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3 T.W. Arman, *pro se*; sole stockholder: Iron Mountain Mines, Inc. President, Chairman, CEO  
4 P.O. Box 992867, Redding, CA 96099 530-275-4550, fax 530-275-4559  
5 Iron Mountain Mines, Inc.; corporation property in the custody of the United States of America  
6 P.O. Box 992867, Redding, CA 96099, T.W. Arman, sole stockholder, no parent corporation  
7

8 **IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

9  
10 **IRON MOUNTAIN MINES, INC.** ) **Civil No. 2:91-cv-00768-JAM-JFM**  
11 **T.W. ARMAN & JOHN F. HUTCHENS** ) **Honorable Judge John A. Mendez**  
12 **“TWO MINERS & 8000 ACRES OF LAND”** ) **INTERVENTION & WRIT OF RIGHT!**  
13 **on behalf of a class; Grantees, Citizens.** ) **ABSOLUTE ORDER FOR ADJUDICATION**  
14 **v.** ) **AND JUDGMENT ON POSSESSION;**  
15 **UNITED STATES OF AMERICA** ) **ABSOLUTE ORDER OF EJECTMENT;**  
16 *Picturi; Signis; Famosus libellus sine* ) **MOTION FOR ORDER OF REMISSION;**  
17 *scriptis; Bursae decrementum; Quando* ) **MOTION FOR ORDER OF REVERSION;**  
18 *dominus conscientiae detrimentum;* ) **ORDER OF DETINUE SUR BAILMENT;**  
19 *de Quibus Commote Alodium & Alodarii,* ) **ORDER INCIDENTAL & PEREMPTORY**  
20 *Quia tria sequunturdefamatorem* ) **ADMINISTRATIVE MANDAMUS**  
21 **“NO IMMUNITY UNDER 1983”** ) **ORDER TO STRIKE CERCLA & EPA**

22 **INTERVENTION FOR IRON MOUNTAIN MINES, INC.**  
23 **GRANTEES’ SECULAR RIGHTS *SUI JURIS* UNDER THE ESTABLISHMENT CLAUSE**  
24 **CONFLICTS OF INTERESTS; PROHIBITIONS; EQUITABLE ESTOPPEL; TRUSTS;**  
25 **WRITS OF ERRORS CORAM NOBIS; FIERI FASCIA; MUTATIS MUTANDIS;**  
26 **ABSOLUTE ORIGINAL ORDER TO CEASE, DESIST, VOID, AND VACATE!**  
27 **ABSOLUTE ORDER FOR REMISSION, REVERSION, AND DETINUE SUR BAILMENT.**  
28 ***Breve capitalis justiciarius noster and ad placita coram nobis tenenda; EJECTMENT!***

1 1. The right to petition the government is the freedom of individuals (and sometimes groups and  
2 corporations) to petition their government for a correction or repair of some form of injustice with-  
3 out fear of punishment for the same. Although often overlooked in favour of other more famous  
4 freedoms and sometimes taken for granted, many other civil liberties are enforceable against the  
5 government only by exercising this basic right,, making it a fundamental right in both  
6 representative democracies (to protect public participation) and liberal democracies. While the pro-  
7 hibition of abridgment of the right to petition originally referred only to the federal legislature (the  
8 Congress) and courts, the incorporation doctrine later expanded the protection of the right to its  
9 current scope, over all state and federal courts and legislatures and the executive branches of the  
10 state and federal governments.

11 2. Intervener Iron Mountain Mines, Inc. v. United States challenges the legitimacy of Iron Mountain  
12 Mines, Inc. invasion and occupation by the Environmental Protection Agency and particularly con-  
13 tests the illegitimate animus and vindictiveness of the EPA actions, the defamations, libel and slan-  
14 der, loss of enjoyment, value, and livelihood; .injury to reputation, credit, honor and dignity

15 **UNITED STATES ABROGATED PATENT TITLE! JOINT & SEVERAL TRESPASSERS!**

16 3. Grantees challenge the constitutionality of the Comprehensive Environmental Response, Cleanup,  
17 and Liability Act “CERCLA” 42 U.S.C. 9601-9659 et seq. for violation of the establishment clause.

18 4. Petitioners allege that the United States Environmental Protection Agency and Department of  
19 Justice fraudulent assertion of authority to promulgate regulations concerning easements or drain-  
20 age on these mining lands in the State of California, such authority being reserved by patent title  
21 solely to the legislature of California, when such property was conveyed with rights, privileges, and  
22 immunities of warrants of patent title from the President of the United States, is an infringement of  
23 patent title and a violation of petitioners constitutionally protected interests, and a constitutional  
24 violation for the failure of Congress or the Judiciary to properly restrict this fraudulently asserted  
25 authority of exactions by the executive branch of the United States government.

26 5. Furthermore, because the right to relief depends upon the construction or application of federal  
27 law, and concerns claims for relief arising out of civil rights (§ 1343), United States as defendant (§  
28 1346), injuries under federal law (§ 1357), supplemental jurisdiction (§1367), United States as de-

1 fendant (§ 1402), venue of cases under chapter 5 of title 3 (§ 1413), creation of remedy (§ 2201),  
2 further relief (§ 2202), process and procedure (§ 2361), constitutional question (§ 2403), quiet title  
3 action (§ 2409a), federal lien (§ 2410), liability of United States (§ 2674), exceptions (§ 2680),  
4 false claims (§ 3729) so territorial, subject matter, concurrent, and pendant State claim jurisdiction  
5 is properly before this court.

6 “The English practice . . . [is] more necessary to be observed here than there” \*John Jay, 1793

7 Petitioners claim violation and usurpation of a franchise granted by patent title and mineral rights.

8 Demand for declaratory and injunctive relief, § 2680. Exceptions!

9 **6.** Writs of: manifest injustice; 10th Amendment repudiation; equitable estoppel.

10 Knowingly reckless disregard of the truth, deliberate ignorance of actual information; trespass:

11 Praeceptum quod reddat & detinue sur bailment; subpoena ad testificandum; subpoena duces tecum;

12 impunity; miscarriage of justice; prohibition; illegitimate animus;

13 Grantees petition for equitable estoppel;

14 **7.** The EPA is required to determine liability based upon applicable law. The doctrine of equitable

15 estoppel provides that in certain cases, the EPA may be estopped from asserting liability based

16 upon actions taken by the EPA in the reliance of which leads to harm or “detriment.”

17 **8.** The doctrine of equitable estoppel will be applied against a governmental agency when applica-

18 tion of estoppel is necessary to prevent manifest injustice.

