. The EPA and its contractors had until March of 2007 conducted themselves with due propriety for which Mr. Arman affectionately referred to them as "the janitors". The EPA first published information indicating that it did not intend to perform additional RODs, (record of decision) in May of 2006, so in the absence of any protest of the CERCLA actions, no claim would be ripe for adverse possession until after that time. **STIGMA CONDEMNATION** Interest computation will be based upon the Contracts Disputes Act, 41 U.S.C. §§ 601-13 (1982). See Jones v. United States , 3 Cl. Ct. 4, 7 (1983). Iron Mountain Mines further seeks awards of attorney fees and costs incurred as a result of litigation to T.W. Arman and John F. Hutchens under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U.S.C. § 4601 et seq. (1995 & 2002 Supp.). Attorney Fees: CERCLA Private Recovery Actions , 10 Pace Envtl. L. Rev . 393 (1992) **$4,000,000. EXPERT FEES AND COSTS, NO BUYERS** Two Miners T.W. Arman and John F. Hutchens also seek compensation for stigmatic injuries. T.W. Arman and Iron Mountain Mines et al have been unfairly blamed for the endangerment and possible extinction of salmon and trout in the Sacramento River, a crime of infamy if ever there was one, not withstanding that there is no evidence that any fish have been killed in the affected

reaches of the Sacramento River since at least 1969, seven years before T.W. Arman. purchased the property, or that T.W. Arman and Iron Mountain Mines, Inc. did not actively mine the massive sulfide ores found to be the source of the minerals passively migrating from the property and alleged to pose an "imminent and substantial endangerment" to the environment, and in disregard of contributory factors, particularly the United States construction of dams that destroyed the habitat of the salmon and trout necessary for their reproduction, and without consideration of other factors affecting the fishes demise, such as urban run-off, untreated sewage, ranching, farming, global warming, and other forms of habitat destruction. **DID I MENTION DAMS?**

When the EPA first conducted its remedial investigation of Iron Mountain Mines, it considered "Among the remedial action alternatives that could be implemented by the EPA, the total removal of the source and sediments in the receiving waters (Alternative CA-10) is considered the only remedy for the Iron Mountain Mine site which is capable of meeting project cleanup objectives and the full requirements of the Clean Water Act (CWA). This alternative would effectively eliminate discharges from Iron Mountain and restore all tributaries to pristine condition. This alternative was based on total removal of all the source of contamination and disposing of them in a RCRA-approved facility." **WHAT NONSENSE, CLEAN IT UP, PLOW IT IN TO FIELDS.**

Without digressing to consider the notion of disposing of millions of tons of valuable ore and mining by-products, it will suffice to observe that having recognized that there was a viable alternative that was fully protective of human health and the environment, the EPA elected to proceed with a remedial action (removal) that was less than fully protective of human health and the environment, and then and thereafter disregarded its duty and responsibilities to implement a remedial action that was fully protective of health and environment. **FERTILIZER FOR FOOD, FARM.**

For these reasons T.W. Arman and John Hutchens dispute the United States lawful authority to conduct these CERCLA remedial actions (removal) and demand the return of the property and restoration of rights, privileges, and immunities of patent title to the possession and enjoyment of T.W. Arman and John F. Hutchens. **NO BASES, JOINT AND SEVERAL TRESPASSERS.**

Because the United States, even with congressional approval, executive authorization, and district court decree, has no actual justification for its actions, and the only remedy found to be fully pro-

tective of human health and the environment is to finish the mining begun 150 years ago, the only remedy consistent with CA-10 of the administrative record, (complete removal of the source) which is what Iron Mountain Mines, Inc. was doing before the EPA interfered, the EPA should be found liable for the taking of private property for the public benefit requiring the payment of just compensation under the 5th amendment of the constitution. **NOW YOU SHOULD HELP!**

T.W. Arman used "due care" in the purchase of the property, because copper, zinc, and cadmium were not listed as "hazardous substances" under the provisions of the Clean Water Act (CWA) in 1976 when the property was purchased, and California laws regarding mining operations compliance with federal regulations show that Iron Mountain Mines was not in violation of any law.

JUST COMPENSATION: MINER-VETERAN - SENIOR CITIZEN; MR. TED ARMAN

Iron Mountain Mine Institute remediation comprises a range of best practices that may be applied throughout the private remedy operations. The best management practices of green remediation provide potential means to improve waste management; conserve or preserve energy, fuel, water, and other natural resources; promote sustainable long-term stewardship; and reduce adverse impacts on the local community during and after remediation activities. Green remediation can also complement efforts to return the private site to productive use in a sustainable manner, such as utility-scale production of renewable energy, utility scale hydropower & pump storage, utility scale photovoltaic, utility scale wind, utility scale biorefinery and biopower. **REMIT TRUSTS**. Utilization of green remediation strategies within the scope of the private response help ensures a protective remedy. It may be possible to lessen the long-term negative effects of the government's previous actions on the site. With the presently operating removal action green remediation practices may be used to upgrade or optimize treatment systems. Iron Mountain Mine remediation strategies complement site reuse involving sustainable activities and property development in accordance with smart growth principles and green building practices. **REMIT NRDC DAMAGE**

In April 2009, the OIG identified 10 key management challenges for Fiscal Year 2009. Three of those challenges impact EPA's management and enforcement capability: 1 EPA's organization and infrastructure; 2 Oversight of delegations to States; and 3 Performance measurement. We believe that the underlying issues persist. **NO FURTHER EVIDENCE REQUIRED.**

Memorandum of Points and Authorities in support of motions, Discrimination Claims

The Environmental Protection Agency administers the general provisions of CERCLA. However, employee complaints of discrimination are filed with and handled by the Occupational Safety and Health Administration within the Department of Labor. Such complaints must be filed within 30 days after the violation of Section 10 occurs (although that deadline may be tolled if the discrimination is of a type, such as blacklisting or discriminatory working conditions, that may be considered continuing in nature).

Section 10 of CERCLA protects employees who themselves or through others provide information, file complaints, or participate in any manner in a proceeding related to administration or enforcement of the provisions of CERCLA. An employee's complaint to management or refusal to perform work due to conditions that the employee reasonably believes are unsafe or unhealthful may be considered participation in a proceeding under CERCLA.

Actionable discrimination under the Act is viewed broadly and includes termination from employment and any discrimination in compensation, terms, conditions, or privileges of employment attributable to the employee's participation in a CERCLA proceeding.

Complaints of discrimination received by OSHA are reviewed by supervisors who in turn will notify EPA of any potential environmental hazards disclosed by the complaint. The complaint letter, with witness names redacted, is sent to the respondent and the local EPA office, and an investigation is conducted by OSHA. A written notice of the results of the investigation and, if appropriate, an order of abatement should be completed within 30 days.

Remedies, Restoration of rights, privileges, and immunities of absolute original title.

Remedies for the employee include abatement of the discrimination through affirmative action including, but not limited to, rehiring or reinstatement of the employee or representative of employees to former positions with compensation. Costs and expenses will be assessed against the violator if the employee has to seek enforcement of the abatement order. ***Qui tam - dam novation***

Petitioner demands equal protection of a government employee *qui tam* "Whistleblower".

To maintain a claim that EPA has "unreasonably delayed" its duties under CERCLA, the court held that plaintiffs may continue to press their claims under another statute, the Administra-

tive Procedure Act (APA), but must do so in another court. The court stated, “plaintiffs may bring an APA claim in the Court of Appeals for the D.C. Circuit alleging EPA unreasonably delayed in promulgating the financial responsibility regulations required under Section 108(b).” Id . at 6. Unless and until such a litigation is brought and decided, the timeline for financial assurance requirements under CERCLA will remain unclear. **We will so determine here.**

It is well established that a physical taking is defined by the government's corporeal violation of private property. As the Supreme Court has noted, “where real estate is actually invaded . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.” Loretto v. Teleprompter Manhattan CATB Corp., 458 U.S. 419, 427 (1982) (quoting Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)). The Court has similarly emphasized that, “[t]he hallmark of a physical taking is government occupation of real property.” Alameda Gateway, Ltd. v. United States , 45 Fed. Cl. 757, 762 (1999), quoting Loretto, 458 U.S. at 426 (1982). (Iron Mountain has been continuously invaded since the July 1977 CWA amendments.)

However, it has also recognized the possibility of compensable stigmatic injuries that extend beyond the tangible aspects of a physical taking. In Hendler v. United States, it held that “if fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation.” Hendler v. United States , 38 Fed. Cl. 611, 625 (1995) (quoting United States v. 760.807 Acres of Land, 731 F.2d 1443, 1447 (9th Cir. 1984)), aff'd 175 F.3d 1374 (Fed. Cir. 1999); see also Shelden v. United States , 34 Fed. Cl. 355, 373 (1995) (reducing post-taking fair market value of property due to stigma associated with earthquake damage).

CONCLUSION TO THE EXTENT OF THE TAKINGS CLAIM JUST COMPENSATION

T.W. Arman and John F. Hutchens claim that the EPA's remedial (removal) actions constitute a taking of the Iron Mountain Mines property warranting just compensation under the Fifth Amendment of the constitution of the United States for a partial takings of private property with actual damages of lost mining opportunities plus stigmatic injuries and property and incidental damages of $7,074,500,000 (billion). Petitioners seek an award of $7,074,500,000 (billion) in just compensation, with detinue sur bailment, reversion, remission, plus interest, attorney's fees, ex-

pert fees and costs. In the alternative that the United States actions are a condemnation that will prevent the lawful mining of Iron Mountain Mines, T.W. Arman and John F. Hutchens seek an award for the complete taking of private property for the public benefit requiring the payment of $18,000,000,000 (billion) in just compensation. **NOT FOR SALE; MR. T.W. ARMAN.** Plaintiff's “Two Miners” submit that plaintiff's mutual interests are undivided interests.

Wherefore, the United States is liable for the taking of private property requiring the payment of just compensation under the 5th amendment of the constitution of the United States, we demand judgment against the United States of seven billion, seventy four million, and five hundred thousand dollars for the partial takings and stigmatic injury, or eighteen billion dollars for the complete takings of the Iron Mountain Mines properties, plus interest, fees, and costs.

DEMAND; WRONGFUL TAKING JUST COMPENSATION TREBLE DAMAGES FORM

1. Plaintiffs in this matter demand exoneration by virtue of the innocent landowner defense, Third party defense, and act of God defenses, for restitution of the property invaded for CERCLA actions, and to void and vacate judgment, void and vacate consent decree, and vacate premises.
2. Plaintiffs demand just compensation for lost mining opportunity resulting from actions by the EPA represented as lawful police actions conducted for the public and environmental welfare, but found not to be fully protective of human health and the environment when such a remedy was offered by the plaintiffs at less expense, but prevented by the actions of the EPA on behalf of the United States. Plaintiffs seek further just compensation for illegitimate animus and vindictive actions, despotism and tyranny, false claims, and negligently arbitrary and capricious reckless endangerment and malicious prosecution. VESTING THE COLLEGE OF THE HUMMINGBIRD
3. Plaintiffs demand just compensation for the stigmatic injuries by the EPA.
4. Plaintiffs demand the creation and appointment of the Essential Products Administration, and the creation and appointment of the Special Deputy Attorney General thereof.
5. Plaintiffs demand review to contest the constitutionality of CERCLA, and request the court to certify any remaining constitutional questions to us and the United States Supreme Court.
6. Plaintiffs demand a determination of unfair and unjust burden upon T.W. Arman, John F. Hutchens, and Iron Mountain Mines et al that should be borne by the public as a whole.

7. Plaintiffs demand a determination of liability of the United States for contribution to waste and disposal without a memorandum of understanding with the property owner.

8. Plaintiffs demand retractions and exonerations by the government which allowed the character of T.W. Arman and Iron Mountain Mines to be libeled and slandered with abuse of process and malice to the severest possible unfair and unjust stigma with illegitimate animus and vindictive actions. VESTING GRAN DUCADO DE LOS CABECERA DEL RIO BUENAVENTURA

This is a paradigmatic issue for resolution by the Judiciary. The federal courts historically have resolved disputes over land, even when the United States military is occupying the property at issue. VESTING OF MORRIL LAND GRANT MILITARY SCRIP BOUNTY WARRANTS (4). In Megapulse, Inc. v. Lewis the court held that declaratory relief may be granted in the district court for unlawful government activities regardless of whether damages might also be available in the Claims Court. MOTION FOR CONCURRENT JURISDICTION AND 3 JUDGE COURTS. As Justice (then Judge) Cardozo admonished, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." VESTING TED ARMAN

The ability of the United States plaintiffs to sue does not turn on whether certain rights which may belong only to the corporation may be asserted "derivatively" by the sole shareholder or on whether we should "lift the corporate veil."- The "standing" inquiry may be conducted along two different branches: first, whether there is a cognizable property interest under the United States Constitution directly assertable by a United States citizen-shareholder; and second, whether (a) there is a cognizable property interest directly belonging to the corporation, and (b) if so, the scope of a shareholder's right to assert that interest derivatively. The crucial issue here is whether the plaintiffs have constitutional rights of their own, which exist by virtue of their exclusive beneficial ownership, control, and possession of the properties and businesses allegedly seized. Properly understood, the question is whether the plaintiffs' and the wholly owned [California] corporation have a judicially cognizable interest in the affected property sufficient to enable them to sue for an unconstitutional deprivation of the use and enjoyment of that private property. Because the plaintiffs have a protected property interest for the purposes of the claims asserted here they have standing to sue **1000 TONS PER HOUR WASTED CAPACITY SINCE JULY 1977.**

The court must concede on standing that the plaintiffs as individuals "have a cognizable property interest in the land, which interest, since they are American citizens, is protected by the Constitution." (Ramirez, Dissenting Opinion of Scailia, J., at 1556).. If the 100% owner, T.W. Arman, has an interest protected by the United States Constitution, that is enough to compel the United States [Federal Claims] Court to go forward. **MOTION FOR CERTIFICATION OF CLASS**

As such, cases involving corporate shareholders' attempts to sue for a violation of a constitutional right which attaches only to individuals when the challenged action affected only the corporation are inapposite. The approach taken in the instant case is consistent with the holdings of those cases by its focus on the nature of a shareholder's personal interests and injuries and his own constitutional rights in determining whether the shareholder has a right to sue.

[T]he Supreme Court has held that monetary relief for unauthorized Executive seizures is not available in the Claims Court . . . . `The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,' and hence recovery is not available in the Court of Claims.' **THESE ACTIONS AUTHORIZED BY THREE FEDERAL BRANCHES**

[I]njunctive relief is available [in U.S. District Court] when the [property] owner proves that government officials lack lawful authority to expropriate his property. **PROVEN BEYOND DOUBT**

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1522 (D.C. Cir. 1984)(en banc) (emphasis in original) (footnote omitted), vacated on other grounds and remanded, 471 U.S. 1113 (1985), dismissed on other grounds, 788 F.2d 762 (D.C. Cir. 1986) (en banc), quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974) (quoting Hooe v. United States, 218 U.S. 322,336 (1910)). Injunctive relief is also available in U.S. District Court `when the monetary compensation available exclusively in the Federal Court of Claims would be wholly inadequate to compensate the complainant for the alleged taking.' Transcapital Financial Corp., 44 F.3d at 1025.

December 14, 2010 Signature; 

/s/ John F. Hutchens, *pro se; sui generis;* Tenant in-Chief, Warden of the Stannaries

DECEMBER 14, 2010 Signature: 

VERIFIED AFFIDAVITS OF AGENT UNDER OATH s/ JOHN F. HUTCHENS

Western Governors Association Conference, December 7-8, 2010

States' leaders say Endangered Species Act 'nonsensical,' hurts business and farming

The Endangered Species Act is a “nonsensical” policy that hurts businesses, property owners and farmers to protect animals and plants that may not be at risk, a panel of Democratic and Republican governors from throughout the West said Wednesday.

The governors complained of having their hands tied by federal policy as animal populations described as thriving but listed as endangered ravage private ranches, state parks and golf courses. Wildlife advocates say species that have thrived under the law's protection might again be threatened if taken off the list.

“The frustration level is reaching the breaking point in many levels because of this act,” said Utah Gov. Gary R. Herbert. “It's nonsensical.”

The Republican governor griped about swarms of endangered prairie dogs digging into golf courses. “They have become so domesticated, they are just a pain,” he said.

The discussion about overhauling the Endangered Species Act came on the second day of a two-day conference of the Western Governors Association. State executives from 19 states, plus the U.S. territories of Guam, American Samoa and the Northern Mariana Islands, were invited to attend.

Federal environmental officials acknowledged the law's challenges and slow-paced evolution, but largely aimed to rebut complaints and praise a conservation policy that seeks to protect nearly 2,000 species of birds, insects, fish, mammals, flowers and trees.

“Does the act always work perfectly? No,” said Eileen Sobeck, deputy assistant secretary of Fish, Wildlife and Parks. “Do the successes under the act outnumber the problems? I think they do.” With its plentiful plains and rich wildlife, endangered species protections remain a testy issue in the West. Hunters and ranchers, a powerful constituency in the Mountain West, have called for delisting recovering populations of certain species such as gray wolves and grizzlies. They contend that the federal policy affects the value and sovereignty of their land and threatens livestock. Western governors insist states, not federal regulators, should have authority over native species that affect local habitats and create business hurdles.

“We are pretty good at managing our wildlife,” Gov. Brian Schweitzer of Montana said.

Montana, Wyoming and Idaho have been in negotiations with the federal Interior Department to remove gray wolves from the endangered species in recent weeks, but talks have since stalled.

The region's 1,700 wolves lost their endangered status in Montana and Idaho in 2009, but were returned to the endangered list this year after a lawsuit brought by environmentalists.

Schweitzer, a Democrat, said that the gray wolf population in the West has fully recovered and should not be on the list, but federal regulators have been reluctant to reconsider the endangered designation.

“The Endangered Species Act is the Hotel California,” he told The Associated Press. “You can check in, but you can never leave.”

Schweitzer said rural states do not have enough clout in Congress to successfully lobby for the delisting of wolves under the Endangered Species Act, and he blasted federal officials for making the process so bureaucratic.

Idaho Gov. C. L. “Butch” Otter said the law has pitted business owners against government enforcers. The Republican suggested the federal government instead encourage land owners to protect endangered species on private land through financial rewards.

“The Endangered Species Act is broken, it's bankrupt, it's a fraud now,” he said.

Title XXXIV, Central Valley Project Improvement Act

The purpose of this title is to protect, restore, and enhance fish and wildlife and their habitats in the Central Valley and Trinity River basins. Objectives include addressing the impacts of the Central Valley Project (CVP) on fish and wildlife resources and achieving a "reasonable balance among competing" water uses.

• Section 3404 -- Imposes several requirements that must be met before the Secretary enters into new CVP contracts for purposes other than fish and wildlife, including reporting requirements and implementation of the fish and wildlife and habitat restoration activities outlined in section 3406(b-d). Also provides conditions for the renewal of existing long-term contracts, such as the completion of all appropriate environmental reviews, and provides direction to the Secretary on administration of all contracts.

• Section 3405 -- Provides conditions and requirements for water transfers between users. Requires the Secretary to review and approve all transfers. In order to approve a transfer, the Secretary must determine that it will not have a "significant adverse effect" on the Department's contractual or fish and wildlife obligations.

• Section 3406(b) -- Immediately upon enactment, directs the Secretary to operate the CVP to meet all obligations, including the Endangered Species Act. Further directs the Secretary to establish programs and manage water resources for the benefit of various fish populations, and to work with the State of California and Tribes to protect and restore fishery resources.

Directs the Secretary to complete or participate in 23 specific activities to benefit fishery resources in specified CVP and Trinity River areas, including: implementation of the Service's Coleman National Fish

Hatchery Development Plan, assisting anadromous fish at the Red Bluff Dam through delivery of water to the Sacramento Valley National Wildlife Refuge complex, and completion by September 30, 1996, of the Trinity River Flow Evaluation Study being conducted by the Service.

• Section 3406(c) -- Requires the Secretary, in cooperation with the State of California, to develop a comprehensive plan to address fish, wildlife, and habitat concerns on the San Joaquin River. Provides guidelines on environmental factors that shall be included and water release measures that shall not be considered during development of the plan.

• Section 3406(d) -- Directs the Secretary to provide firm water supplies for specified areas to maintain and improve wetlands habitat in support of the objectives of the Central Valley Habitat Joint Venture (CVHJV). Specified areas include the National Wildlife Refuge System in the Central Valley.

Guidelines are provided for water supply needs and delivery schedules, including conformance with the Refuge Water Supply Report.

The Secretary in consultation with the State and the CVHJV is to investigate the water requirements necessary for "full habitat development for water dependent wildlife" on wetlands identified in the CVHJV implementation plan. A report is to also include "feasible means" to meet the requirements and is due September 30, 1997.

• Section 3406(e) -- The Secretary is directed to investigate and provide recommendations on the feasibility, cost and effects of: developing measures to maintain suitable temperatures for anadromous fish in the Sacramento and San Joaquin rivers; increased fisheries in the Central Valley or additional hatchery production to offset impacts of development; eliminating barriers to salmonid migration and assisting in the successful migration of anadromous fish; and other measures to protect, restore, and enhance natural production of salmonids in tributaries of those rivers. (COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)

• Section 3406(f) -- The Secretary, in consultation with others, is directed to examine all the effects of the CVP on all anadromous fish populations and fisheries, and all interests and entities with any significant association with these fishery resources. A report of these findings is to be provided to the Congress within 2 years of enactment of this Act (by October 30, 1994).

• Section 3406(g) -- Directs the Secretary, in cooperation with the State and other interests, to develop models and data to evaluate the ecology and hydrology of the Sacramento, San Joaquin, and Trinity river watersheds. Lists specific areas of emphasis that will support efforts to fulfill this title, including measures to restore anadromous fisheries, development of base flows to protect riparian habitat, and opportunities to protect and restore wetland and upland habitat.

• Section 3407 -- Establishes the Central Valley Project Restoration Fund, to be funded by donations from any source. At least 67 percent of the Fund is to be available for habitat restoration, improvement, and acquisition. Up to 33 percent is to be available to carry out specific paragraphs of section 3406(b).

Up to $50 million per year is authorized to be appropriated from the Fund to the Secretary for the provisions of this title. The Secretary is also directed to "assess and collect additional annual mitigation and restoration payments" from water and power beneficiaries to recover some or all fish, wildlife, and habitat restoration activity costs under this title.

• Section 3408 -- The Secretary is to develop regulations and enter into agreements as necessary to fulfill the purposes of this title. The Secretary is required to submit annual reports to Congress, the first of which is due by September 30, 1993. The report is to describe all significant actions taken by the Secretary and progress toward achieving the purposes and provisions of this title.

• Section 3409 -- Requires the Secretary to prepare a programmatic environmental impact statement according to NEPA, to analyze the direct and indirect, negative and beneficial effects of implementing this title. The EIS is to be completed within 3 years of enactment (by October 30, 1995). (COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)

• Section 3410 -- Such sums as may be necessary are authorized to be appropriated to carry out this title, and are to remain available until expended without fiscal year limitation.

Central Valley Project, California

Central Valley Project, California (16 U.S.C 695d-695j). The Emergency Relief Appropriations Act (Chapter 48, April 8, 1935; 49 Stat. 115) authorized expenditures of funds for various types of public works projects, including water conservation and irrigation. The Central Valley Project (CVP), a series of dams, reservoirs and canals in the San Joaquin Valley of California, was first established under this authority. This authority has been subsequently amended as follows: Chapter 689; June 2, 1936; 74 Stat. 1622; Chapter 832; August 26, 1937; 50 Stat. 844, 850; Chapter 895; October 17, 1940; 54 Stat. 1198; Chapter 690; October 19, 1949; 63 Stat. 852; Chapter 1047; September 26, 1950; 64 Stat. 1036; Public Law 674; August 27, 1954; 68 Stat. 879; P.L. 95-616; November 8, 1978; 92 Stat. 3115; and P.L. 102-575, October 30, 1992; 106 Stat. 4600. (COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)

The Flood Control Act of 1936 formally authorized funds for the project by name and the project was reauthorized by statutes enacted in 1937 (Chapter 832), 1940 (Chapter 895), 1949 (Chapter 690), 1950 (Chapter 1047), and 1954 (Public Law 674). The 1940 statute broadened the project's purpose to include navigation improvements, flood control, and energy development purposes. The 1949 statute reauthorized the CVP to include the Folsom dam and reservoir. The 1950 statute again reauthorized the Central Valley project and declared the purpose of the project to be for improving navigation, regulating the flow of the San Joaquin and Sacramento Rivers, flood control, irrigation, and electric power.

Public Law 674, enacted in 1954, declared use of water for fish and wildlife as a project purpose in addition to all other previously stated purposes. It also provided authority and conditions for delivery of water to the Grasslands areas of the San Joaquin Valley for waterfowl purposes as

stipulated in the 1950 DOI report entitled "Waterfowl Conservation in the Lower San Joaquin Valley, Its Relationship to the Grasslands and the Central Valley Project."

Public Law 95-616, approved November 8, 1978, amended the 1954 Act to guarantee the delivery of 3000 acre-feet of water each fall and 4000 acre-feet of water each summer, when available, and authorized construction of the water delivery system to deliver water to Federal waterfowl refuges in the San Joaquin Valley.

P.L. 102-575, signed October 30, 1992 (106 Stat. 4600) included provisions to protect, restore, and enhance fish and wildlife and their habitats in the Central Valley and Trinity River basins. Objectives include addressing the impacts of the CVP on fish and wildlife resources and achieving a "reasonable balance among competing" water uses. (For more detail, see the entry on P.L. 102-575, the Reclamation Projects Authorization and Adjustment Act of 1992, particularly Title XXXIV, the Central Valley Project Improvement Act.)

CERCLA § 104, 42 U.S.C. § 9604 (2000 & Supp. V 2005). Implementation of health-related authorities provided in CERCLA section 104 is a joint responsibility of the EPA and the Agency for Toxic Substances and Disease Registry (“ATSDR”), which was established under section 104. Id. § 9604 (i) (providing a listing of responsibilities of the ATSDR administrator and of other EPA/ATSDR joint responsibilities).

38 See id. § 9604(a)(1) (2000). See also id. § 9601(23) (defining “removal”); id. § 9601 (24) (defining “remedial action”). The President is authorized to acquire real property, or any interest therein necessary, in the President’s discretion, to conduct remedial actions. Id. § 9604(j)(1) (2000). See also id. § 9601(33) (defining “pollutant or contaminant”); id. § 9605 (discussing the preparation contents, revision, and republication of the national contingency plan).39 42 U.S.C. § 9604 (2000). The President has the authority to act under section 104 of CERCLA to: remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.Id. § 9604(a)(1). 40 Id. § 9604(e)(5)(A). 41 Id. § 9606(a). 42 Id. § 9606(a)-(b).

CERCLA section 106 directs the federal courts to use their equitable powers to cause responsible parties to abate the danger caused by the release or threatened release. Id. § 9606(a).

(4) that each of the defendants is a “person,” as that term is defined in 42 U.S.C. § 9607(a).

(Iron Mountain Mines is not a person)

[Federal Register: November 30, 2010 (Volume 75, Number 229)] [Notices] [Page 74045-74046] From the Federal Register Online via GPO Access [wais.access.gpo.gov] [DOCID:fr30no10-78] ----------

ENVIRONMENTAL PROTECTION AGENCY [EPA-HQ-SFUND-2010-0894; FRL-9233-7] Guidance on Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites AGENCY: Environmental Protection Agency (EPA). ACTION: Notice of availability. ---------- SUMMARY: EPA is interested in soliciting individual stakeholder input regarding the issues addressed in the EPA interim final guidance, titled Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites. The Agency will consider the information gathered from this notice and other sources before finalizing this guidance. DATES: Comments must be received on or before January 14, 2011, 45 days after publication in the Federal Register. ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-SFUND-2010-0894 by one of the following methods: http://www.regulations.gov: Follow the on-line instructions for submitting comments. E-mail: superfund.docket@epa.gov Fax: (202) 566-9744 Mail: U.S. Environmental Protection Agency; EPA Docket Center, Superfund Docket, Mail Code 28221T; 1200 Pennsylvania Avenue, NW., Washington, DC 20460 Hand Delivery: EPA Docket Center--Public Reading Room; EPA West Building, Room 3334; 1301 Constitution Avenue, NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Instructions: Direct your comments to Docket ID No. EPA-HQ-SFUND- 2010-0894.

Environmental Protection Agency Administrator Lisa Jackson testifies during a hearing in Washington, DC. that "The EPA asks for more time in crafting new pollution regulations."

(COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)

EPA Seeks Small Business Input on Financial Responsibility Requirements for Hard Rock Mining Release date: 12/06/2010

Contact Information: Richard Yost, yost.richard@epa.gov, 202-564-7827, 202-564-4355

WASHINGTON -- The U.S. Environmental Protection Agency (EPA) invites small businesses to participate in a Small Business Advocacy Review (SBAR) panel on a proposed rule that would establish financial responsibility requirements for classes of facilities within the hard rock mining industry. The requirements will help ensure that owners and operators of the facilities, not taxpayers, foot the bill for environmental cleanup.

Iron Mountain Mine Cleanup - State of Calif., CVRWQCB, et al. v. Iron Mountain Mines, Inc., et al., (EDCal No. CIV-S-91-1167-DFL-PAN) and U.S. v. Iron Mountain Mines, Inc., et al., (EDCal No. S-91-0768 DFL/JFM)

There were no Approved TMDLs reported to EPA by the state for this watershed. EPA is in the process of collecting TMDL information from the states. Because these efforts are on-going, there may be additional approved TMDLs that were not found here.

Approved TMDLS by EPA Fiscal Year (October 1 through September 30) since October 1, 1995

There were no Approved TMDLs reported to EPA by the state since October 1995.

1. See memorandum to Record, from Stephen Hoffman, USEPA and Shahid Mahmud, USEPA. Re : Mining Classes Not Included in Identified Hard Rock Mining Classes of Facilities. June 2009.

Florida Officials File Lawsuit Against EPA Over Federal Intrusion Into State's Clean Water Program TALLAHASSEE, FL – Florida Attorney General Bill McCollum, Agriculture Commissioner Charles Bronson, Attorney General-elect Pam Bondi and Agriculture Commissioner-elect Adam Putnam today announced that the State of Florida has filed a lawsuit against the federal Environmental Protection Agency (EPA) over the agency's intrusion into Florida's previously approved clean water program.

A copy of the lawsuit, which was filed today in the federal court in Pensacola, is available online at: http://myfloridalegal.com/webfiles.nsf/WF/CRUE-8BWPPD/$file/epacompliant.pdf

(COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)

Water Use Restrictions under the Endangered Species Act Constitute a Taking and Require Compensation - Eric H. Foy, National AgLaw Center Research Associate

Summary of Decision

In Tulare Lake Basin Water Storage District v. United States , 49 Fed. Cl. 313 (Fed. Cl. 2001), the United States Court of Federal Claims granted the plaintiffs' motion for summary judgment, holding that the plaintiffs' contractually-conferred right to the use of water was taken when the government imposed water use restrictions under the Endangered Species Act (ESA).

Background

In California, the distribution of water involves the transport of water from the water-rich areas in northern California to the more arid parts of the state. Id. at 314. Various water projects and aqueduct systems, including the Central Valley Project (CVP) and the State Water Project (SWP), were built to facilitate that process. Id. Although the CVP was a federal project managed by the Bureau of Reclamation (BOR) and the SWP was a state project managed by the Department of Water Resources (DWR), the two projects shared a common pumping system. Id. They were operated in concert pursuant to statute and subsequent agreements. Id. at 314-15. The BOR and the DWR were granted water permits by the State Water Resources Control Board (SWRCB), and, in turn, they contracted with county water districts, conferring on the districts the right to withdraw prescribed quantities of water. Id. at 315.