19 1. Elements of Equitable Estoppel

20 (1) The EPA is fully advised of the facts; TRUE

21 (2) The party claiming estoppel had a right to believe it was so intended and intentional; TRUE

22 (33 counter-claims with malice, fraud, oppression, deceit, negligent endangerment)

23 (3) Ignorant of the true facts; conflict of interest, libel and slander, infamy, stigmatic injuries, con-

24 cealment, deliberate ignorance, errors of impunity, miscarriage of justice; TRUE

25 (4) The party claiming estoppel suffered detrimental reliance. TRUE!

26 (25 years of invasion and occupation, taking private property requiring just compensation, civil

27 rights violations of equal protection and due process, tyranny and despotism, false claims, abuse,

28 malice, oppression, deceit, fraud upon the court, unnecessary and reckless negligent endangerment.

1 2. Detrimental Reliance

2 Detrimental reliance is present where the EPA's action results in an increased liability. TRUE

3 3. Application of the Doctrine of Equitable Estoppel

4 The EPA, as an administrative agency, does not have the legal authority to interpret a statute in  
5 such a way as to change its meaning or effect. (Or to alter prior statutes!)

6 Petition to strike the liens.

7 Pursuant to 1107 of the California Code, you may grant such protective relief *ex parte*

8 ***Writ of certiorari:***

9 **9.** You should consider whether a government agency may abrogate the laws of the United States  
10 and the State of California concerning mineral rights and patent title by merely posting a revised  
11 and unattainable environmental law, and then by its actions of despotism and tyranny fail to pro-  
12 tect, preserve, or perfect the mine property during its fraudulently obtained receivership, funded by  
13 fraudulent trusts and created by false claims and misrepresentations, discrimination, and coercion  
14 of the owners and previous owners, with breach of duty, negligently fraudulent violation of envi-  
15 ronmental laws with the impunity of judicial swaddling and judicial deference, and resulting in the  
16 owners and the public's negligent endangerment, with ulterior government motives; to hold a lien  
17 against the property for same, as it operates at a loss, and hold the property as they do against the  
18 true and rightful owner, even to his entry, with illegitimate animus, and by fraud upon the court.

19 **10.** You should as well consider whether the government agency, swaddled in judicial deference,  
20 engaged in despotism and tyranny to damage these persons or the general welfare, infringed and  
21 usurped the corporate franchise, slandered and libeled the petitioners and the true and rightful own-  
22 ers, defamed their honor, poisoned their reputations, invaded and occupied their private property  
23 without justification and without compensation, and that those who pretended to claim such rights  
24 in the water or lands against the true and rightful owner that is Iron Mountain Mines, Inc. make  
25 such claims in violation of the constitution of California. When Iron Mountain Mines concluded  
26 underground mining in 1954, the copper cementation process continued as it had since copper min-  
27 ing began in 1896. Copper cementation had been practiced almost continuously until the EPA  
28 forced T.W. Arman to retire. Copper cementation has been known for over 2000 years and has

1 been practiced on an industrial scale for over 1000 years. You should further consider whether  
2 agency actions serve to undermine and abrogate principles of liberty and justice and principles of  
3 our democracy and republican form of government, and endanger the general welfare.

4 **ABUSE, MALICE, OPPRESSION, DECEIT, MISTAKE, ACCIDENT, AND HARDSHIP.**

5 **TAKINGS! ERRORS! PROHIBITIONS! EQUITABLE ESTOPPEL! INTERVENTION!**

6 **Creation by 811, 1085, and 1160 California Code of Civil Procedure verified affidavit**

7 **Date: July 8<sup>th</sup>, 2009 Signature: \_\_\_\_\_**

8 **s/ John F. Hutchens, Special Deputy Warden of the Forest & Stannaries**

9 ***I, JOHN F. HUTCHENS, DO SOLEMNLY SWEAR THAT I WILL SUPPORT THE***  
10 ***CONSTITUTIONS OF THE UNITED STATES AND THAT I WILL CONDUCT MYSELF IN***  
11 ***AN UPRIGHT MANNER AS A SPECIAL DEPUTY GOVERNMENT PRIVATE ATTORNEY***  
12 ***GENERAL LEVYING OFFICER OF THIS COURT.***

13 "I, \_\_\_\_\_, do solemnly swear that I will support and defend the Consti-  
14 tution of the United States and the Constitution of the State of California against all enemies, for-  
15 eign and domestic; that I will bear true faith and allegiance to the Constitution of the United States  
16 and the Constitution of the State of California; that I take this obligation freely, without any men-  
17 tal reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon  
18 which I am about to enter.

19 "And I do further swear that I do not advocate, nor am I a member of any party or organization,  
20 political or other- wise, that now advocates the overthrow of the Government of the United States  
21 or of the State of California by force or violence or other unlawful means; that within the five  
22 years immediately preceding the taking of this oath (or affirmation) I have not been a member of  
23 any party or organization, political or other-wise, that advocated the overthrow of the Government  
24 of the United States or of the State of California by force or violence or other unlawful means ex-  
25 cept as follows: "No Exceptions" and that during such time as I hold the office of: SPECIAL  
26 DEPUTY GOVERNMENT PRIVATE ATTORNEY GENERAL LEVYING OFFICER I will not  
27 advocate nor become a member of any party or organization, political or otherwise, that advo-  
28 cates the overthrow of the Government of the United States or of the State of California by force  
or violence or other unlawful means."

***I declare under penalty of perjury that the foregoing is true and correct.***

***Executed on July 8<sup>th</sup>, 2009. (28 U.S.C. §1746)***

24 DATED: July 8, 2009 By: \_\_\_\_\_

25 **Verification affidavit:**

1 I, John F. Hutchens, hereby state that the same is true of my own knowledge, ex-  
2 cept as to matters which are herein stated on my own information or belief, and as to  
3 those matters, I believe them to be true.

4 Affirmed this day: July 8, 2009

5 Signature: \_\_\_\_\_

6 s/ John F. Hutchens

7 **ABSOLUTE ORIGINAL ORDER TO HEAR THE CASE OR SET A DATE FOR HEARING**

8 **11.** Grantees have shown that the EPA has violated the Grantees' civil rights by denying an inno-  
9 cent landowner defense by false claims of a failure to use "due care" in the property purchase based  
10 upon "due care" standards adopted by amendment to the legislation from 1986 to 2002 being ap-  
11 plied retroactively as a standard for purchase of real property in 1976. It is not possible for T.W.  
12 Arman to have had knowledge in 1976, a priori, of copper, zinc, and cadmium being designated as  
13 "hazardous substances" for purposes of the clean water act (CWA) in Dec.1977. This is the EPA's  
14 only basis for denial of the innocent landowner defense to the Grantees..

15 Grantees have further shown that the illegitimate animus of the EPA and its misapplication of these  
16 environmental laws have resulted in its unconstitutional application ex post facto and as a bill of  
17 attainder. Petitioner has shown that petitioners have been libeled and slandered by false accusations  
18 and of crime of infamy, defamations of honor and character, and have presented facts and informa-  
19 tion of a substantial nature to be recognized as representatives of a class.

20 **12.** Petitioners has shown the necessary conditions for intervention, meeting all three criteria rec-  
21 ognized by the Courts, so petitioner is entitled to intervention of right by Fed.R.Civ.P. 24(a)(2),

22 **13.** Petitioners has shown that EPA actions have failed to achieve the legislations goals while at the  
23 same time they have served to undermine fundamental principles of republican government and are  
24 in violation of civil rights with illegitimate animus a negligent imminent hazard.

25 **14.** Petitioner has shown that a fundamental failure of government has occurred, that a basic imbal-  
26 ance of powers in contravention of the Constitution of the United States exists, that this imbalance  
27 serves to endanger the health, wealth, and prosperity of the citizens of the United States as well as  
28

1 petitioners, and petitioners has provided a reasonable and logical course of remedy to the govern-  
2 ments problems.

3 **15.** The Equal Protection Clause prohibits state action that discriminates” See, e.g., *Brown v. Board*  
4 of 16 Education, 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873 (1954) The Court, in its Order, rec-  
5 ognized that “ stigmatic injuries” may satisfy the “ injury in fact” component of standing, and that  
6 upon doing so, they also automatically satisfy the other standing requirements of causation and re-  
7 dressability.

8 **16.** In *Heckler v. Matthews*, 465 U.S. 728, 139, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984), the Su-  
9 preme Court articulated how the non-economic, stigmatic injury that results from discriminatory  
10 treatment confers standing even when the court cannot award the benefit originally denied as a re-  
11 sult the discrimination

12 **17.** “There can be no doubt that this sort of noneconomic injury is one of the most serious conse-  
13 quences of discriminatory government action and is sufficient in some circumstances to support  
14 standing.” 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

15 **18.** As early as 1886, the Supreme Court recognized that the Equal Protection clause of the Four-  
16 teenth Amendment to the U.S. Constitution prohibits discrimination even under the auspices of a  
17 facially neutral law. In *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 6 L.Ed. 22 (1886)  
18 “Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and ad-  
19 ministered by public authority with an evil eye and an unequal hand, so as practically to make un-  
20 just and illegal discriminations between persons in similar circumstances, material to their rights,  
21 the denial of equal justice is still within the prohibition of the constitution.” *Yick Wo*, 118 U.S. at  
22 373-74.

23 **19.** “Courts must accept as true all material allegations of the complaint, and must construe the  
24 complaint in favor of the complaining party”) and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 502,  
25 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (courts cannot require plaintiffs to plead more than is  
26 necessary to succeed on the merits in order to survive a motion to dismiss).

27 **20.** (b) Attorney’s fees  
28



1 In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and  
2 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom  
3 Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized  
4 Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.  
5 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing  
6 party, other than the United States, a reasonable attorney’s fee as part of the costs, except that in  
7 any action brought against a judicial officer for an act or omission taken in such officer’s judicial  
8 capacity such officer shall not be held liable for any costs, including attorney’s fees, unless such  
9 action was clearly in excess of such officer’s jurisdiction.

10 **21. (c) Expert fees**

11 In awarding an attorney’s fee under subsection (b) of this section in any action or proceeding to  
12 enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include  
13 expert fees as part of the attorney’s fee.

14 **EQUAL PROTECTION OF A MUNICIPAL CORPORATION**

15 **22. 811.** The action provided for in this chapter may be maintained by the board of supervisors of  
16 any county or city and county or the legislative body of any municipal corporation, respectively, in  
17 the name of such county, city and county or municipal corporation against any person who usurps,  
18 intrudes into or unlawfully holds or exercises any franchise, or portion thereof, within the respec-  
19 tive territorial limits of such county, city and county or municipal corporation and which is of a  
20 kind that is within the jurisdiction of such board or body to grant or withhold.

21 **DEMAND FOR IMMEDIATE POSSESSORY JUDGMENT**

22 **23. 1169.** If, at the time appointed, any defendant served with a summons does not appear and de-  
23 fend, the clerk, upon written application of the plaintiff and proof of the service of summons and  
24 complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, im-  
25 mediately shall enter judgment for restitution of the premises and shall issue a writ of execution  
26 thereon. The application for default judgment and the default judgment shall include a place to in-  
27 dicate that the judgment includes tenants, subtenants, if any, named claimants, if any, and any other  
28 occupants of the premises. Thereafter, the plaintiff may apply to the court for any other relief de-



1 mandated in the complaint, including the costs, against the defendant, or defendants, or against one  
2 or more of the defendants.

3 **24. 1107.** When an application is filed for the issuance of any prerogative writ, the application  
4 shall be accompanied by proof of service of a copy thereof upon the respondent and the real party  
5 interest named in such application. The provisions of Chapter 5 (commencing with Section 1010)  
6 of Title 14 of Part 2 shall apply to the service of the application. However, when a writ of mandate  
7 is sought pursuant to the provisions of Section 1088.5, the action may be filed and served in the  
8 same manner as an ordinary action under Part 2 (commencing with Section 307). Where the real  
9 party in respondent's interest is a board or commission, the service shall be made upon the presid-  
10 ing officer, or upon the secretary, or upon a majority of the members, of the board or commission.  
11 Within five days after service and filing of the application, the real party in interest or the respon-  
12 dent or both may serve upon the applicant and file with the court points and authorities in opposi-  
13 tion to the granting of the writ.

14 **25.** The court in which the application is filed, in its discretion and for good cause, may grant the  
15 application *ex parte*, without notice or service of the application as herein provided.

16 **26.** The provisions of this section shall not be applicable to applications for the writ of habeas cor-  
17 pus, or to applications for writs of review of the Industrial Accident or Public Utilities Commis-  
18 sions.

19 **27. 1108.** Writs of review, mandate, and prohibition issued by the Supreme Court, a court of ap-  
20 peal, or a superior court, may, in the discretion of the court issuing the writ, be made returnable,  
21 and a hearing thereon be had at any time.