The delta smelt and winter-run Chinook salmon were both determined to be in jeopardy of extinction according to the United States Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Id. at 314. To protect the two species of fish, the agencies restricted water out-flows in California's primary water distribution system, causing water that would otherwise have been available for distribution by California water projects to be unavailable. Id. This decision, although in harmony with the purpose of the ESA, to halt and reverse the trend toward species extinction, conflicted with California's century-old regime of private water rights. Id. Despite the conflict, the agencies believed that restricting water flow to protect the two species of fish was a reasonable and prudent alternative (RPA) to the traditional water rights (COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)

program that threatened the species' existence. Id. at 315. Facing an impairment of their collective water rights, the plaintiffs, a group of California citizens, filed suit. Id. at 316.

Arguments

The plaintiffs claimed the imposition of the RPAs on their private water rights constituted an unconstitutional physical taking of their property in violation of the Fifth Amendment. Id. at 318. Arguing against the existence of a taking, the government asserted that: (1) the implementation of the RPAs merely frustrated the purpose of the water contracts and did not effectuate a taking; (2) the criteria for a regulatory taking had not been met; and (3) the federal government cannot be held liable for a taking when it does no more than impose a limit on the plaintiffs' title that the background principles of state law would otherwise require. Id. at 316-17.

Analysis and Holdings

The government first asserted that when contract expectations were merely frustrated by lawful government action not directed against the takings claimant, no taking had occurred. Id. at 317. It argued that the RPAs were lawful government action that frustrated, rather than appropriated, the plaintiffs' water rights. Id. The court disagreed, holding that California's water distribution system conferred "on plaintiffs a right to the exclusive use of prescribed quantities of water, consistent with the terms of the permits." Id. at 318. The plaintiffs' rights to the water were superior to all other competing interests. Id.

Although the government argued that the facts of the case were more akin to a regulatory takings analysis, the court agreed with the plaintiffs that a physical takings analysis was more appropriate. Id. at 318-19. A physical taking occurs when the government's action amounts to a physical occupation or invasion of property. Id. at 318. The court held that a deprivation of water amounted to a physical taking, but the court then needed to determine whether the plaintiffs owned the water for which they sought compensation. Id. at 320. Although the plaintiffs' water rights were subject to the doctrines of reasonable use and public trust, and the SWRCB could have modified the terms of the water permits to reflect the changing needs of various water users, in the case at bar, it had not done so. Id. at 324. The government was free to take the necessary steps to preserve the fish species, but it was required to pay for the water it took. Id.

The case was decided on April 30, 2001.

b. The placement of monitoring wells on private property is an example of a taking case under Superfund. At $200 million, the settlement in the Whitney Benefits case is the most expensive takings payment that the government has made to date. 1 The claim involved the application of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) to a coal lease owned by Whitney Benefits, Inc. The coal was located beneath an alluvial valley floor in the Powder River basin of Wyoming; SMCRA prohibits surface mining in such areas to protect agricultural resources. After unsuccessfully attempting to exchange the lease for certain federally owned resources, the lease's owner filed a taking claim in the U.S. Court of Federal Claims.

A series of trials and appeals led to a settlement that awarded the coal leaseholder $60 million plus interest from the date of the taking (1977--the date of passage of SMCRA). The court held that SMCRA eliminated the value of the lease, upsetting the owner's reasonable, investment-backed expectations about the property, and that the substantial public interest at stake did not outweigh the interest of the private owner. In addition, the court found that the taking occurred with the enactment of SMCRA rather than with its enforcement. The basis of that finding was a grandfather clause that was omitted from the final law but that appeared in an earlier version of the legislation. The clause excluded several properties, including the Whitney tract, from regulation and, according to the court, demonstrated that the Congress knew that SMCRA would adversely affect the mining rights associated with the Whitney Benefits property. Because the Congress willingly chose to let that happen, the court deemed the Whitney Benefits claim to be a taking and awarded compensation as of the date of SMCRA's enactment.

(**COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)**

Most of the payment in the Whitney Benefits settlement--$140 million of the $200 million awarded--is interest because of the substantial delay between the date of the actual taking (1977) and the settlement date (1995). One reason for the delay was the difficulty of determining the value of the taken property. Valuing the lease required considering such issues as future coal prices, extraction costs, labor costs, demand for various grades of coal, transportation costs, capital costs, the amount of extractable coal, environmental cleanup costs, and the appropriate dis-

count rate, to name only a few. Experts retained by each side in the dispute contested the values arrived at for those factors, which extended the litigation of the claim and delayed the award.

1. See Pennsylvania Coal Co. v. Mahon , 260 U.S. 393 (1922).

2. For more detail, see National Research Council, Wetlands Characteristics and Boundaries (Washington, D.C.: National Academy Press, 1995), pp. 3-8; Army Corps of Engineers, Army Corps of Engineers Wetlands Delineation Manual , Technical Report Y-87-1 (Vicksburg, Miss.: Army Corps of Engineers, 1987); and T.E. Dahl, Wetlands Losses in the United States, 1780's to 1980's (Department of the Interior, Fish and Wildlife Service, 1990), p. 5.

3. Those decisions are complicated by a lack of information about the value of particular wetland properties. See Paul F. Scodari, Wetlands Protection: The Role of Economics (Washington, D.C.: Environmental Law Institute, 1990), pp. 17-18 and 45-46.

4. Data sources on wetlands losses are Department of the Interior, The Impact of Federal Programs on Wetlands , vol. 1, A Report to Congress by the Secretary of the Interior (October 1988), pp. 4-30 and 4-33; and Department of Agriculture, Economic Research Service, Natural Resources Conservation Service, Agricultural Resources and Environmental Indicators, 1996-97 , Agricultural Handbook No. 712 (September 1997), p. 319.

5. 33 U.S.C. 1344, 86 Stat. 884.

6. Those rulings came in National Resources Defense Council v. Calaway , 392 F. Supp. 685 (1975); and United States v. Riverside Bayview Homes, Inc. , 474 U.S. 121 (1985). See also C. Peter Goplerud, "Water Pollution Law: Milestones from the Past and Anticipation of the Future," Natural Resources and the Environment , vol. 10, no. 2 (Fall 1995).

7. The Clean Water Act exempts ongoing farming, forestry, and ranching activities, minor drainage and drain maintenance, and maintenance of preexisting structures from the Section 404 permitting requirement. If a wetland is to be dredged or filled to begin such practices, however, a permit is required.

8. Statement of Michael L. Davis, Deputy Assistant Secretary of the Army for Civil Works, before the Subcommittee on Water Resources and Environment of the House Committee on Transportation and Infrastructure, April 29, 1997.

9. See Dennis King and Curtis Bohlen, "Estimating the Costs of Restoration," National Wetlands Newsletter (May/June 1994), pp. 3-5 and 8.

10. These programs are discussed in Ralph Heimlich and Linda Langner, Swampbusting: Wetland Conversion and Farm Programs (Department of Agriculture, Economic Research Service, August 1986), pp. 8-9; and Department of Agriculture, Agricultural Resources and Environmental Indicators , p. 319.

11. Department of the Interior, The Impact of Federal Programs on Wetlands , pp. 55-73.

12. Department of Agriculture, Agricultural Resources and Environmental Indicators, p. 316.

13. Army Corps of Engineers, Regulatory Branch, Section 404 of the Clean Water Act and Wetlands: Special Statistical Report (July 1995). More recent data are provided in the statement of Michael L. Davis, April 29, 1997.

14. Based on Army Corps of Engineers data and data reported in Virginia S. Albrecht and Bernard N. Goode, Wetland Regulation in the Real World (Washington, D.C.: Beveridge and Diamond, February 1994), p. 23.

15. A recent estimate of the average evaluation time for individual permits by the Corps is 104 days (see the statement of Michael L. Davis, April 29, 1997). Albrecht and Goode used a different method and found that the average time between the application and decision dates for a sample of individual permit applications processed in fiscal year 1992 was 373 days (see Wetland Regulation in the Real World , p. 16).

16. Two separate evaluations of the regulatory program reached similar conclusions: Office of Technology Assessment, Wetlands: Their Use and Regulation , OTA-O-206 (March 1984), pp. 142-144 and 152; and General Accounting Office, Wetlands: The Corps of Engineers' Administration of the Section 404 Program , GAO/RCED-88-110 (July 1988), pp. 20-22 and 33-34.

17. Department of Justice, Environment and Natural Resources Division, Policy Legislation and Special Litigation Section, "The Regulatory Takings Docket of the Justice Department's Environment and Natural Resources Division, End of Fiscal Year 1997" (mimeo, October 1997).

18. Regulations regarding wetlands are the most significant cause of takings claims. Nevertheless, the number of such claims is minuscule when compared with the volume of permit applica-

tions that have been approved in recent years. See the statement of Michael L. Davis, April 29, 1997.

19. Barton H. Thompson Jr., "The Endangered Species Act: A Case Study in Takings and Incentives," Stanford Law Review , vol. 49, no. 2 (January 1997), pp. 305-380.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power [1] ; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." [2] And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may there-

fore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the

latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference. **(COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)**

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, [3] in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing

Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

(COPPER, CADMIUM, AND ZINC; QAPP Information: QA Info Missing;)

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whosoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws. Notwithstanding Jackson's claims to the contrary, many critics – this writer included – believe that the 40-year experiment with a freestanding Environmental Protection Agency has been a failure and that the agency should be abolished, its essential functions reassigned to other, less scientifically-challenged government organizations. Over the years, though, the EPA has, in effect, bought the loyalty of a cadre of scientists and advocacy organizations that will defend it. For the foreseeable future, then, American companies and consumers – even our natural environment – will bear the scars of bureaucratic ambition and incompetence.

Court Denies Attempt to Block EPA Climate Rules

By REUTERS Published: December 10, 2010

Office of Whistleblower Protection Program – Federal Statutes

Holy war looming over Iron Mountain? “EPA messed up my business.”- Ted Arman

Eliminating such reporting will allow emergency response officials to better focus on releases where the Agency is more likely to take a response action. Finally, in proposing this administrative reporting exemption from the notification requirements under the Comprehensive Environmental Response, Compensation, and Liability Act, section 103(a) and the Emergency Planning and Community Right to Know Act, section 304, EPA is not proposing to limit any of its authorities under CERCLA sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of the Comprehensive Emergency Response, Compensation, and Liability Act or the Emergency Planning and Community Right to Know Act in this rulemaking.

DATES: Comments must be received on or before March 27, 2008. ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ- SFUND-2007-0469, by one of the following methods: http://www.regulations.gov: Follow the on-line instructions for submitting comments. E-mail: superfund.docket@epa.gov . Fax: (202) 566-9744. Mail: Superfund Docket, Environmental Protection Agency, Mail code: [2822T], 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand Delivery: EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Instructions: Direct your comments to Docket ID No. EPA-HQ-SFUND- 2007-0469. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at http://www.regulations.gov , including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through http://www.regulations.gov or e-mail. The http://www.regulations.gov Web site is an ``anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e- mail comment directly to EPA without going through http://www.regulations.gov , your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm . For additional instructions on submitting comments, go to Unit I.B of the SUPPLEMENTARY INFORMATION section of this document. Docket: All documents in the docket are listed in the http://www.regulations.gov index. Although listed

in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in http://www.regulations.gov or in hard copy at the Superfund Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Superfund Docket is (202) 566-0276. FOR FURTHER INFORMATION CONTACT: Lynn M. Beasley, Regulation and Policy Development Division, Office of Emergency Management (5104A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564-1965; fax number: (202) 564-2625; e-mail address: Beasley.lynn@epa.gov . SUPPLEMENTARY INFORMATION: The contents of this preamble are listed in the following outline: I. General Information A. Does This Action Apply to Me? B. What Should I Consider As I Prepare My Comments for EPA? C. What Is the Statutory Authority for This Rulemaking? D. Which Hazardous Substances Are We Proposing to Exempt From the Notification Requirements of CERCLA and EPCRA? II. Background III. Summary of This Action A. What Is the Scope of This Proposed Rule? B. Proposed Definitions C. What Is Not Included Within the Scope of This Proposed Rule? D. What Is EPA's Rationale for This Administrative Reporting Exemption? E. What Are the Economic Impacts of This Administrative Reporting Exemption? IV. Statutory and Regulatory Reviews A. Executive Order 12866 (Regulatory Planning and Review) B. Paperwork Reduction Act C. Regulatory Flexibility Act D. Unfunded Mandates Reform Act E. Executive Order 13132 (Federalism) [[Page 73701]] F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) G. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks H. Executive Order 13211 (Energy Effects) I. National Technology Transfer and Advancement Act of 1995 (``NTTAA") J. Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations) I. General Information A. Does This Action Apply to Me? ---------- Type of entity

Examples of affected entities ---------- Industry..... NAICS Code 111--Crop Production. NAICS Code 112--Animal Production. State and/or Local Governments..... State Emergency Response Commissions, and Local Emergency Planning Committees. Federal Government..... National Response Center. ---------- This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the criteria in section III.A of this proposed rule and the applicability criteria in Sec. Sec. 302.6 and 355.40 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding FOR FURTHER INFORMATION CONTACT section. B. What Should I Consider as I Prepare My Comments for EPA? In an effort to implement the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right to Know Act (EPCRA) more efficiently, EPA is proposing to establish an administrative reporting exemption from the notification requirements of CERCLA and EPCRA for releases of hazardous substances, such as ammonia and hydrogen sulfide, to the air where the source of the release is animal waste at farms. The Agency believes that a federal response to such notifications is impractical and unlikely. In addition, nothing in this proposal would limit EPA's authority to take action under its various authorities under CERCLA sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any of provisions of CERCLA or EPCRA (other than ECPCRA section 304) through this rulemaking. Therefore, when submitting comments, remember to: Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number). Follow directions--The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number. Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes. Describe any assumptions and provide any technical informa-

tion and/or data that you used. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced. Provide specific examples to illustrate your concerns, and suggest alternatives. Explain your views as clearly as possible. Make sure to submit your comments by the comment period deadline identified. C. What Is the Statutory Authority for This Rulemaking? Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601, et seq., as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, gives the Federal government broad authority to respond to releases or threats of releases of hazardous substances from vessels and facilities. The term ``hazardous substance'' is defined in section 101(14) of CERCLA primarily by reference to other Federal environmental statutes. Section 102 of CERCLA gives the Environmental Protection Agency (EPA) authority to designate additional hazardous substances. Currently there are approximately 760 CERCLA hazardous substances, exclusive of Radionuclides, F-, K-, and Unlisted Characteristic Hazardous Wastes. CERCLA Section 103(a) calls for immediate notification to the National Response Center (NRC) when the person in charge of a facility has knowledge of a release of a hazardous substance equal to or greater than the reportable quantity (RQ) established by EPA for that substance. In addition to the notification requirements established pursuant to CERCLA section 103, section 304 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 et seq., requires the owner or operator of certain facilities to immediately report to State and local authorities releases of CERCLA hazardous substances or any extremely hazardous substances (EHSs) if they exceed their RQ (see 40 CFR 355.40). This proposed rule only applies to CERCLA section 103 notification requirements, including the provisions that allow for continuous release reporting found in paragraph (f)(2) of CERCLA section 103, and EPCRA section 304 notification requirements. The Agency has previously granted such administrative reporting exemptions (AREs) where the Agency has determined that a federal response to such a release is impracticable or unlikely. For example, on March 19, 1998, the Agency issued a final rule (see 63 FR 13459) that granted exemptions for releases of naturally occurring radionuclides. The rule entitled, Administrative Reporting Exemptions for Certain Radionuclide Releases (``Radionu-

clide ARE"), granted exemptions for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate (see 63 FR 13461). The Agency relies on CERCLA sections 102(a), 103, and 115 (the general rulemaking authority under CERCLA) as authority to issue regulations governing section 103 notification requirements. The Agency relies on EPCRA section 304 as authority to issue regulations governing EPCRA section 304 notification requirements, and EPCRA section 328 for general rulemaking authority. D. Which Hazardous Substances Are We Proposing to Exempt From the Notification Requirements of CERCLA and EPCRA?