22 **28.** The assassination of character of the brave mining men who mined these mountains after serv-  
23 ing as soldiers of the United States, and the dishonor of patent title granted from the President lies  
24 as a stigmatic and defamatory injury upon the petitioners and their heirs and assigns forever.

25 **SALUS POPULI; QUIS SEPARABIT?**

26 **29.** "since Gold and Silver. ...has its value only from the consent of Men, whereof Labor yet  
27 makes, great part, the measure, it is plain, that Men have agreed to disproportionate and unequal  
28 Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man

1 may fairly possess more land than he himself can use the product of, by receiving in exchange for  
2 the over plus, Gold and Silver, which may be hoarded up without injury to any one, the metals not  
3 spoiling or decaying in the hands of the possessor.”

4 **30.** In the Two Treatise, Locke defines a servant as “Free-man” who:

5 “makes himself a Servant to another, by selling him for a certain time, the Service he undertakes to  
6 do, in exchange for the Wages he is to receive: And though this commonly puts him into the Fam-  
7 ily of his Master, and under the ordinary Discipline thereof; yet it gives the Master but a Temporary  
8 Power over him, and no greater, than what is contained in the Contract between ‘em.”

9 **31.** Another crucial element of the thesis is the relationship that Locke posits between property and  
10 consent. For Tully, the self-proprietorship that allegedly results from Locke’s broad conception of prop-  
11 erty forms the basis of a radical democratic form of sovereignty. As such, “the natural right or  
12 property of exercising one’s consent over any things which are one’s own will necessarily be the  
13 one common element in all civil rights.” Property, in the form of lives, liberties and estates, there-  
14 fore refers to the civil rights of individuals, thereby granting them a “natural right to exercise sov-  
15 ereignty over what is legally one’s own,” including their person. As a result of this, Tully argues  
16 that Locke “places the right to resist illegal acts of the Crown in the hands of each citizen.”

17 **AN ACT adopting the Common Law of England. Passed April 13, 1850.**

18 **32.** The people of the State of California, represented in Senate and Assembly, do enact as follows:  
19 The Common Law of England, so far as it is not repugnant to or inconsistent with the Constitution  
20 of the United States, or the Constitution or laws of the State of California, shall be the rule of deci-  
21 sion in all the Courts of this State.

22 **33.** Admission to the Union

23 Sec 3. And be it further enacted, hat the said State of California is admitted into the Union upon the  
24 express condition that the people of said State, through their legislature or otherwise, shall never  
25 interfere with the primary disposal of the public lands within its limits, and shall pass no law and  
26 do no act whereby the title of the United States to , and right to dispose of , the same shall be im-  
27 paired or questioned; and that they shall never lay any tax or assessment of any description whatso-  
28 ever upon the public domain of the United States...

1 **Of the Office of the President of Iron Mountain Mines, Inc.**

2 **34.** Mr. T.W. Arman, our champion, and Freeholder, the lawful Heir and Assign to his Corporate  
3 Chair: whose Place and Person is his proper own, by a most honorable and creative descent. It is  
4 his Commission, by whose powerful authority we are now and at all times commanded to do him  
5 service: To show the worthiness of our Place and Office. You must therefore understand:

6 **BREVE SOKE: JURISDICTION OF IRON MOUNTAIN MINES, INC.**

7 **35.** The President of the United States at his inauguration is sworn to do Justice unto all his citi-  
8 zens, which in his own Person it is impossible to perform. And therefore his Honor is constrained  
9 by his Ministers, Deputies, Justices, and Judges, to administer Justice unto all his people. Men  
10 therefore (in such place employed) ought with wondrous care, & conscionable diligence to dis-  
11 charge the trust in them reposed: for unto them, & into their hands, is (as it were) delivered the  
12 President's own Oath; because, what he is sworn unto, must be by them in his behalf performed.  
13 The Place of a Judge then, the greater that it is, so much the more should their care be, to discharge  
14 the same, upon whom so weighty an Office and Honorable Authority is bestowed.

15 **36.** From whom our Commission comes, and to whom it is directed, has been briefly specified: I  
16 will now proceed, and show out of this word Quid, what is in the Commission contained. Briefly  
17 therefore, it is that bounded limit, in which solely does consist the strength of our authority; beyond  
18 which compass we are commanded not to pass: For it is appointed unto I, the private Warden of the  
19 Forest, what it is that we must execute, as well in causes betwixt party and party, as also the Corpo-  
20 ration and parties depending. So as you are not only to hear, judge, and determine, such Causes of  
21 Controversy, as shall by Writ of Quo Warranto be tried, but also to examine, acquit, or condemn all  
22 such Officers, as shall for any offence against the Nation I bring before you, to receive their Trials.  
23 So that by virtue of your Commission you have authority, as in the person of the President, to judge  
24 in causes, that do concern ourselves and our heirs and assigns forever.

25 **37.** That your Commission then is very Large, Ample, and Absolute, containing in it self a power-  
26 ful Authority, may by your selves be judged. And to the end, that Justice may by you receive the  
27 more full sound and perfect Execution, Your Commission, when it hath largely described unto you  
28 what you may do herein, it then most sweetly doth Appoint, Limit, and Command. What manner of

1 doing you must use in those things appointed to be done, so that it does not only give unto you au-  
2 thority, what to execute, but does also lay down unto you the manner how your Authority must be  
3 executed, and to the understanding there of, my next word Quomodo does direct itself.

4 **38.** You then are appointed to administer justice; but Quomodo, how, not according to your own  
5 Will, Conceit, or Opinion, but Secundum Legem & Consuetudinem Moduli. According to the Law,  
6 Custom, and Manner of England: Which Law, Custom, and Manner must be executed with Knowl-  
7 edge, judgment, understanding, and Equity. For you must know your selves, and Place wherein you  
8 are: You must Know and understand each cause before you brought, and according to your Knowl-  
9 edge and understanding, you must uprightly Judge, according to Equity, without (in the least sort)  
10 being drawn, by respecting either Person or Profit, to bear a Partial Hand in the Execution of  
11 Judgment.

12 **39.** Of all the Moral virtues, Justice is enthroned: for unto her only is a Throne ascribed, because  
13 her Execution doth nearest represent Heavens eternal Deity. Justice and Mercy are inseparable Vir-  
14 tues; Mercy and Judgment, as it was Righteous King Davids, and lately our good President: in  
15 whose breast Mercy and Judgment are most gloriously united, and you may execute Justice as you  
16 ought, I will now out of my last word, de Quibus, declare unto you, of whom, and of what Causes  
17 we are to enquire, that Justice and Judgment may thereby receive a more clear and powerful Execu-  
18 tion. Those then of whom wee are in the first place to enquire, are such, by whom our President is  
19 most disobeyed, his State disturbed, and Nation threatened: As touching the penal Statutes for the  
20 punishing of any irreverent demeanor only point out unto you some several officers, whose actions  
21 not being sufficiently looked into, many abuses are committed, which do pass unpunished.

22 : And that the wisdom of a state, in the framing of a Statute Law, could not be deluded by a vain  
23 and shallow brained idleness of their ridiculous Foolery. Let them be therefore punished whose  
24 misdemeanor in this case offended. The better to prevent the Riotous expense of unthrifty idleness,  
25 you shall do well to have a special care unto the Statutes, by the neglect whereof too much abuse is  
26 nourished. Motion for adjudication of vindictive actions

27 **40.** In this, as in all the rest of the abuses specified, use your best endeavors for the furtherance of a  
28 settled Reformation, according to the Laws established: For you must know, that Vita &, vigor Ju-

1 ris, in execucione consistit, The life and strength of the Laws, consists in the execution of them: For  
2 in vain are just laws Enacted, if not justly executed. And now my loving Country men, because I  
3 would that all which I have spoken, may receive a profitable remembrance. I will thus conclude,  
4 Similes and Comparisons doe best confirm our understanding: and do fastest cleave unto the mem-  
5 ory; my conclusion therefore, shall consist upon this one Similitude.

6 **41.** There was a certain man, who having a great account to make unto mighty King, made trial of  
7 his best Friends, that might accompany him, in that dangerous journey, and not forsake him until  
8 his account were made. This man upon his Inquisition found one friend that would go with him a  
9 great part of the way, but then forsake him. And that was his (Riches.) Some other Friends he  
10 found that would go with him until he came in sight of the Kings palace, but then they would also  
11 leave him and bear him company no further, all these Friends were his wife and children, that  
12 would follow him to his grave. But at last, he found one Friend that would go with him into the  
13 presence of the King, and not forsake him, until he had seen his account made and for ever bear the  
14 greatest part with him, either in woe, or happiness, and this Friend was his Conscience; Dear Coun-  
15 trymen betwixt God and your Consciences therefore, make your peace, for he is the King, unto  
16 whom all of us must make a strict account of all our actions done. This then considered, such  
17 would be our care, as God should be obeyed, and our peace in this life, and in the world to come  
18 preserved. Unto which eternal grace be we all committed.

19 **42. Breve Capitalis Justiciarius noster and ad placita coram nobis tenenda**

20 **PETITIONS TO RESTORE DIGNITY AND HONOR TO T.W. ARMAN**

21 **PETITION FOR WRIT OF EJECTMENT!**

22 **Creation by Letters Patents is the surer, for he may be sufficiently created by Letters Patents**  
23 **800-811, 1085, and 1169 California Code of Civil Procedure *sui juris* by verified affidavit**

24 **“One co-tenant may recover the whole estate in ejectment against strangers”**

25 **King Solomon Co. v. Mary Verna Co. 22 Cal. App. 528, 127 P 129,130**

26  
27 Aug 3, 2009

Signature: \_\_\_\_\_

28 s/ John F. Hutchens

1                   **TRESPASS DECLARATION FOR INJUNCTIVE & MANDAMUS RELIEF**

2   **43. Western miners' codes**

3   Miners and prospectors on the California Gold Rush of 1849 found themselves in a legal vacuum.  
4   Although the US federal government had laws governing the leasing of mineral land, the United  
5   States had only recently acquired California by the Treaty of Guadalupe Hidalgo, and had little  
6   presence in the newly acquired territories.

7   **44. Miners organized their own governments** in each new mining camp, and adopted the Mexi-  
8   can **mining laws then existing in California** that gave the **locator right to explore and mine**  
9   **gold and silver on public land.** Miners moved from one camp to the next, and made the rules of  
10   all camps more or less the same, usually differing only in specifics such as in the maximum size of  
11   claims, and the frequency with which a claim had to be worked to avoid being forfeited and subject  
12   to being claimed by someone else. **California miners spread the concept** all over the west with  
13   each new mining rush, and the practices spread to all the states and territories west of the Great  
14   Plains.

15   **45. In 1865, Congress passed a law that instructed courts deciding questions of contested**  
16   **mining rights to ignore federal ownership, and defer to the miners in actual possession of the**  
17   **ground**

18   **46. The 1872 act also granted extralateral rights to lode claims,** and fixed the maximum size of  
19   lode claims as 1500 feet (457m) long and 600 feet (183m) wide.

20   **47. A lode claim, known in California as a quartz claim, is a claim over a hardrock deposit.**

21   **48. The owner of a patented claim can put it to any legal use.** The process of patenting claims  
22   has been perhaps the most controversial part of the mining law.

23   **49. The 1872 law granted extralateral rights to owners of lode claims. This gave the owners of**  
24   **the surface outcrop of a vein the right to follow and mine the vein wherever it led, even if its**  
25   **subsurface extension continued beneath other mining claims. This provision, also known as**  
26   **the law of the apex** led to lengthy litigation and even underground battles, especially in Butte,  
27   Montana and the Comstock Lode.