339 See Tahoe-Sierra Preservation Council, 535 U.S. at 321–43 (discussing how a temporary moratorium can not be considered a taking without analyzing the particular facts and circumstances).

340 See Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 741–42 (1996) (recognizing that government can bear the risk of loss when it enters land markets to further a regulatory scheme).

341 See id. at 741 (recognizing that the right to transfer is of some importance in the bundle of rights and the impact of government regulation on transfer of rights and land for value). But see Hodel v. Irving, 481 U.S. 704 (1987) (recognizing the inter vivos right to transfer does cut off the rights of descent and devise in the bundle of rights).

342 See Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001) (citing Olson v. United States, 292 U.S. 246, 255 (1934)); 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12.01 (rev. 3d ed. 2000)).

343 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

344 Dolan v. City of Tigard, 512 U.S. 374 (1993).

345 Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1991).

FOR LAND IN LIEU OF LAND IN THE PIERSON B. READING MEXICAN LAND GRANT ABRAHAM LINCOLN LETTERS PATENT MAY 1ST, 1862, ABSOLUTE IDEAL APEX LODE EQUAL PROTECTION OF A. SUTRO, THE ARMAN TRINITY TUNNEL HYDROPOWER; IRON MOUNTAIN MINE COLLEGE OF THE HUMMINGBIRD FREEMINERS UNIVERSITY

SUPPORTING MEMORANDUM AND AUTHORITIES IN DISFAVOR OF GOVERNMENT

[7] Under Rule 24(a)(2) and § 113(i), an applicant must be situated such that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interests.

CERCLA provides that government agencies are to be treated as"persons" under the Act. Another provision states that the United States"shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title."

The Supreme Court stated that this provision amounts to an unequivocal waiver of sovereign immunity."

1. CERCLA

The proposed HMRA states that any activities specified in the reclamation plan "that constitute removal or remedial action under section 101 of [CERCLA]" shall only be conducted in concurrence with the EPA.

The HMRA states that existing environmental laws are not superseded.

Nevertheless, these provisions imply a repeal of CERCLA for AMLs.

231 Compare Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) § 120(e)(2), 42 U.S.C. § 9620(e)(2) (2006) (requiring an interagency agreement for federal facility cleanups), with S. 796, § 402(g)(2) (requiring only a memorandum of understanding for such cleanups). § 9604(a)(4) (2006) (allowing the President to declare "a public health or environmental emergency [when] no other person with the authority and capability to respond to the emergency will do so in a timely manner").

A mining permittee's operations plan need only demonstrate that "the formation of acid mine drainage will be avoided to the maximum extent practicable"

235 Although the proposed HMRA explicitly states that existing environmental laws are not superseded by that Act, the phrase "to the maximum extent practicable" would effectively circumvent CWA restrictions.

SUSTAINABLE MINING PROMOTES GLOBAL PROSPERITY

(The phrase "to the maximum extent practicable" is arbitrary.)

Iron Mountain Mine policy is: “the formation of acid mine drainage will be beneficially exploited to the maximum extent practicable”

[9] The statutory scheme reflects a Congressional intent that the interests of entities other than the government and settling PRPs be considered as part of the settlement process.

When a settlement is submitted for judicial approval, a court is required to evaluate whether a proposed consent decree is “fair, reasonable and consistent with the objectives of CERCLA” before approving it. Montrose, 50 F.3d at 743.

A court must consider the substantive fairness of the consent decree to non-settling PRPs by assessing whether liability has been roughly apportioned based upon “some acceptable measure of comparative fault.” United States v. Cannons Eng’g Corp., 899 F.2d 79, 87 (1st Cir. 1990); see Montrose, 50 F.3d at 746.

Applicants have the right to participate in this process and to have their interests considered by the court. We conclude that the notice and comment procedure does not provide Applicants with sufficient “other means” by which to protect their interests, see Lockyer, 450 F.3d at 442, and that those interests will be impaired if Applicants are not afforded the right of intervention.

4. Adequacy of Representation

“This Court considers three factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.” Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003).

Conclusion

[12] For the foregoing reasons the Applicants have a right to intervene under Rule 24(a)(2) and § 113(i) of CERCLA to protect their interests in contribution and in the fairness of the proposed consent decree. We therefore reverse and remand for further proceedings consistent with this opinion.

Cases Applying the Arranger Liability Standard Announced in BNSF

The “arranger” issue that BNSF addressed arose from a fact pattern involving a chemical manufacturer that sold a product to a chemical mixing facility. Although the manufacturer used a third party to transport the chemicals and sold a “useful product,” the defendant knew that significant leaks and spills occurred during the transfer of its product to storage on the site. The Ninth Circuit held the manufacturer liable on the theory that it arranged for disposal because it knew spills and leaks were inherent in the transfer process. The Supreme Court disagreed, explaining that an entity may only qualify as an arranger “when it takes intentional steps to dispose of a hazardous substance.” [3] In this case, the defendant's “mere knowledge” that spills would occur did not amount to “intent” to dispose. The Court emphasized that arranger liability “requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a ‘disposal' or ‘sale' and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions.” [4]

So far, the majority of cases applying BNSF have focused on whether defendants fall into the class of parties that Congress intended as arrangers. Generally, these cases show that lower courts are taking seriously the Supreme Court's directive to engage in a “fact-intensive inquiry” of whether the defendants have an “intent to dispose” and have, in many cases, rejected plaintiffs' requests to extrapolate “intent” from “mere knowledge.”

Several decisions issued by Judge O'Neill in the Eastern District of California involving two California dry cleaning sites illustrate this trend. [5] The underlying cases, Hinds Investments v. Team Enterprises, Inc . and Team Enterprises, LLC v. Western Investment Real Estate Trust , involved claims against the manufacturers of dry cleaning machines [6] and products that recycled spent perchloroethylene (PCE) for reuse. The machine manufacturers intended to dispose of PCE, according to the plaintiffs, because the machines were designed to dispose of PCE-laden wastewater to open drains, as evidenced by manuals for the machines instructing the operators to connect the machines to open drains. The court rejected the plaintiffs' claims on the pleadings, holding that they at best showed that the manufacturers knew that disposal would occur, but that the plaintiffs failed to show that the manufacturers sold the machines with the intention that a portion of the PCE be disposed of. [7] The court noted that the plaintiffs failed to present evi-

dence showing that the manufacturers had control over how the products would be used – the defendants did not directly install the equipment, determine how the equipment would be used at the specific dry cleaning sites, or inspect the disposal mechanisms.

The court also rejected the plaintiffs' claims against the manufacturers that designed the recycling equipment for similar reasons. The products at issue were designed to recapture spent PCE and recycle it for future use. In both cases, the plaintiffs alleged that PCE-laden wastewater – that could not be reclaimed – would be discharged to floor drains. In the Western Investment case, the plaintiff presented evidence showing that the defendant required its product to be set up in a manner where PCE would be disposed of down floor drains, and that a representative of the defendant had once visited the store and poured waste PCE down the drain. In both cases, the court held that the plaintiffs presented insufficient evidence that the defendants intended to dispose: According to the court, the manufacture of these products and the instructions on their use were insufficient – without actual direction for their use at the facilities – to hold the defendants liable. [8]

Similarly, in the first substantive application of BNSF at the federal appellate level, the Fifth Circuit declined to hold a construction company liable after it damaged an underground methanol pipeline. The case, Celanese Corp. v. Martin K. Eby Construction Co., Inc ., [9] involved CERCLA claims brought by the owner of a methanol pipeline against the construction company that struck and damaged the plaintiff's pipeline with a backhoe. Neither party was aware of the damage to the pipeline until it corroded and leaked many years later. In a pre- BNSF decision, the district court rejected the plaintiff's claims based on the defendant's lack of awareness that it had damaged the pipeline. The Fifth Circuit affirmed, holding that the defendant did not “plan to take any intentional steps to release methanol from the” pipeline under the BNSF standard of arranger liability. [10] The plaintiff argued that the defendant “intentionally took steps to dispose of methanol by disregarding its obligations to investigate the incident and backfilling the excavated area where the incident had occurred. In other words, [the plaintiff] argue[d] that [the defendant's] conscious disregard of its duty to investigate is tantamount to intentionally taking steps to dispose of methanol.” [11] The Fifth Circuit disagreed, holding that BNSF “precludes liability

under these circumstances," because the BNSF Court "declined to impose arranger liability for a defendant with more culpable mens rea," i.e., where that defendant knew that its actions resulted in disposal. [12]

A typical application of arranger liability, even after BNSF , is evidenced in a New Jersey case, Litgo New Jersey, Inc. v. Martin , [13] where the court declined to hold the United States liable for contamination stemming from a facility that produced parts for the military, but did hold the United States liable for contamination stemming from its discarded hazardous wastes. First, the court determined that releases likely occurred from a facility that manufactured precision parts for military aircraft during World War II due to degreasing operations and common disposal practices of solvents at the time. The United States leased a significant amount of machinery and equipment to the facility and conducted frequent inspections of the facility. The court held that this evidence was insufficient to hold the United States liable, because the plaintiffs failed to show that that the United States "owned or possessed any [of the hazardous substances] which were disposed of at the" site, a "necessary element" of arranger liability. [14] However, the court did hold the United States liable as an arranger with respect to hazardous substances that were released from a warehouse at the site during a potentially botched cleanup. Although the United States claimed that it only arranged to have the substances stored at the warehouse, and that the stored substances were in stable condition until difficulties arose during the cleanup, the court held that the United States intended to dispose by hiring a third party "to permanently get rid of what they believed to be waste products." [15]

At least one case shows, however, that arranger liability is not necessarily limited to the so-called "direct" circumstances, where a defendant contracts with a third party to dispose of the defendant's waste. In United States v. Washington State Department of Transportation (WSDOT), [16] the Western District of Washington potentially expanded arranger liability by holding that the design and management of a stormwater system that discharges hazardous substances to a contaminated site may be sufficient to establish arranger liability. The case involved the United States' efforts to recover costs associated with a Superfund site in Washington from WSDOT, which constructed, designed, owned, and operated highways and storm drains that discharged

stormwater runoff containing hazardous substances to the site. In a brief analysis, the court held WSDOT liable as a matter of law. The court acknowledged that, under BNSF , arranger liability is limited to entities that "take[] intentional steps to dispose of a hazardous substance," and that "the word 'arrange' implies action directed to a specific purpose." [17] But WSDOT's actions met that standard, the court opined, because the agency indisputably designed the stormwater system, "[d]esigning is an action directed to a specific purpose," and that "purpose was to discharge the highway runoff into the environment." [18] WSDOT knew that the runoff contained hazardous substances, according to the court, had "control over how the collected runoff was disposed of," and had "the ability to redirect, contain, or treat its contaminated runoff." [19] Finally, in American International Specialty Lines Ins. Co. v. United States , [20] the Central District of California held the United States liable for historical contamination stemming from a private facility that refurbished and recycled rocket engines for the military. The Cold War era contracts between the facility and the United States included provisions that vested title in the products with the United States while the products were at the facility. The United States also required the facility to "hog-out" the original propellant from the engines undergoing refurbishment, test-fire some of the rocket engines, and dispose of remaining perchlorate. The United States argued that it only "owned" the perchlorate when it was a part of the rocket engines, and that it did not own the "waste" perchlorate. The court disagreed with the United States' interpretation of the contract, but also held that, "continuous ownership" was unnecessary to constitute arranger liability. Here, according to the court, the United States "owned the materials at the outset, continued to own them during the manufacturing process, and received the finished product, all with knowledge that processing would lead to hazardous wastes." [21] This case was distinguishable from BNSF , according to the court, because there the defendant sold a useful product and "completely gave up ownership of the chemicals to the site operator." [22] Allowing the United States to escape liability in this case would, according to the court, "create a loophole in the statute that could be exploited by other polluters." [23]

Cases Applying BNSF 's Divisibility Ruling

The divisibility prong of the Supreme Court's BNSF ruling arose from the defendant railroads' argument that, because they only owned a portion of the contaminated property, their liability could reasonably be “apportioned.” The Court agreed, affirming a standard that had already been adopted by several circuit courts. Applying Section 422A of the Restatement (Second) of Torts, the Court held that “apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm,” [24] and that the defendants bear the burden of proof on the issue. The Supreme Court also held that the evidence supporting apportionment need not be precise: There must simply be “facts contained in the record reasonably support[ing] the apportionment of liability.” [25]

Only a few cases have applied the “divisibility” prong of the BNSF case. [26] In a case out of the Eastern District of California, United States v. Iron Mountain Mines , [27] the defendants sought reconsideration of a 2002 order holding them jointly and severally liable to the United States. In the 2002 order, the court held that “given the nature of the pollution at the site, it would be difficult to identify distinct harms,” instead instructing the defendants to raise their arguments regarding their lesser responsibility in a contribution proceeding. The defendants argued that BNSF required reconsideration of that decision, because “the Supreme Court would not have granted certiorari for [BNSF] if it was only dealing with a factual dispute … the Supreme Court clearly meant to send a signal to other courts that they must begin evaluating apportionment in a different way,” and, after BNSF , “district courts are now mandated to consider apportionment.” [28] The court disagreed, holding that BNSF “simply reiterated the law as established in” what the Supreme Court called “the seminal opinion on the subject of apportionment in CERCLA action,” United States v. Chem-Dyne Corp ., [29] “and then examined the record to resolve a factual question of whether the record supported apportionment. [BNSF] did not add a new mandate that District Courts must apportion harm.” [30]

A few cases in 2010 have applied BNSF 's divisibility standard to the evidence submitted by the defendants. For example, in United States v. Saporito , [31] the Northern District of Illinois rejected the defendant's effort to be apportioned zero liability, where the court had already determined that the defendant was liable because it leased equipment to operators at a contaminated

site. The defendant argued that, because his equipment was incapable of producing waste by itself, he should be apportioned no liability based solely on his ownership of the equipment. The court disagreed, holding that, because the equipment was “a necessary part of the plating process,” it must be “responsible for some amount of the waste that the process produced.” [32] The defendant also maintained that, because one piece of his equipment – a filter press – could only hold a small fraction of the hundreds of thousands of gallons of waste that were removed from the site, the contribution of waste from the filter press was negligible. The court rejected this argument as well, concluding that the defendant failed to provide evidence showing what his proper percentage of liability should be.

A case out of Michigan, ITT Industries, Inc. v. Borgwarner, Inc ., [33] is one of the few cases so far that has evaluated the sufficiency of a defendant's evidence for a divisibility defense. The case involved the North Bronson Industrial Area Superfund site in Michigan. The primary contaminants included metals and volatile organic compounds, such as trichloroethylene (TCE), in soil and groundwater stemming from activities at several former industrial facilities and the historical disposal of industrial wastewater into a complex of industrial sewers and waste lagoons. EPA divided the site into two sub-areas, including several operable units in these areas, and entered into several administrative orders with entities connected to the former industrial facilities. One of these entities sought to recover its costs incurred at a former facility from several defendants, including one party whose predecessors conducted activities at the plaintiff's facility, and two other parties with connections to adjacent facilities.