28   **50. Mineral lands Reserved. Sec. 2318**

- 1 **51. Mineral lands Open to Purchase by Citizens. Sec. 2319**
- 2 **52. Length of Mining Claims Upon Veins or Lodes. Sec. 2320**
- 3 **53. Proof of Citizenship. Sec. 2321**
- 4 **54. Locators' Rights of Possession and Enjoyment. Sec. 2322**
- 5 **55. Owners of Tunnels, Rights of. Sec. 2323**
- 6 **56. Regulations Made by Miners. Sec. 2324**
- 7 **57. Patents for Mineral lands, how obtained. Sec. 2325**
- 8 **58. Adverse Claim, Proceedings on. Sec. 2326**
- 9 **59. Description of Mining Vein or Lode Claims-Monuments. Sec. 2327**
- 10 **60. Pending Applications; Existing Rights. Sec. 2328**
- 11 **61. Conformity of Placer Claims to Surveys, Limit of. Sec. 2329**
- 12 **62. Subdivisions of Ten-Acre Tracts; Maximum of Placer Locations. Sec. 2330**
- 13 **63. Conformity of Placer Claims to Surveys, Limitation of Claims. Sec. 2331**
- 14 **64. What Evidence of Possession, &c. to Establish a Right to a Patent. Sec. 2332**
- 15 **65. Proceedings for Patent for Placer Claim, &c. Sec. 2333**
- 16 **66. Surveyor General to Appoint Surveyors of Mining Claims, &c. Sec. 2334**
- 17 **67. Verification of Affidavits, &c. Sec. 2335**
- 18 **68. All Affidavits required to be made under this chapter may be verified before any officer**
- 19 **authorized to administer oaths within the land district where the claims may be situated, and**
- 20 **all testimony and proofs may be taken before any such officer, and, when duly certified by**
- 21 **the officer taking the same, shall have the same force and effect as if taken before the register**
- 22 **and receiver of the land office....**
- 23 **69. Where Veins Intersect, &c. Sec. 2336**
- 24 **70. Patents for non-mineral Lands, &c. Sec. 2337**
- 25 **71. What Conditions of Sale May Be Made by Local Legislature. Sec. 2338**
- 26 **72. Vested Rights to Use of Water for Mining, &c.; Right of way for Canals. Sec. 2339**
- 27 **73. Patents, Preemptions and Homesteads Subject to Vested and Accrued Water Rights. Sec. 2340**
- 28 **74. Non-mineral lands open to Homesteads. Sec. 2341**



1 **75. Mineral Lands, How Set Apart as Agricultural Lands. Sec. 2342**

2 **76. Additional Land Districts and Officers, Power of the President to Provide. Sec. 2343**

3 **77. Provisions of This Chapter Not to Affect Certain Rights, Sec. 2344**

4 **78. Nothing contained in this chapter shall be construed to impair, in any way, rights or in-**  
5 **terests in mining property acquired under existing laws; nor to affect the provisions of the act**  
6 **entitled “An act granting to A. Sutro the right of way and other privileges to aid in the con-**  
7 **struction of drainage and exploring tunnel to the Comstock lode, in the State of Nevada,” ap-**  
8 **proved July twenty-five, eighteen hundred and sixty-six.**

9 **79. Mineral Lands in Certain States Excepted. Sec. 2345**

10 **80. Grant of Lands to States or Corporations Not to Include Mineral Lands. Sec. 2346**

11 **81. “An act to promote the development of the mining resources of the United States,” 1872**  
12 **Revised Statutes “relating to the development of the mining resources of the United States. 1875.**

13 **82. Sec. 2324. “where a person or company has or may run a tunnel for the purpose of devel-**  
14 **oping a lode of lodes, owned by said person or company, the money so expended in said tun-**  
15 **nel shall be taken and considered as expended on said lode or lodes, whether located prior to**  
16 **or since the passage of said act; and such person or company shall not be required to perform**  
17 **work on the surface of said lode or lodes in order to hold the same as required by said act.**

18 **Approved Feb. 11**

19 **83. Sec. 2324 and 2325.**

20 **“Provided, That where the claimant for a patent is not a resident of within the land district**  
21 **wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for**  
22 **patent and the affidavits required to be made in this section by the claimant for such patent**  
23 **may be made by his, her, or its authorized agent, where said agent is conversant with the**  
24 **facts sought to be established by said affidavits: And Provided, That the period within which**  
25 **the work required to be done annually on all unpatented mineral. Sec. 2 Unpatented Claims,**

26 **1880**

27 **84. Sec. 2326 Perfected Title. 1881**

1 **85. Sec. 2326 “verified by the oath of any duly authorized agent or attorney in fact. Cognizant**  
2 **of the facts stated; oath of adverse claim before the clerk of any court of record of the United**  
3 **States or the State or Territory”. Or before notary public.**

4 **Proof of citizenship before any clerk of record or notary public.**

5 **86. Repeal of Timber Culture Sec. 16, Sec. 17, 1891**

6 **An act to authorize the entry of lands chiefly valuable for building stone under the placer**  
7 **mining laws. Provided, That lands reserved for the benefit of the public schools or donated to**  
8 **any State shall not be subject to entry under the act. 1892**

9 **87. Notice of good faith intent to hold and work said claim. 1893**

10 **88. Civil government and other purposes. Sec. 15 The respective recorders shall, upon the**  
11 **payment of the fees for the same prescribed by the Attorney-General, record separately, in**  
12 **large and well-bound separate books, in fair hand:**

13 **89. First, Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of**  
14 **real estate, releases of mortgages, powers of attorney, leases which have been acknowledged**  
15 **or proved, mortgages upon personal property;**

16 **90. Ninth. Affidavits of annual work done on mining claims; Provided, Miners in any organ-**  
17 **ized mining district may make rules and regulations governing the recording of notices of lo-**  
18 **cation of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not**  
19 **in conflict with this act or the general laws of the United States: and nothing in this act shall**  
20 **be construed so as to prevent the miners in any regularly organized mining district not within**  
21 **any recording district established by the Court from electing their own mining re-**  
22 **corider...Provided further, All records heretofore ...**

23 **91. Tenth. Notices of mining location and declaratory statements;**

24 **92. Eleventh. Such other writings as are required or permitted by law to be recorded, includ-**  
25 **ing the liens of mechanics, labors, and others: Provided. Notices. Provided, Miners in any or-**  
26 **ganized mining district may make rules and regulations governing the recording of no-**  
27 **tices...water rights, and affidavits at labor, not in conflict with this act or the general laws of**  
28 **the United States; and nothing in this act shall be construed so as to prevent the miners in**

1 any regularly organized mining district not within any recording district established by the  
2 court from electing their own mining to act as such until a recorder therefore is appointed by  
3 the court: Provided further, All records heretofore regularly made by the United States  
4 commissioner...are hereby legalized. And all records heretofore made in good faith in any  
5 regularly organized mining district are hereby made public records, and the same shall be  
6 delivered to the recorder for the recording district including such mining district with six  
7 months...

8 93. Sec. 26. Alaska

9 94. 51 Mining Law.

10 Nor do the views here announced overlook the settled principle that a location held by patent  
11 or by prior location is property in the highest sense, and that no rights upon it can be initi-  
12 ated by trespass.

13 95. Iron Mountain was first secured by preemption of agricultural college scrip by Colonel  
14 William McGee in 1861. Located for Gold, Silver, Copper, Zinc, Cadmium, Iron.

15 96. Recorded by the Mountain Copper Co. and Iron Mountain Investments. Ltd. thru 1967

16 97. Recorded by Stauffer Chemical Co. 1967-1976

17 98. Recorded by T.W. Arman and Iron Mountain Mines, Inc. in 1976. Patent Title.

18 99. TRESPASS QUARE CLAUSUM FREGIT; DETINUE SUR BAILMENT; CORAM NOBIS.

19 100. All is retained which has not been surrendered. "In every stage of these oppressions we  
20 have Petitioned for Redress in the most humble terms: Our repeated Petitions have been  
21 answered only by repeated injury. "

22 101. VOID AS UNCONSTITUTIONAL AN UNNECESSARY AND IMPROPER LAW

23 102. REMISSION to Iron Mountain Mines, Inc. WARDEN OF THE FOREST & STANNARY

24 Strike the liens. Commutate Iron Mountain Mines Remediation Trusts I and II to IMMI.

25 Original Absolute Appointment, Special Deputy Warden of the Forests and Stannaries

26 on behalf of Iron Mountain Mines, Inc. and T.W. Arman.

27 July 12, 2009

Signature:

28 s/ John F. Hutchens,

1 **DECLARATION BY VERIFIED AFFIDAVIT; PRIOR RIGHTS; PATENT TITLE.**

2 **CHIEF OF BUILDING STONE. RIGHT OF WAY AND OTHER PRIVILEGES;**

3 **LOCATORS RIGHTS OF POSSESSION AND ENJOYMENT;**

4 **LAND DISTRICTS AND OFFICERS, POWER OF THE PRESIDENT TO PROVIDE;**

- 5 1. T.W. (Ted) Arman, P.O. Box 992867, Redding, CA 96099 (FOR IMMI); 530-275-4550
- 6 2. Sara J. Russell, Deputy Attorney General, California; Phone: 916-324-6058
- 7 3. Edmund G. Brown, Attorney General of the State of California, 455 Golden Gate Ave., Suite
- 8 11000, San Francisco, CA 94102-7004, Phone: (415) 703-5506
- 9 4. Margarita Padilla, Deputy Attorney General, 1515 Clay St. P.O. Box 70550 Oak, Ca. 94612
- 10 5. Eric H. Holder Jr, Attorney General of the United States U.S. Dept. of Justice, 950 Pennsylvania
- 11 Ave. NW Washington DC 20530
- 12 6. Joshua A. Doan; Trial Attorney, ENRD, USDOJ P.O. Box 663 D.C. 20004-0663
- 13 7. Nancy Marvel; Office of the Regional Counsel; 75 Hawthorne St. San Francisco, Ca. 94105
- 14 8. John F. Hutchens, P.O. Box 182, Canyon Ca. 94516 ph. 925-878-9167,

15 **CERTIFICATE**

16 **In The United States Court of Federal Claims**

17 Incidental & Peremptory Administrative Mandamus filed under the Great Seal of the United States.

18 July 12<sup>th</sup>, 2009 Signature: \_\_\_\_\_

19 This last act is the signature of the commission.

20 July 12<sup>th</sup>, 2009 Signature: \_\_\_\_\_

21 /s/ **John F. Hutchens, Original Absolute Appointment to the Commissions of FEMA & EPA**

22 **Verification affidavit:**

23 I hereby state that the same is true of my own knowledge, except as to matters which are herein  
24 stated on my own information or belief, and as to those matters, I believe them to be true.

25 July 12<sup>th</sup>, 2009 Signature: \_\_\_\_\_

26 s/ John F. Hutchens

27 **SPECIAL DEPUTY GOVERNMENT PRIVATE ATTORNEY GENERAL § 1988**

28 **LEVYING OFFICER IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

1 **103.** “We are not able to concur in that interpretation of the power conferred... They seem intended  
2 to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circum-  
3 stances of each case, but a naked and arbitrary power to give or withhold consent not only as to  
4 places, but as to persons. So that, if an applicant for such consent, being in every way a competent  
5 and qualified person and having complied with every reasonable condition demanded by any public  
6 interest, should, failing to obtain the requisite consent... to the prosecution of his business, apply for  
7 redress by the judicial process of mandamus to require... to consider and act upon his case, it would  
8 be a sufficient answer for them to say that the law had conferred upon them authority to withhold  
9 their assent without reason and without responsibility. The power given to them is not confided to  
10 their discretion in the legal sense of that term, but is granted to their mere will.

11 It is purely arbitrary, and acknowledges neither guidance nor restraint.” Yick Wo

12 (1) This is a Civil Action against violation of the Constitution.

13 (2) This is a Civil Action against an unfair and unjust law, a bill of pains and penalties and a bill of  
14 attainder for crime of infamy in violation of the establishment clause and an ex post facto law void  
15 for vagueness, and founded on *illegitimate animus* in Congress, and a violation of the establishment  
16 clause for the establishment of dogmatic ideology by State and Federal laws.

17 (3) This is a Civil Action founded against civil rights and property rights violations by a regulation  
18 of an executive department; and contract, express or implied, with the government;

19 (4) This is a Civil Action with actions for damages, liquidated or unliquidated, pertaining to those  
20 matters of this case that are sounding in tort.

21 **104.** “Bills of attainder, ex-post facto laws, and laws impairing the obligation of contracts are con-  
22 trary to the first principles of the social compact, and to every principle of sound legislation....

23 [T]he sober people of America are weary of the fluctuating policy which has directed the public  
24 councils. They have seen with regret and indignation that sudden changes and legislative interfer-  
25 ences, in cases affecting personal rights, become jobs in the hands of enterprising and influential  
26 speculators, and snares to the more industrious and less informed parts of the community. They  
27 have seen, too, that one legislative interference is but the first link of a long chain of repetitions,  
28 every subsequent interference being naturally produced by the effects of the preceding. They very

1 rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on  
2 public measure, inspire a general prudence and industry, and give a regular course to the business  
3 of society.” James Madison, Federalist No. 44.

4 **105.** “The establishment of the writ of habeas corpus, the prohibition of ex-post-facto laws, and of  
5 titles of nobility, to which we have no corresponding provision in our [State] Constitution, are per-  
6 haps greater security to liberty and republicanism than any it contains. The creation of crimes after  
7 the commission of the fact, or ... the subjecting of men to punishment for things which, when they  
8 were done, were breaches of no law ... have been, in all ages, the favorite and most formidable in-  
9 struments of tyranny.” James Madison, Federalist No. 84.

10 **106.** “Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and  
11 administered by public authority with an evil eye and an unequal hand, so as practically to make  
12 unjust and illegal discriminations between persons in similar circumstances, material to their rights,  
13 the denial of equal justice is still within the prohibition of the Constitution.” Yick Wo.