The court rejected the defendants' divisibility arguments, holding that the defendants did not meet their burden of proof. The party with connections to the plaintiff's facility argued that its liability was divisible based on the geographic location of its operations and the types of contaminants released at the site. The court disagreed, holding that the defendant failed to show: (1) that its predecessor's operations were contained within a geographically limited portion of the facility, because that entity leased the entire facility, operated on the entire facility, and evidence showed that releases occurred throughout; and (2) that its predecessor's liability was divisible based on the types of contaminants released at the site, because evidence showed that the prede-

cessor discharged some contaminants containing PCE, and investigating for PCE would have required the same level of effort as investigating for TCE. The two other defendants – with connections to adjacent facilities – argued that their liability was limited to TCE contamination, because that was the only contaminant at issue in the plaintiff's administrative consent order, and because metal contamination at the plaintiff's site originated from on-site operations. The court disagreed, holding that the consent order also required the plaintiff to determine the source of all contaminants on the site, and evidence showed that metals and other contaminants released at the defendants' sites could have reached the plaintiff's site.

Conclusion

The cases decided so far in 2010 affirm that BNSF directed the courts to conduct a fact-intensive inquiry into whether parties qualify as arrangers. On the divisibility side, the early cases show that courts are working their way through the evidence put forth by defendants, but there are too few decided cases to draw firm conclusions regarding the quantum of proof necessary to establish a divisibility defense.

For more information, please contact Meli MacCurdy or any member of Marten Law's Environmental Litigation or Waste Cleanup practice groups

LACK OF DIVISIBILITY IS PRIMA FACIE EVIDENCE FOR INNOCENT LANDOWNER, THIRD PARTY, ACT OF GOD DEFENSES.

GOVERNMENT CODE

SECTION 12650-12656

12650. (a) This article shall be known and may be cited as the False Claims Act. (b) For purposes of this article: (1) "Claim" means any request or demand, whether under a contract or otherwise, for money, property, or services, and whether or not the state or a political subdivision has title to the money, property, or services that meets either of the following conditions: (A) Is presented to an officer, employee, or agent of the state or of a political subdivision. (B) Is made to a contractor, grantee, or other recipient, if the money, property, or service is to be spent or used on a state or any political subdivision program or interest, and if the state or political subdivision meets either of the following conditions: (i) Provides or has provided any portion of the

money, property, or service requested or demanded. (ii) Reimburses the contractor, grantee, or other recipient for any portion of the money, property, or service that is requested or demanded. (2) "Claim" does not include requests or demands for money, property, or services that the state or a political subdivision has paid to an individual as compensation for employment with the state or political subdivision or as an income subsidy with no restrictions on that individual's use of the money, property, or services. (3) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following: (A) Has actual knowledge of the information. (B) Acts in deliberate ignorance of the truth or falsity of the information. (C) Acts in reckless disregard of the truth or falsity of the information. Proof of specific intent to defraud is not required. (4) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money, property, or services. (5) "Political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries. (6) "Political subdivision funds" means funds that are the subject of a claim presented to an officer, employee, or agent of a political subdivision or where the political subdivision provides, has provided, or will reimburse any portion of the money, property, or service requested or demanded. (7) "Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision. (8) "Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust. (9) "State funds" mean funds that are the subject of a claim presented to an officer, employee, or agent of the state or where the state provides, has provided, or will reimburse any portion of the money, property, or service requested or demanded. 12651. (a) Any person who commits any of the following enumerated acts in this subdivision shall have violated this article and shall be liable to the state or to the political subdivision for three times the amount of damages that the state or political subdivision sustains because of the act of that person. A person who commits any of the following enumerated acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and shall be liable to the state or political subdivi-

sion for a civil penalty of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation: (1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval. (2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim. (3) Conspires to commit a violation of this subdivision. (4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less than all of that property. (5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used. (6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property. (7) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or to any political subdivision, or knowingly conceals or knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state or to any political subdivision. (8) Is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim. (b) Notwithstanding subdivision (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following: (1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information. (2) The person fully cooperated with any investigation by the state or a political subdivision of the violation. (3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation. (c) Liability

under this section shall be joint and several for any act committed by two or more persons. (d) This section does not apply to any controversy involving an amount of less than five hundred dollars ($500) in value. For purposes of this subdivision, "controversy" means any one or more false claims submitted by the same person in violation of this article. (e) This section does not apply to claims, records, or statements made pursuant to Division 3.6 (commencing with Section 810) of Title 1 or to workers' compensation claims filed pursuant to Division 4 (commencing with Section 3200) of the Labor Code. (f) This section does not apply to claims, records, or statements made under the Revenue and Taxation Code. (g) This section does not apply to claims, records, or statements for the assets of a person that have been transferred to the Commissioner of Insurance, pursuant to Section 1011 of the Insurance Code. 12652. (a) (1) The Attorney General shall diligently investigate violations under Section 12651 involving state funds. If the Attorney General finds that a person has violated or is violating Section 12651, the Attorney General may bring a civil action under this section against that person. (2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt requested" a copy of the complaint on the appropriate prosecuting authority. (3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met. (b) (1) The prosecuting authority of a political subdivision shall diligently investigate violations under Section 12651 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 12651, the prosecuting authority may bring a civil action under this section against that person. (2) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General. (3) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following: (A)

Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party. (B) Notify the court that it declines to proceed with the action, in which case the prosecuting authority shall have the right to conduct the action. (c) (1) A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court and the Attorney General or prosecuting authority of a political subdivision, or both, as appropriate under the allegations of the civil action, taking into account the best interests of the parties involved and the public purposes behind this act. No claim for any violation of Section 12651 may be waived or released by any private person, except if the action is part of a court approved settlement of a false claim civil action brought under this section. Nothing in this paragraph shall be construed to limit the ability of the state or political subdivision to decline to pursue any claim brought under this section. (2) A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed. (3) On the same day as the complaint is filed pursuant to paragraph (2), the qui tam plaintiff shall serve by mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses. (4) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve state funds but not political subdivision funds, the Attorney General may elect to intervene and proceed with the action. (5) The Attorney General may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal pursuant to paragraph (2). The motion may be supported by affidavits or other submissions in camera. (6) Before the expiration of the 60-day period or any extensions obtained under paragraph (5), the Attorney General shall do either of the following: (A) Notify the court that it intends to proceed

with the action, in which case the action shall be conducted by the Attorney General and the seal shall be lifted. (B) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action. (7) (A) Within 15 days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure of material evidence and information to the appropriate prosecuting authority for disposition, and shall notify the qui tam plaintiff of the transfer. (B) Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to subparagraph (A), the prosecuting authority may elect to intervene and proceed with the action. (C) The prosecuting authority may, for good cause shown, move for extensions of the time during which the complaint remains under seal. The motion may be supported by affidavits or other submissions in camera. (D) Before the expiration of the 45-day period or any extensions obtained under subparagraph (C), the prosecuting authority shall do either of the following: (i) Notify the court that it intends to proceed with the action, in which case the action shall be conducted by the prosecuting authority and the seal shall be lifted. (ii) Notify the court that it declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action. (8) (A) Within 15 days after receiving a complaint alleging violations that involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority. (B) Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve both state and political subdivision funds, the Attorney General or the prosecuting authority, or both, may elect to intervene and proceed with the action. (C) The Attorney General or the prosecuting authority, or both, may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motion may be supported by affidavits or other submissions in camera. (D) Before the expiration of the 60-day period or any extensions obtained under subparagraph (C), the Attorney General shall do one of the following: (i) Notify the court that it intends to proceed with the action, in which case the ac-

tion shall be conducted by the Attorney General and the seal shall be lifted. (ii) Notify the court that it declines to proceed with the action but that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority. (iii) Notify the court that both it and the prosecuting authority decline to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff shall have the right to conduct the action. (E) If the Attorney General proceeds with the action pursuant to clause (i) of subparagraph (D), the prosecuting authority of the political subdivision shall be permitted to intervene in the action within 60 days after the Attorney General notifies the court of its intentions. The court may authorize intervention thereafter upon a showing that all the requirements of Section 387 of the Code of Civil Procedure have been met. (9) The defendant shall not be required to respond to any complaint filed under this section until 30 days after the complaint is unsealed and served upon the defendant pursuant to Section 583.210 of the Code of Civil Procedure. (10) When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action. (d) (1) No court shall have jurisdiction over an action brought under subdivision (c) against a Member of the State Senate or Assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought. (2) A person may not bring an action under subdivision (c) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party. (3) (A) No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or by the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision, or the person bringing the action is an original source of the information. (B) For purposes of subparagraph (A), "original source" means an individual who has direct and independent knowledge of

the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure as described in subparagraph (A). (4) No court shall have jurisdiction over an action brought under subdivision (c) based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time. (e) (1) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action. (2) (A) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing. (B) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances. (f) (1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed under subdivision (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts. (2) (A) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff. (B) If the state or political subdivision is allowed to intervene under paragraph (A), the qui tam plaintiff shall retain princi-

pal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed. (g) (1) (A) If the Attorney General initiates an action pursuant to subdivision (a) or assumes control of an action initiated by a prosecuting authority pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the office of the Attorney General shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims. (B) If a prosecuting authority initiates and conducts an action pursuant to subdivision (b), the office of the prosecuting authority shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims. (C) If a prosecuting authority intervenes in an action initiated by the Attorney General pursuant to paragraph (3) of subdivision (a) or remains a party to an action assumed by the Attorney General pursuant to subparagraph (A) of paragraph (3) of subdivision (b), the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery under subparagraph (A), taking into account the prosecuting authority's role in investigating and conducting the action. (2) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4) and (5), receive at least 15 percent but not more than 33 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. When it conducts the action, the Attorney General's office or the office of the prosecuting authority of the political subdivision shall receive a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision. When both the Attorney General and a prosecuting authority are involved in a qui tam action pursuant to subparagraph (C) of paragraph (6) of subdivision (c), the court at its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action. (3) If the state or political subdivision does not proceed with an action under subdivision (c), the qui tam plaintiff shall, subject to paragraphs (4)

and (5), receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of these proceeds. (4) If the action is one provided for under paragraph (4) of subdivision (d), the present or former employee of the state or political subdivision is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of the falsely claimed funds through official channels. (5) If the action is one that the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff any sums from the proceeds that it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action or 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of the present or past employee's involvement in the fraudulent activity, the employee's attempts to avoid or resist the activity, and all other circumstances surrounding the activity. (6) The portion of the recovery not distributed pursuant to paragraphs (1) to (5), inclusive, shall revert to the state if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed. (7) For purposes of this section, "proceeds" include civil penalties as well as double or treble damages as provided in Section 12651. (8) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action under subdivision (c), the qui tam

plaintiff shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision. (9) If the state, a political subdivision, or the qui tam plaintiff proceeds with the action, the court may award to the defendant its reasonable attorney's fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. (h) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. This showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings. (i) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting authority' s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including the following: (1) Limiting the number of witnesses the person may call. (2) Limiting the length of the testimony of the witnesses. (3) Limiting the person's cross-examination of witnesses. (4) Otherwise limiting the participation by the person in the litigation. (j) The False Claims Act Fund is hereby created in the State Treasury. Proceeds from the action or settlement of the claim by the Attorney General pursuant to this article shall be deposited into this fund. Moneys in this fund, upon appropriation by the Legislature, shall be used by the Attorney General to support the ongoing investigation and prosecution of false claims in furtherance of this article. 12652.5. Notwithstanding any other provision of law, the University of California

shall be considered a political subdivision, and the General Counsel of the University of California shall be considered a prosecuting authority for the purposes of this article, and shall have the right to intervene in an action brought by the Attorney General or a private party or investigate and bring an action, subject to Section 12652, if it is determined that the claim involves the University of California. 12653. (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652. (b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652. (c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision. (d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur: (1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed. (2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the

employer or its management into engaging in the fraudulent activity in the first place. 12654. (a) A civil action under Section 12652 may not be filed more than three years after the date of discovery by the Attorney General or prosecuting authority with jurisdiction to act under this article or, in any event, not more than 10 years after the date on which the violation of Section 12651 was committed. (b) A civil action under Section 12652 may be brought for activity prior to January 1, 1988, if the limitations period set in subdivision (a) has not lapsed. (c) In any action brought under Section 12652, the state, the political subdivision, or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence. (d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, except for a plea of nolo contendere made prior to January 1, 1988, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subdivision (a), (b), or (c) of Section 12652. (e) Subdivision (b) of Section 47 of the Civil Code shall not be applicable to any claim subject to this article. 12655. (a) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law. (b) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby. (c) This article shall be liberally construed and applied to promote the public interest. 12656. (a) If a violation of this article is alleged or the application or construction of this article is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, the person or political subdivision that commenced that proceeding shall serve a copy of the notice or petition initiating the proceeding, and a copy of each paper, including briefs, that the person or political subdivision files in the proceeding within three days of the filing, on the Attorney General, directed to the attention of the False Claims Section in Sacramento, California. (b) Timely compliance with the three-day time period is a jurisdictional prerequisite to the entry of judgment, or-

der, or decision construing or applying this article by the court in which the proceeding occurs, except that within that three-day period or thereafter, the time for compliance may be extended by the court for good cause. (c) The court shall extend the time period within which the Attorney General is permitted to respond to an action subject to this section by at least the same period of time granted for good cause pursuant to subdivision (b) to the person or political subdivision that commenced the proceeding.

Recent Supreme Court opinions interpreting Rule 12(b)(6) have been applied in an environmental context. A state agency cost recovery action was dismissed for failure to plead facts sufficient to show a plausible claim for relief, resulting in unnecessary additional litigation costs.

When Bell Atlantic v. Twombly , 550 U.S. 554 (2007) was decided, many lawyers lamented the loss of Conley v. Gibson , 355 U.S. 41 (1957) (in effect, if there is a claim somewhere within the four corners of a complaint, a motion to dismiss will be denied) as the governing case in Rule 12(b)(6) jurisprudence. Then Ashcroft v. Iqbal , 129 S.Ct. 1937 (May 18, 2009) came down. The laments became cries for action to restore Conley legislatively, and, indeed, such legislation was introduced in the Congress by Senator Specter who was not returned to office. For now, Iqbal and Twombly remain the law.

For those few lawyers who may not be familiar with Twombly or Iqbal , both cases dealt with the sufficiency of allegations in a complaint to state a cause of action. Twombly dealt with parallel conduct in an antitrust setting that was consistent with lawful behavior but was alleged conclusorily to represent a conspiracy in restraint of trade. Without fact allegations to show why lawful parallel conduct was in fact unlawful anticompetitive behavior, the complaint did not survive. Iqbal dealt with claims against the Attorney General and the Director of the FBI for post-9/11 activities that restrained the liberty of the plaintiffs for a period of time. Other defendants remained in the case. The Supreme Court held that the complaint's allegations against these two executives were not “plausible.” Hence, they were dismissed.

What is a “plausible” claim? The Supreme Court gave this answer in Iqbal : “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” This plausibility standard is not

"akin to a probability requirement,' but it asks for more than "a sheer possibility that the defendant has acted unlawfully."

It has not taken long for Iqbal and Twombly to be applied in an environmental dispute. Just ask Pennsylvania's Department of Environmental Protection (DEP). On November 3, 2010, Magistrate Judge Lenihan in the Western District of Pennsylvania, citing this Supreme Court precedent and the Third Circuit's interpretation of it in Fowler v. UPMC Shadyside , 578 F.3d 203 (3 rd Cir. 2009), dismissed a CERCLA amended complaint with prejudice. The 2009 action involved $3.7 million in costs incurred in a landfill response action that was completed in 2004. The DEP characterized the excavation, drum and soil removal, and restoration work it conducted as a remedial action for which it had six years within which to file suit under CERCLA. Three defendants argued that the DEP had engaged in a removal action for which it had only three years from the conclusion of the removal action within which to bring suit. The magistrate judge agreed with the defendants and because suit was brought beyond three years, the case was dismissed. The magistrate accepted the factual averments in the amended complaint as true but disregarded the DEP's "legal conclusions." Because the actions described in the complaint were "the equivalent of a CERCLA removal action," she held, the DEP had failed "to set forth sufficient factual matter to show a plausible claim for relief."

The magistrate judge was persuaded by the administrative record that "repeatedly and consistently" characterized the DEP's response action as "interim." The DEP was not helped by its 2002 "Analysis of Alternatives" under Pennsylvania's Hazardous Sites Cleanup Act which stated that the interim response was warranted but that the response as then proposed "is not a final remedial response." The magistrate judge rejected the DEP's argument that a "prompt interim response" would be a removal action in CERCLA terms but that a "limited interim response" in fact was the same as a remedial action under CERCLA.

Under Conley , it is likely that the motion to dismiss would have been denied, discovery would have occurred, and the limitations question would have been decided under Rule 56's summary judgment standards. Had the DEP filed suit before Twombly , it would have been able to so argue. Of course, if it had done that, it could have been within the three-year removal action win-

dow. Not having done so, it had to deal with Iqbal and Twombly's preference for using the motion to dismiss as a way to address escalating discovery costs in federal court litigation where a claim is not “plausible.”

" In Higgins v. Houghton, 25 Cal. 255, where it was held that the State of California, by virtue of the grant of March 3d, 1853, which in some respects is similar to the grant under consideration, ' became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quantity, but as to position also,' the Court impliedly recognized the fact that it was within the power of Congress and the State by mutual agreement to change the provisions of the grant. After stating that there had been no legislation by Congress prior to the grant which would interfere with the conclusions reached in said case, the Court said: ' And if there has been any legislation since the grant that conflicts with the conclusion, it must be null and void, unless, indeed, it has been acceded to by the grantee.' Here such subsequent legislation was had by Congress, and it was NOT acceded to by the grantee (Ted Arman).

And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor.

Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers.'

" This doctrine of right by prior appropriation was recognized by the legislation of Congress, in 1866." 1

The limitation of the doctrine of prior appropriation and the restrictions as to reasonable use, were touched upon as follows:

"The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted, that the owner can allow it, after its diversion, to run to waste, and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

" Such was the purport of the ruling of the Supreme Court of California. i Atchison v. Peterson, 20 Wall. U. S. 510.

But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a Court of Equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a Court of Equity in the exercise of its preventive process of injunction." 4

1 11 Cal. 143.

2 13 Cal. 33. See, also, Lobdell v. Simpson, 2 Nev. 274.

8 See, to the same effect, Hill v. Smith, 27 Cal. 483; Yale's Mining Claims, 194. * Atchison v. Peterson, 20 Wall. U. S. 514.

" In the case of Tartar v. The Spring Creek Water and Mining Company, decided in 1855, the Supreme Court of California said: ' The current of decisions of this Court goes to establish that the policy of this State, as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner. In evidence of this, acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims; recognizing canals and ditches which were known to divert the

water of streams from their natural channels for mining purposes; and others of like character. This policy has been extended equally to all pursuits, and no partiality for one over another has been evinced, except in the single case where the rights of the agriculturist are made to yield to those of the miner where gold is discovered in his land. The policy of the exception is obvious. Without it the entire gold region might have been enclosed in large tracts, under the pretense of agriculture and grazing, and eventually what would have sufficed as a rich bounty to many thousands would be reduced to the proprietorship of a few. Aside from this, the legislation and decisions have been uniform in awarding the right of peaceable enjoyment to the first occupant, either of the land or of anything incident to the land.' 1

i 8 Cal. 397.

The officers of the Government are the agents of the law. They cannot act beyond its provisions, nor make compromises

1 Decision Commissioner, Dec. 10th, 1809, Copp's U. S. Mining Decisions, '2l,. - Decision of Assistant Secretary Interior, April 19th, 1872, Copp's U. S. Mining Decisions, 88.

3 Lindsay i'. Howes, 2 Black. U. S. 557; Cunningham v. Ashley, 14 How. 377.

§ 2319. Mineral lands open to purchase by citizens.—

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Sec. 1 of the Act of 1872. 17 U. S. Stat. 91, was identical with the above.

Sec. 1 of the Statute of July 26th, 1860, read as follows: Sec. 1. That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed bylaw, and subject

also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States. [14 U. S. Stat. 231.]

§ 2473. Penalty for prosecuting fraudulent suits, etc., in California. —Every person who, for the purpose of setting up or establishing any claim against the United States to lands, mines, or minerals within the State of California, presents, or causes or procures to be presented, before any Court, judge, com mission, or commissioner, or other officer of the United States, any false, forged, altered, or counterfeited petition, certificate, order, report, decree, concession, denouncement, deed, patent, diseiio, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim to lands, minerals, or mines in the State of California, knowing the same to be false, forged, altered, or counterfeited, or any falsely dated petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseiio, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim to lands, mines, or minerals in California, knowing the same to be falsely dated; and every person who prosecutes in any Court of the United States, by appeal or otherwise, any claim against the United States for lands, mines, or minerals in California, which claim is founded upon, or evidenced by, any petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseiio, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim, which has been forged, altered, counterfeited, or falsely dated, knowing the same to be forged, altered, counterfeited, or falsely dated, shall be punishable as prescribed in section twentyfour hundred and seventy-one. Sec. 3, Act of May 18th, 1858, 11 U. S. Stat. 291

Seventy percent of the U.S. economy is driven by consumer spending, which has been driven by borrowing over the last ten years. Even if we wanted to do so, we can't borrow our way back to prosperity this time around, however, because the credit markets are broken for good this time… because they were a fraud in the first place. Our economy has entered a downturn that, before it reverses itself, will force most of us to reduce our standard of living for many of not most of our remaining years. Some believe that foreign spending and spending by the very rich can bring us back, but the numbers just don't prove out.

Meanwhile, our helpless, hapless, and perhaps hopeless government continues to treat this financial crisis like it's a liquidity crisis… lowering interest rates and pumping cash into a failed and fraudulent system being run by the same men that brought us here.

Treasury Secretary Hank Paulson, in his recently published book, writing about this moment in history, explains it this way: “We were just wrong.”

Devils Lake Ruling: State Doesn`t Need EPA Approval

Amanda Tetlak

11/23/2010

Sen. Kent Conrad, D-N.D., says the Environmental Protection Agency (EPA) cannot get in the way of the state deciding to move more water off of Devils Lake.

The state had been seeking EPA approval for either a permanent change or variance in water quality standards on the lower Cheyenne and Red rivers in order to increase controlled releases. However, upon the request of senators Conrad and Byron Dorgan, the Obama Administration reviewed the issue and concluded that the state can proceed to move water without EPA approval.

"This is incredibly important news obviously for Devils Lake, and the whole Devils lake basin as well as downstream cities as well," said Conrad.

Conrad says the State now has considerable and immediate flexibility to operate the outlet as leaders best see fit.

Water Infrastructure Projects Designated in EPA Appropriations: Trends and Policy Implications

Spearfish hydro plant gets water quality certification

DENR to issue final water quality decision today

By Kaija Swisher

Black Hills Pioneer

SPEARFISH -- The South Dakota Department of Environment and Natural Resources today issued a final water quality certification to the city of Spearfish.

The certification gets the city one step closer to obtaining a license from the Federal Energy Regulatory Commission for the former Homestake Mining Company's hydroelectric power plant.

“In my mind, we've cleared the last big hurdle,” Cheryl Johnson, the Spearfish public works administrator, said previously. “I can see the light at the end of the tunnel.”

City officials and Mayor Jerry Krambeck could not be reached Wednesday morning for comment.

The Spearfish Hydroelectric plant was built in 1910 to provide power to the Homestake Mine and has two generators. According to previous documents submitted by the Federal Energy Regulatory Commission, the city of Spearfish and numerous other departments, when the hydroelectric plant was constructed, water was diverted at the Maurice intake located in Spearfish Canyon. From there it flows into pipes that deliver the water approximately 4.5 miles to the plant located in Spearfish City Park, where it turns twin turbines. The water then exits the plant, flows through Spearfish and onto its confluence with the Redwater River north of town.

The city bought the plant from Homestake Mining Company in 2004 for $250,000, and it began the licensing process after officials discovered that the plant would not be exempt from needing a license.

The certification is required under Section 401 of the federal Clean Water Act, in order to license the hydroelectric plant, a process the city began in 2007. The city of Spearfish first submitted a request for a Section 401 Water Quality Certification in September 2008, which was withdrawn

and resubmitted in August 2009 and again in July 2010.

The process became delayed when the city of Spearfish proposed to alter Homestake's historically diverted flow to allow some flow to bypass the diversion dam at Maurice and remain in Spearfish Creek.

Since then the U.S. Forest Service, Division of Environmental Services and the city of Spearfish negotiated flow criteria based on critical low flows that will allow the city to comply with the operational conditions as well as protect and maintain the water quality standards of Spearfish Creek.

“The 401 certification includes conditions for the city to follow when operating and maintaining the hydropower plant to protect and maintain the water quality standards and beneficial uses assigned to Spearfish Creek,” Jeanne Goodman, administrator of the Department of Environment and Natural Resources Surface Water Quality Program, said previously.

The 401 certification will be part of an application packet that includes a Historic Properties Management Plan and the Environmental Assessment to the Federal Energy Regulatory Commission board, which will make a final decision on the hydroelectric plant's license.

The fully negotiated settlement between DENR, the city, and the U.S. Forest Service can be found at http://denr.sd.gov/des/sw/PNSpearfish401cert.aspx . An environmental assessment of the hydroelectric plant has been completed by the Federal Energy Regulatory Commission and can also be found at the DENR Web site.

Multiproject Program Grants (P42)

Superfund Research Program

With this 2010 RFA, NIEHS proposed the continuation of the Superfund Hazardous Substance Research and Training Program (SRP) to address the broad, complex health and environmental

issues that arise from the multimedia nature of hazardous waste sites. Grants made under the SRP are for coordinated, multi-project, multi-disciplinary programs. The objective remains to establish and maintain a unique Program that links and integrates biomedical research with related engineering, hydrogeologic, and ecologic components.

The 2010 RFA was released on October 29, 2010. The application deadline for the 2010 Request for Applications (RFA) for the Multiproject Program (P42) grants is April 15, 2011.

RFA-ES-09-012: Superfund Hazardous Substance Research and Training Program (P42) - html version (http://grants.nih.gov/grants/guide/rfa-files/ RFA-ES-10-010.html)

Application Guidelines (http://tools.niehs.nih.gov/srp/1/Funding/Appl ication Guidelines ES-10-010 11-3-10 final.pd f) (184 KB)

Suggested Research Topics (http://tools.niehs.nih.gov/srp/1/Funding/Sugg ested Research Topics ES-10-010 11-4-10.pdf) (52 KB)

There will be a free informational webinar, Superfund Research Program Funding Opportunities, (http://www.niehs.nih.gov/research/supported/s rp/funding/rfa.cfm) on December 15, 2010, 2:00 - 3:30p.m. ET. Please refer to EPA's CLU-IN website (http://clu-in.org/live/#Superfund_Research_Pr ogram_Funding_Opportunities_20101215) to register.

Lack of Science

Appeals process flawed

“Most ‘coordination’ (between the state and regional boards) is reactive and happens at the end of processes when something goes wrong and there are appeals or lawsuits,” Chris Crompton, manager of environmental resources for Orange County, told the Commission in written testimony. “This ‘back-end coordination’ is inefficient and hence costly, and has real environmental impacts from delayed decisions/actions.”112

“As for the fairness of the process, the regulated community is frustrated by the fact that members of the SWCRB and the nine

RWQCBs say they are unapproachable under state law,'' complained Mick Pattinson, president and CEO of Barratt American Homes, a Southern California homebuilder. "While it is perfectly acceptable and appropriate to speak with elected city, state and federal officials, it is unfathomable that the same rights do not apply to unelected board members."

NAHB Sues Army Corps of Engineers Over Wetlands Classification

NAHB has joined in a lawsuit with the American Farm Bureau Federation and the United States Sugar Corporation that challenges a U.S. Army Corps of Engineers decision to begin treating certain farm fields as wetlands, affecting both the value of the property and the process for developing or building on it.

American Farm Bureau Federation et al. v. U.S. Army Corps of Engineers resembles a suit brought simultaneously by New Hope Power Company and Okeelanta Corporation. Both suits have been before Judge K. Michael Moore of the U.S. District Court of the Southern District of Florida and challenge the Corps' recent attempts to improperly change a 17-year-old regulation that provides that land used for agriculture since at least 1985 can no longer be treated as wetlands.

In 1993, the Corps adopted a rule establishing that agricultural lands converted from wetlands prior to 1985 — or "prior converted croplands" — would be excluded from regulation under the Clean Water Act. Therefore, if a farmer decides to utilize land that has been excluded from regulation for some other use or to sell it to a residential or commercial builder, there is no need to get a new jurisdictional determination or go through the Clean Water Act permitting process.

However, in a 2009 memorandum, Corps Director of Civil Works Steven Stockton approved a new standard to regulate these agricultural lands when there is a change in their use. The regulatory uncertainty caused by this action is what prompted the lawsuits from NAHB and other in-

dustry groups.

In a recent positive development, this October, Judge Moore ruled in the New Hope Power case that the Corps could not change its policy without going through the usual federal process of giving public notice and offering a set time for comments from stakeholders or other interested parties. However, as yet there is no indication whether the government will appeal this ruling to the U.S. Court of Appeals for the 11th Circuit. Posted by Michael Dey

Energy Storage Breakthrough is Put to the Test in Bella Coola

Posted on 11/11/2010

Storing away food and supplies is a simple practice we all do to weather snowstorms and other difficult circumstances.

Doing the same with electricity, however, isn't that simple.

Energy storage, though, is a top priority on the agenda of North American governments and power producers who are under pressure to find clean, reliable backup power for periods of peak demand.

North America has committed significant funding to the development of energy storage technologies and researchers are beginning to learn how to store meaningful amounts of renewable power that can be tapped on demand.

Hydropower is poised to play an important part in the growth of energy storage, a promising concept that could transform the power industry.

BC Hydro is testing what could be the most viable method for storing large amounts of power at its Clayton Falls hydroelectric plant in Bella Coola, about 248 miles north of Vancouver.

The run-of-river plant is now capable of using its surplus electricity to produce and store hydrogen through a process known as electrolysis. The hydrogen can then be used in a 100-kilowatt fuel cell to generate electricity when demand peaks.

This new source of emission-free power is replacing the need for power made from diesel-fueled generators. BC Hydro estimates the demonstration project known as the Hydrogen Assisted Renewable Power system (HARP) will lower the community's diesel consumption by 200,000 liters a year and lower greenhouse gas emissions by 600 tons a year.

“It's a very cost-effective and convenient way to store renewable energy,” said David Field, a spokesman for BC Citizens for Green Energy. “It's better than importing coal-fired electricity from Alberta and the U.S. to accomplish the same thing, which is what we're doing right now.”

Even more interesting is the project's use of smart grid technology.

A microgrid controller acts as a “brain” of sorts to manage the power system. The microgrid controller monitors the balance between supply and demand and uses the information to determine when to convert power into hydrogen and when to convert the hydrogen into power to meet increased demand.

“Smart grid technology is going to let us actively manage the electrical grid,” Field said. “It's the biggest change in the electrical system since Thomas Edison. “Using renewable resources such as water to cheaply produce hydrogen that can be used in fuel cells to generate power for homes and businesses has been a long-held dream for many researchers and chemists.

The demonstration project at Canyon Falls may prove to be a major step toward fulfilling that goal.

FERC Shifts into High Gear for Hydropower Developers

Posted on 9/29/2010

California: Background conditions are determined from monitoring data to set water quality objectives.

Source of Information

Information presented in this document is based on a preliminary online search of documents and websites, including State Water Quality Criteria and Standards and Clean Water Act 303(d) Integrated Reports, for the 23 States and five Territories that have marine waters. This document is for information only, and is not to be used for regulatory purposes.

EPA issues November 15, 2010 Memorandum: Integrated reporting and listing decisions related to ocean acidification

Fifty-six leading denominations and faith-based organizations released a joint letter Wednesday calling on the U.S. Senate to uphold the EPA's power to protect the environment and public's health through the Clean Air Act.

In particular, the religious leaders , including Protestants, Jews, Unitarians and other faiths, noted that the effort by Sen. Jay Rockefeller (D-WV) to delay EPA controls on greenhouse gas emissions should be turned down.

In December 2009, the EPA finalized its study on the effects of greenhouse gases, and announced that these emissions are indeed a threat to public health and welfare.

Rockefeller's bill (S.3072) was introduced in March 2010, and would put the EPA's regulation of greenhouse gases and other air pollution on hold for two more years.

The joint letter opens as follows: "As communities and people of faith, we are called to protect

and serve God's great Creation and work for justice for all of God's people.

"We believe that the United States must take all appropriate and available actions to prevent the worst impacts of climate change; we therefore urge you to oppose any efforts to undermine the authority of the Clean Air Act (CAA) to regulate greenhouse gas emissions.

"We have seen various challenges to the CAA this session including Senator Rockefeller's proposal to delay regulation of greenhouse gases under the Environmental Protection Agency. We urge you to protect the Clean Air Act and allow the EPA to use the full strength of the law to ensure that God's Creation and God's children remain healthy."

(The full text of the joint letter and list of signers is available at nccecojustice.org).

According to the U.S. Climate Network , the Rockefeller bill is designed to give polluters free rein to dump carbon pollution into the atmosphere, and would release polluters from their responsibility to keep communities and people safe from harmful emissions.

"As leaders in our communities of faith, we take very seriously our charge to act as stewards of God's Creation," said Rev. Harriet Olson, deputy general secretary of United Methodist Women. "Preserving a strong Clean Air Act and limiting the harm done by climate change are very important and concrete things we can do today working together as people of faith acting in that stewardship capacity."

Environmentalism as Religion

While people have worshipped many things, we may be the first to build shrines to garbage.

By PAUL H. RUBIN

Many observers have made the point that environmentalism is eerily close to a religious belief system, since it includes creation stories and ideas of original sin. But there is another sense in

which environmentalism is becoming more and more like a religion: It provides its adherents with an identity.

Scientists are understandably uninterested in religious stories because they do not meet the basic criterion for science: They cannot be tested. God may or may not have created the world—there is no way of knowing, although we do know that the biblical creation story is scientifically incorrect. Since we cannot prove or disprove the existence of God, science can't help us answer questions about the truth of religion as a method of understanding the world.

But scientists, particularly evolutionary psychologists, have identified another function of religion in addition to its function of explaining the world. Religion often supplements or replaces the tribalism that is an innate part of our evolved nature.

Original religions were tribal rather than universal. Each tribe had its own god or gods, and the success of the tribe was evidence that their god was stronger than others.

But modern religions have largely replaced tribal gods with universal gods and allowed unrelated individuals from outside the tribe to join. Identification with a religion has replaced identification with a tribe. While many decry religious wars, modern religion has probably net reduced human conflict because there are fewer tribal wars. (Anthropologists have shown that tribal wars are even more lethal per capita than modern wars.)

It is this identity-creating function that environmentalism provides. As the world becomes less religious, people can define themselves as being Green rather than being Christian or Jewish. Consider some of the ways in which environmental behaviors echo religious behaviors and thus provide meaningful rituals for Greens:

• There is a holy day—Earth Day.

• There are food taboos. Instead of eating fish on Friday, or avoiding pork, Greens now eat organic foods and many are moving towards eating only locally grown foods.

• There is no prayer, but there are self-sacrificing rituals that are not particularly useful, such as recycling. Recycling paper to save trees, for example, makes no sense since the effect will be to reduce the number of trees planted in the long run.

• Belief systems are embraced with no logical basis. For example, environmentalists almost universally believe in the dangers of global warming but also reject the best solution to the problem, which is nuclear power. These two beliefs co-exist based on faith, not reason.

• There are no temples, but there are sacred structures. As I walk around the Emory campus, I am continually confronted with recycling bins, and instead of one trash can I am faced with several for different sorts of trash. Universities are centers of the environmental religion, and such structures are increasingly common. While people have worshipped many things, we may be the first to build shrines to garbage.

• Environmentalism is a proselytizing religion. Skeptics are not merely people unconvinced by the evidence: They are treated as evil sinners. I probably would not write this article if I did not have tenure.

Some conservatives spend their time criticizing the way Darwin is taught in schools. This is pointless and probably counterproductive. These same efforts should be spent on making sure that the schools only teach those aspects of environmentalism that pass rigorous scientific testing. By making the point that Greenism is a religion, perhaps we environmental skeptics can enlist the First Amendment on our side.

Mr. Rubin is a professor of economics at Emory University. He is the author of "Darwinian Politics: The Evolutionary Origin of Freedom" (Rutgers University Press, 2002).

Moyers on America . Is God Green? Religion and the Environment | PBS

How does your faith or religion or spirituality affect your perspective of environmentalism or creation care?

Consent Decree: Legal document approved by a judge that formalizes an agreement reached between EPA and companies, governments, or individuals associated with contamination at the sites (potentially responsible parties (PRPs)) through which PRPs will take certain actions to resolve the contamination at a Superfund site.

CERCLA allows a private party to recover its attorney fees and expenses incurred in bringing a cost-recovery action pursuant to 42 U.S.C. Sec. 9607(a)(4)(B). reasonable and necessary costs of its cleanup, including the attorney fees and expenses incurred in bringing this cost-recovery ac-

tion. IMMI would be a section 9613(f)(1) liable party only if it owned the site at the time the wastes were dumped or was responsible otherwise for the dumped wastes. See 42 U.S.C. Sec. 9607(a). Since that is not the case, IMMI is not a liable party and cannot be held liable under 42 U.S.C. Sec. 9613(f)(1)

IMMI has met the state cleanup standards, which is what 40 CFR Sec. 300.71(a)(4) required. Thus, the consent decree does not obligate IMMI to clean the site past what CERCLA and the NCP required

40 CFR Sec. 300.65(b)(3) requires removal actions to end after either one million dollars has been obligated or six months have elapsed from the date of the initial response.

CERCLA § 107(a)(4)(A) allows the government to recover all costs of removal or remedial action "not inconsistent with the national contingency plan." When the United States is seeking recovery of response costs, consistency with the NCP is presumed. Washington State Dept. of Transp., 59 F.3d at 799-800; United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir.1992). The potentially responsible party has the burden of proving inconsistency with the NCP. Washington State DOT, 59 F.3d at 800. "To prove that a response action of the EPA was inconsistent with the NCP, a defendant must prove that the EPA's response action was arbitrary and capricious." Id.; 42 U.S.C. § 9613(j)(2).

2. Documentation

The NCP requires:

During all phases of response, the lead agency shall complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery.

40 C.F.R. § 300.160(a)(1) (1990). **QAPP, QA INFO MISSING. WRONG WATERSHED.**

5. Community Relations Plan

The NCP specifies the necessary community relations activities to be taken in a removal action. The 1990 NCP requires that in removal actions where "on-site action is expected to extend beyond 120 days from the initiation of on-site removal activities," the EPA shall prepare a formal community relations plan. 40 C.F.R. § 300.415(n)(3) (1990). The plan should address the pub-

lic's concerns and outline any community relations activities that the EPA expects to undertake. Id. at (n)(3)(ii).

The 1985 NCP requires the same formal community relations plan, but the plan is required if the on-site removal activities are expected to extend beyond 45 days. 40 C.F.R. § 300.67(b) (1985).

We hereby execute our sovereign absolute authority which allows intervention as of right in any civil or administrative action to obtain remedies by any citizen having an interest which is or may be adversely affected; all citizen complaints submitted pursuant to the procedures specified in §123.26(b)(4); permissive intervention authorized by statute, rule, or regulation; October 14, 2010 Citizens seek to join suit over EPA mining rules

Identify the breakdowns in management that allowed actions prohibited by EPA ethics policies to occur and implement accountability. We believe that the underlying issues persist.

EMANCIPATE T.W. ARMAN & IRON MOUNTAIN MINE

Innocent and "Unknowing" Purchasers

Entities that acquire property and had no knowledge of the contamination at the time of purchase may be eligible for CERCLA's third- party defense for certain purchasers of contaminated property. CERCLA §§ 107(b)(3), 101(35)(A)(i). This defense, added to CERCLA in the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), provides entities with an affirmative defense to liability if they conducted all appropriate inquiries prior to purchase and complied with other pre- and post-purchase requirements. The 2002 Brownfields Amendments partially amended the innocent purchaser defense by elaborating on the all appropriate inquiry requirement. See the "All Appropriate Inquiries" text box on page 17.

The innocent purchaser defense may provide liability protection to some owners of contaminated property -- especially those that purchased property prior to January 1, 2002, and are therefore ineligible for the bona fide prospective purchaser protection -- but generally most post-2002 prospective purchasers will not rely on this defense because of the requirement that the purchaser have no knowledge of contamination at the site.

Several of EPA's guidance documents discuss the innocent purchaser third-party defense, including the Common Elements guidance, discussed in Section II.A.5 beginning on page 21.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOHN F. HUTCHENS and T.W. ARMAN, a/k/a Two Miners and 8000 Acres of Land,	)	
Plaintiffs,	)	No. 09-207L
v.	)	
	)	Judge Christine O.C. Miller
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO DISMISS, PLAINTIFFS' SECOND AMENDED COMPLAINT

Pursuant to RCFC 11, 12(b)(1), 12(b)(6), and 83.1, Defendant, the United States of America, herein moves to strike or, in the alternative, to dismiss, the Second Amended Complaint filed by Plaintiffs Iron Mountain Mines, Inc. ("IMMI"), T.W. Arman, and John F. Hutchens. The Second Amended Complaint should be struck for failing to comply with RCFC 11(a) and 83.1(a)(3) because it has not been signed on behalf of Iron Mountain Mines, Inc. – a newly added Plaintiff which appears to be the only proper plaintiff in this action – by counsel admitted to practice in this Court. Pursuant to the rules of this Court, a corporation, such as IMMI, may not be represented by an individual who is not an attorney. Therefore, this Court should strike Plaintiffs' Second Amended Complaint, and direct Plaintiffs to submit a new Second Amended Complaint that either omits IMMI as a plaintiff or includes the signature of an attorney for IMMI.

Alternatively, if this Court finds that Plaintiffs' Second Amended Complaint complies with RCFC 11(a) and 83.1(a), two bases exist for this Court to dismiss the Second Amended Complaint. First, the Second Amended Complaint must be dismissed under RCFC 12(b)(1)

because Plaintiffs allege that the taking occurred in 1989 and, as such, their claim is time-barred by the applicable six-year statute of limitations, 28 U.S.C. § 2501. Second, the Second Amended Complaint should be dismissed under RCFC 12(b)(6) because Plaintiffs allege that Defendant's conduct was unlawful, and claims for just compensation in this Court must be premised on lawful conduct by the United States.

I. Background

Plaintiffs Arman and Hutchens asserted in their original complaint and First Amended Complaint that this action is related both to a seventeen-year-old lawsuit in the United States District Court for the Eastern District of California and to two recent proceedings in the United States Court of Appeals for the Ninth Circuit in connection with that lawsuit.

The district-court lawsuit was filed in 1991 by the United States and the State of California alleging that Mr. Arman and IMMI were liable (along with other defendants) under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for cleanup costs at the Iron Mountain Mine Superfund site near Redding, California. United States v. Iron Mountain Mines, Inc., No. 91-0768 (E.D. Cal., filed June 12, 1991). In 2002, the district court granted summary judgment to the United States and California on the issue of Mr. Arman and IMMI's CERCLA liability, holding that IMMI was liable as a current owner of the site and that Mr. Arman was liable as a site operator. United States v. Iron Mountain Mines, Inc., No. 91-0768 (E.D. Cal. Sept. 30, 2002) (order granting partial summary judgment). In granting summary judgment to the United States and California, the district court rejected two affirmative defenses offered by IMMI and Mr. Arman. The district court rejected the innocent-landowner defense asserted by IMMI "because IMMI purchased the property with knowledge of – indeed, at least in part, because of – the presence of hazardous materials." Id. The district court noted

that Mr. Arman was not entitled to the innocent-landowner defense "**because he is not the 'owner' of the facility in need of cleanup**." Id. (emphasis added). The district court also rejected the third-party defenses asserted by IMMI and Mr. Arman.

In March 2008, Mr. Hutchens moved to intervene in the district-court lawsuit by filing a document titled "Notice of Joinder." In that motion, he asserted that "Mr. T.W. Arman and Iron Mountain Mines, Inc., have entered into a joint venture with Mr. John Hutchens and Serenescapes," and that the joint venture's purpose was to recover minerals "from the High Density Sludge (HDS) disposed upon the brick flat mine as a result of the treatment of Acid Mine Drainage (AMD) performed by EPA and its contractors in the course of remedial and removal actions at the Iron Mountain Mine Superfund Site." Notice of Joinder at 1, United States v. Iron Mountain Mines, Inc., No. 91-0768 (E.D. Cal. Mar. 10, 2002). On January 2, 2009, the district court struck his motion (and other filings) and barred Mr. Hutchens from filing additional documents except through properly admitted counsel. United States v. Iron Mountain Mines, Inc., No. 91-0768 (E.D. Cal. Jan. 2, 2009) (order denying motion to join or to intervene). Mr. Hutchens has since made two attempts to obtain a writ of mandamus from the Ninth Circuit in connection with the district-court lawsuit. The Ninth Circuit denied his first attempt on February 18, 2009, see In re John F. Hutchens, No. 09-70047 (9th Cir. Feb. 18, 2009) (order denying petition for writ of mandamus and dismissing all pending motions), and his second attempt is pending, see In re John F. Hutchens et al., No. 09-71150 (9th Cir. filed Apr. 20, 2009).

On April 6, 2009, Plaintiffs Arman and Hutchens filed their original complaint [Dkt. 1] in this action. On May 7, Plaintiffs Arman and Hutchens filed a First Amended Complaint [Dkt. 6], which consisted of 923 numbered paragraphs.[1]

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[1] Both the original complaint and the First Amended Complaint were so vague, ambiguous, and verbose that the United States could not have reasonably responded to them.

On May 26, 2009, this Court held a telephonic hearing to address further proceedings in this action in light of the First Amended Complaint and preliminary-injunction motion filed by Plaintiffs Hutchens and Arman. During that hearing, the United States orally moved pursuant to RCFC 12(e) for a more definite statement of Plaintiffs' claim. This Court issued an Order on May 27 granting Defendant's motion and requiring Plaintiffs to file a Second Amended Complaint that "complies with RCFC 8(a)" and "set[s] forth the exact nature of their respective ownership rights in the property that is the subject of the alleged taking and stating precisely the actions of the Government that constitute a taking and for which plaintiffs seek compensation." Dkt. 13 at 2. In addition, the Order stated, "[t]he Clerk of the Court shall accept for filing no pleading or other submission from plaintiffs other than [the Second Amended Complaint] until defendant files its answer or other response. . . ." Id.

On June 2, Plaintiffs filed their Second Amended Complaint [Dkt. 14], which added IMMI as a new plaintiff in this action. In their Second Amended Complaint, "Iron Mountain Mines, Inc., T.W. Arman, and John Hutchens claim that the EPA's remedial (removal) actions constitute a taking of the Iron Mountain Mines, Inc. property warranting just compensation to Iron Mountain Mines, Inc. et al[.] under the Fifth Amendment. . . . " Dkt. 14 at 8. Plaintiffs expressly allege that they "date the taking as having actually commenced on January 1, 1989, . . ." Id. ¶ 22. The signature block of the Second Amended Complaint identifies Plaintiff Arman as the "sole stockholder of Iron Mountain Mines, Inc.," as well as its "President, Chairman, and Chief Executive Officer." Id. Plaintiff Hutchens is identified as the "Tenant in-Chief, Warden of the Forest, and Warden of the Stannaries, Iron Mountain Mines, Inc." Id.

II. This Court Should Strike The Second Amended Complaint Because It Has Not Been Signed On Behalf of IMMI By Properly Admitted Counsel.

Plaintiffs' Second Amended Complaint fails to comply with RCFC 11(a) and 83.1(a), and, as such, it should be struck from the docket. RCFC 11(a) states, "[e]very pleading, written motion, and other paper must be signed by or for the attorney of record in the attorney's name – or by a party personally if that party is unrepresented." It continues, "[t]he court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney or party's attention." Id. Not all parties may proceed without representation. RCFC 83.1(a)(3) states, "An individual who is not an attorney may represent oneself or a member of one's immediate family, but may not represent a corporation, an entity, or any other person in any proceeding before this court." In other words, Plaintiff Hutchens may represent himself in this action, and Plaintiff Arman may represent himself, but neither Mr. Hutchens nor Mr. Arman may represent IMMI. IMMI must instead be represented by counsel, and that counsel must sign the Second Amended Complaint on behalf of IMMI. The Second Amended Complaint, however, has been signed only by Plaintiffs Arman and Hutchens, and it has not been signed on behalf of IMMI by properly admitted counsel. Dkt. 14 at 8.

IMMI's compliance with RCFC 11(a) and 83.1(a)(3) is especially important because it likely is the only proper plaintiff in this action. "It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation" under the Fifth Amendment. Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001)); see also Cienega Gardens v. United States, 331 F.3d 1319, 1328 (Fed. Cir. 2003) ("For any Fifth Amendment takings claim, the complaining party must show it owned a distinct property interest at the time it was allegedly taken"). Plaintiffs expressly allege in their Second Amended Complaint that the United States took property belonging to Iron Mountain Mines, Inc., rather than property

belonging to Plaintiffs Hutchens or Arman. Dkt. 14 at 8 ("the EPA's remedial (removal) actions constitute a taking of the Iron Mountain Mines Inc. property"); id. (demanding judgment in excess of $7 billion "for the complete takings of Iron Mountain Mines, Inc. properties"); id. ¶ 22 ("[d]eprived owner Iron Mountain Mines, Inc. is entitled to interest on just compensation"). The allegation that IMMI, rather than Mr. Arman (or Mr. Hutchens), owns the property at issue is consistent with the district court's 2002 ruling that Mr. Arman was not entitled to an innocent-landowner defense to CERCLA liability "because he is not the 'owner' of the facility in need of cleanup." United States v. Iron Mountain Mines, Inc., No. 91-0768 (E.D. Cal. Sept. 30, 2002) (order granting partial summary judgment).

Because IMMI has failed to comply with RCFC 11(a) and 83.1(a)(3), this Court should strike the Second Amended Complaint.[2]

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[2] On June 17, the undersigned counsel for the United States sent a letter to Plaintiffs Arman and Hutchens in their purported capacities as IMMI's sole stockholder, President, Chairman, and Chief Executive Officer (in Mr. Arman's case), and IMMI's Tenant in-Chief, Warden of the Forest, and Warden of the Stannaries (in Mr. Hutchens' case). That letter notified Plaintiffs Arman and Hutchens that IMMI had not complied with RCFC 11(a) and 83.1(a)(3) in filing the Second Amended Complaint, and that the United States would move to strike the Second Amended Complaint unless it received notice that IMMI would be either (1) withdrawing as a plaintiff in this action, or (2) represented by properly admitted counsel. Rather than respond directly to the undersigned counsel for the United States, on June 24, the undersigned received from Plaintiffs Arman and Hutchens a copy of a petition submitted to this Court asking it to permit IMMI to proceed without properly admitted counsel and to be instead represented by Plaintiffs Hutchens and Arman. Plaintiffs' petition, a copy of which is attached hereto as Exhibit A, does not appear to have been entered on the docket, perhaps because of this Court's May 27 Order prohibiting further filings by Plaintiffs until the United States has responded to the Second Amended Complaint. Even if it had been filed, however, Plaintiffs' petition should be denied because, as the Federal Circuit has explained, the rule that corporations must be represented by counsel in the Court of Federal Claims (former RCFC 83.1(c)(8) and Fed. Cl. R. 81(d)(8)) "does not contemplate exceptions." Talasila, Inc. v. United States, 240 F.3d 1064, 1067 (Fed. Cir. 2001); see also Curtis v. United States, 63 Fed. Cl. 172, 179-80 (2004).

III. This Court Lacks Jurisdiction To Hear Plaintiffs' Takings Claim Because The Alleged Taking Occurred More Than Six Years Before The Filing Of This Action.

Should this Court determine that the Second Amended Complaint was properly filed, it must dismiss the Second Amended Complaint for lack of subject-matter jurisdiction. Under 28 U.S.C. § 2501, "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." "A claim first accrues within the meaning of the statute of limitations when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." Brown Park Estates v. United States, 127 F.3d 1449, 1455 (Fed. Cir. 1997) (internal quotation marks omitted). As this Court has explained, "[w]hen a taking is pleaded, a claim accrues when the taking occurs." Goodrich v. United States, 63 Fed. Cl. 477, 480 (2005). The limitations period of section 2501 is jurisdictional, and thus it is not subject to waiver or equitable tolling. See Fauvergue v. United States, 86 Fed. Cl. 82, 92 (2009).

Plaintiffs filed their original complaint in this action on April 6, 2009. Thus, Plaintiffs' claim is time-barred unless it accrued on or after April 6, 2003.

Plaintiffs' purported takings claim accrued years before that date. Plaintiffs allege in their Second Amended Complaint that they "date the taking as having actually commenced on January 1, 1989." Dkt. 14 ¶ 22. Plaintiffs explain that they "use[] this date because it marks the Court[']s approval of the physical intrusion from which all damages in this matter arise." Id. Plaintiffs also allege that IMMI began suffering damages on January 1, 1989 in the form of "lost mining opportunity." Id. ¶ 18. Because the alleged taking occurred in 1989, Plaintiffs' claim is time-barred under 28 U.S.C. § 2501 and thus, it must be dismissed pursuant to RCFC 12(b)(1).

IV. Plaintiffs' Second Amended Complaint Also Should Be Dismissed For Failure To State A Claim Because It Alleges Unlawful Conduct By The United States.

Alternatively, Plaintiffs' Second Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted. "A motion to dismiss for failure to state a claim is brought pursuant to RCFC 12(b)(6)." Abbey v. United States, 82 Fed. Cl. 722, 725 (2008). As the United States Court of Appeals for the Federal Circuit has explained, "[t]he purpose of [RCFC 12(b)(6)] is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail." Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993).

It is well established that "in a takings case [the court] assume[s] that the underlying governmental action was lawful." Lion Raisins Inc. v. United States, 416 F.3d 1356, 1370 (Fed. Cir. 2005) (internal quotation marks omitted). "[T]o the extent that [a] plaintiff claims it is entitled to prevail *because* the agency acted in violation of statute or regulation," Federal Circuit precedent does "not give the plaintiff a right to litigate that issue in a takings action." Id. at 1369; see also NW Louisiana Fish & Game Preserve Comm'n v. United States, 79 Fed. Cl. 400, 406 (2007). Indeed, during the May 26 telephonic hearing, this Court explained at length the difference between a claim for just compensation under the Fifth Amendment, which may be brought in this Court, and a challenge to the legality of governmental action, which must be brought in the appropriate district court.

Notwithstanding this Court's explanation and the well-established case law, Plaintiffs continue to contest the legality of the EPA's actions at the Iron Mountain Mines Superfund site in this action. In their Second Amended Complaint, "Iron Mountain Mines, Inc. et al. dispute the United States['] lawful authority to conduct the[] CERCLA remedial actions (removal)" about which Plaintiffs complain, "and demand the return of the property and the restoration of rights,

privileges, and immunities of patent title to the possession and enjoyment of T.W. Arman and John F. Hutchens." Dkt. 14 ¶ 26. Plaintiffs go on to allege that they are entitled to just compensation "[b]ecause the United States has no actual justification for its actions." Id. Because Plaintiffs' Second Amended Complaint challenges the lawfulness of the EPA's actions at the Iron Mountain Mines Superfund site, it should be dismissed under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted.

V. Conclusion

For the foregoing reasons, Defendant respectfully requests that this Court strike Plaintiff's Second Amended Complaint from the docket and direct Plaintiffs to file a new Second Amended Complaint that either omits IMMI or includes the signature of an attorney appearing on behalf of IMMI. In the alternative, should the Court determine that Plaintiffs' Second Amended Complaint was properly filed, Defendant respectfully requests that the Court dismiss the Second Amended Complaint with prejudice.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General

/s/ Joshua A. Doan

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Attorney for Defendant

July 6, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DEFENDANT'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO DISMISS, PLAINTIFFS' SECOND AMENDED COMPLAINT** has been served by U.S. mail, first class postage prepaid, and by facsimile, on this 6th day of July, 2009, on the following interested parties:

John F. Hutchens
P.O. Box 182
Canyon, CA 94516
Fax: 925-878-9167

T.W. Arman
P.O. Box 992867
Redding, CA 96099
Fax: 530-275-4559

Joshua A. Doan

Joshua A. Doan

Doan, Joshua

John F. Hutchens, *pro se; sui juris; Tenant-in-Chief, Warden of the Forests & Stannaries.*
P.O. Box 182, Canyon, Ca. 94516, 925-878-9167 john@ironmountainmine.com
T.W. Arman, *pro se*; sole stockholder: Iron Mountain Mines, Inc. President, Chairman, CEO
P.O. Box 992867, Redding, CA 96099 530-275-4550, fax 530-275-4559
Iron Mountain Mines, Inc.; corporation property in the custody of the United States of America
P.O. Box 992867, Redding, CA 96099, T.W. Arman, sole stockholder, no parent corporation

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

TWO MINERS & 8000 ACRES OF LAND	**)Court of Federal Claims No. 09-207 L**
IRON MOUNTAIN MINES, INC. et al,	**)Honorable Judge Christine O. C. Miller**
T.W. ARMAN and JOHN F. HUTCHENS,	**)PETITION FOR LEAVE TO PROCEED**
(real parties in interest), "Two Miners"	***)PRO SE & IN FORMA PAUPERIS***
Plaintiffs	**)SECOND AMENDED COMPLAINT:**
v.	
UNITED STATES	**)DEMAND FOR ANSWER!**
Defendants	**)TAKINGS CLAIM!**

Plaintiffs petition the Court with an extraordinary request for leave to proceed *pro se* on behalf of Iron Mountain Mines, Inc. and ask the Court to grant an exception to the usual rules against a corporation being represented by persons not licensed as attorneys in this case.

Plaintiffs cite as affirmative case law *United States* v. *Reeves*, 431 F. 2d 1187 (CA9 1970) *(per curiam)* (partner can appear on behalf of a partnership), and *In re Holliday's Tax Services, Inc.*, 417 F. Supp. 182 (EDNY 1976) (sole shareholder can appear for a closely held corporation). Plaintiffs submit that Iron Mountain Mines, Inc. sole shareholder is T.W. Arman, a real party in interest, and who is also its Chairman, Chief Executive Officer, and unemployed President.

Plaintiffs submit that, as in *Holliday's Tax Services,* the exception should be made on the premise that, since the corporation is without any funds, to deny it the ability to prosecute this matter without an attorney might be to deny it the ability to proceed at all.

plea
90-1-23-12820

DEFENDANT EXHIBIT A

Plaintiffs submit that Iron Mountain Mines, Inc. has effectively been a prisoner of war in federal detention for the last 25 years by actions of the EPA and DOJ, and that any viable source of revenue for the company has been systematically disrupted and prevented by EPA and DOJ actions, especially any possibility of mining development or mining revenue.

Plaintiffs further submit that the last meaningful source of revenues for Iron Mountain Mines, Inc. was its timber harvest, which was all but destroyed by the raging wild fires of last summer (2008) that decimated over 1000 acres of the forests for even the sale of fire wood.

Plaintiffs submit that real parties in interest T.W. Arman and John F. Hutchens have entered into a joint venture constituting a mining partnership on Iron Mountain Mines, Inc. properties.

Plaintiffs submit that the joint venture agreement expressly conveys "any right of agency or factor as may be required to protect or enforce such interest." and "including any causes of action against any agencies or other parties, and to pursue claims based on any rights or breach thereof, and upon any breach or bad faith by any agency or other parties, and to protect any property rights or other rights and the "Right to Resume Work" as may be necessary to protect their interests."

Plaintiffs submit that real party in interest John F. Hutchens submitted an application for admission to this Court, subscribed to the Oath, and passed the examination for electronic case filing.

Plaintiffs submit that Iron Mountain Mines, Inc. is a mining company, and as such is entitled to the benefits of the absence of *delectus personae* in mining companies, and therefore it is not a artificial entity in the usual corporate sense, and further that plaintiffs have in essence already "pierced the corporate veil" by establishing their own status *in forma pauperis,* and so the plaintiffs are properly entitled to proceed and to have their day in Court.

Plaintiffs recognize and acknowledge the Courts concerns and apprehensions in granting such an extraordinary request, and are mindful of the implicit caveat that "the [court] could require the corporation to obtain professional counsel if it found that "lay representation is causing a substantial threat of disruption or injustice," or that "changed economic conditions make it possible for the corporation to obtain an attorney." 417 F.Supp. at 185.

Plaintiff T.W. Arman submits that Iron Mountain Mines, Inc. has vested this authority in the "Warden of the Forest" including the authority to prosecute, such as for trespassers and the like.

Plaintiffs submit that the real parties in interest; Iron Mountain Mines, Inc., T.W. Arman, and John F. Hutchens interests are undivided interests, and so therefore there is no just reason to apply the rule to prevent the parties from proceeding in this matter.

The relationship among joint venturers was eloquently described by United States Supreme Court Justice Cardozo in the seminal 1928 case of Meinhard v. Salmon - "joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

Plaintiffs submit that on June 17, 2009, trial attorney for defendants' transmitted correspondence indicating the government's intention to move to strike the second amended complaint based only upon the grounds that Iron Mountain Mines, Inc. is unrepresented by a licensed attorney.

Plaintiffs submit that as this is a prosecution on behalf of Iron Mountain Mines, Inc. and Iron Mountain Mines, Inc. is not a defendant or co-defendant in this case, so there is no just reason for the application of the rule and the extraordinary request should be granted as requested.

Plaintiffs submit that application of the rule will result in manifest injustice in this case.

Plaintiffs submit that they are willing, able, and prepared to proceed, and in the alternative that the Court must uphold the rule, the Court should appoint counsel pursuant to §3006A(a)(1)(I). (The Plaintiffs face loss of liberty, and Federal law requires the appointment of counsel.)

Date: June 19, 2009 **Signature:** _____
s/ John F. Hutchens

Date: June 19, 2009 **Signature:** _____
s/ T.W. Arman

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CERTIFICATE AND PROOF OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that I am above the age of eighteen years and that I am not a party to the action herein.
My name and address is: Michele L. Petti, 49 Meadow View Rd., Orinda, Ca. 94563
On the date entered below, I caused to be served on the United States Attorney General:

PETITION FOR LEAVE TO PROCEED *PRO SE & IN FORMA PAUPERIS*

TWO MINERS & 8000 ACRES OF LAND
IRON MOUNTAIN MINES, INC. et al
T.W. ARMAN and JOHN F. HUTCHENS, (real parties in interest),
"Two Miners"

Plaintiffs

Court of Federal Claims No. 09-207 L

v. **Honorable Judge Christine O.C. Miller**

UNITED STATES

Defendants

To be served by first class mail, postage prepaid, upon the following party by placing a true and correct copy of the same in a sealed envelope with proper postage affixed thereto and depositing the same in the United States Mail addressed as follows:.

Joshua A. Doan, Esq.
Trial Attorney
Natural Resources Section
Environmental and Natural Resources Division
United States Department of Justice
P.O. Box 663
Washington D.C. 20004-0663

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that the information contained in the Certificate and Proof of Service is true and correct.
Executed on:

DATE: June 19, 2009 **Signature:** Michele L. Petti

/s/ Michele L. Petti