14 **107.** It might be thought that criminal laws can be distinguished from civil laws because violations  
15 of criminal laws, unlike civil laws, can be punished with physical incarceration. This reasoning  
16 fails, however, because incarceration as punishment for violation of civil law was prevalent in co-  
17 lonial times when the Constitution was drafted. For example, there were debtor prisons that re-  
18 quired incarceration for nonpayment of debt. In fact, the existence of debtor prisons at the time of  
19 the Constitution shows that there was no hard and fast distinction between civil and criminal laws  
20 and is one more argument for applying the prohibition against ex post facto laws to civil laws.

21 Justice Sandra Day O'Connor identified the unfairness of retroactive legislation (*General Motors*:  
22 320):

23 **108.** Retroactive legislation presents problems of unfairness that are more serious than those posed  
24 by prospective legislation, because it can deprive citizens of legitimate expectations and upset set-  
25 tled transactions. For this reason, "the retroactive aspects of economic legislation must meet the test  
26 of due process"--a legitimate legislative purpose furthered by rational means.

27 **109.** Unfortunately, the due process standard of "a legitimate legislative purpose furthered by ra-  
28 tional means" is so easily satisfied that it renders any due process constraints against retroactive

1 laws of very dubious use. Virtually any law passed by a majority can be said to satisfy a legitimate  
2 legislative purpose. Similarly, a test for "rational means" is vague. An activist court can second-  
3 guess the legislature and make the rational means standard difficult to satisfy, while a court of judi-  
4 cial restraint can decide that any piece of legislation satisfies the rational means standard.

5 **110.** The whole purpose behind the prohibition on ex post facto laws, as the Federalist Papers note,  
6 is to give a regular course to the business of society and banish speculations on public measures.

7 Allowing interest groups to lobby a legislature to pass ex post facto laws, and abiding by the results  
8 so long as they pass the basically standard-less criteria of "a legitimate legislative purpose furthered  
9 by rational means," does not provide the regular course to business that the Founders intended  
10 when they included the constitutional prohibition on ex post facto laws.

11 **111.** It is interesting to contrast the due process standard with respect to vagueness with the due  
12 process standard regarding retrospective legislation. Regarding vagueness, the Court has held in  
13 cases such as *Grayned v. City of Rockford* (1972) that government regulation must be sufficiently  
14 clear so that ordinary people can understand what conduct is being prohibited. In *Village of Hoff-*  
15 *man Estates v. The Flip Side, Hoffman Estates, Inc.* (1982: 498), the Court held that although "eco-  
16 nomic regulation is subject to a less strict vagueness test" than criminal laws, vagueness analysis  
17 still applies. The Court gave two reasons for such a lesser standard. First, "because its subject mat-  
18 ter is often more narrow, and because businesses can be expected to consult relevant legislation in  
19 advance of action" (ibid.). Second, because "the regulated enterprise may have the ability to clarify  
20 the meaning of the regulation by its own inquiry, or by resort to an administrative process" (ibid.:  
21 455).

22 **112.** It should be clear that neither of these considerations supports the application of retroactive  
23 laws to economic legislation. First, business will not be able to consult relevant legislation in ad-  
24 vance since the legislation is retroactive. Second, business will not be able to clarify the meaning of  
25 the regulation by resorting to administrative processes, because the retroactive legislation does not  
26 even exist at the time.

27 **113.** The contrast between what due process requires of retroactive and prospective legislation is  
28 stark. Due process requires that retrospective legislation meet the vague criteria of a "legitimate



1 legislative purpose furthered by rational means." With respect to prospective legislation, on the  
2 other hand, due process requires that an ordinary citizen be able to know what is proscribed by a  
3 law. Barring clairvoyant abilities, the ordinary citizen will not know what behavior, including eco-  
4 nomic behavior, is proscribed by retroactive legislation. That is, retroactive legislation will cer-  
5 tainly not be able to satisfy the due process standard required for prospective legislation. This  
6 seems an altogether unsatisfactory state of affairs. It makes no sense for due process to require that  
7 legislation be sufficiently clear so that an ordinary person must know what is proscribed in ad-  
8 vance, and yet for due process to allow that same individual to become befuddled by retroactive  
9 laws that were impossible to know at the time of his or her actions.

10 **114.** Scientists have conclusively determined that Acid Mine Drainage is entirely due to biological  
11 actions of micro-organisms. This process has existed for millions and perhaps billions of years.

12 **115.** T.W. Arman purchased Iron Mountain Mines in December, 1976.

13 **116.** Congress amended the Clean Water Act to regulate Copper, Cadmium, and Zinc in Dec.  
14 1977.

15 **117.** CERCLA was passed by Congress in 1980, and amended and reauthorized by SARA in 1986.

16 **118.** T.W. Arman and Iron Mountain Mines, Inc. were sued for Acid Mine Drainage in 1991.

17 All is retained which has not been surrendered. "In every stage of these oppressions we have  
18 Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only  
19 by repeated injury. "

20 **119.** The crucial issue here is whether the plaintiffs have constitutional rights of their own, which  
21 exist by virtue of their exclusive beneficial ownership, control, and possession of the properties and  
22 businesses allegedly seized.

23 **120.** Properly understood, the question is whether the plaintiffs' and the wholly owned [California]  
24 corporation have a judicially cognizable interest in the affected property sufficient to enable them  
25 to sue for an unconstitutional deprivation of the use and enjoyment of that private property. Be-  
26 cause the plaintiffs have a protected property interest for the purposes of the claims asserted here  
27 they have standing to sue

1 **121.** The court must concede on standing that the plaintiffs as individuals "have a cognizable prop-  
2 erty interest in the land, which interest, since they are American citizens, is protected by the Consti-  
3 tution." (Ramirez, Dissenting Opinion of Scalia, J., at 1556).

4 **122.** If the 100% owner, T.W. Arman, has an interest protected by the United States Constitutions,  
5 that is enough to compel the United States Courts to go forward.

6 **123.** In the interest of expediency and avoid undue further delays, Plaintiffs submit a supplemental  
7 signature page for the second amended complaint attached hereto signed on behalf of IMMI by  
8 Plaintiff Hutchens in his official capacity of Counsel of Record for IMMI, and respectfully ask the  
9 Court to admit Plaintiff Hutchens and grant its approval in the interests of Justice.

10 **124.** Furthermore, Plaintiff Hutchens has subscribed to the oath required by the Court, and suc-  
11 cessfully passed the test for use of the Electronic Case Filing System (ECF).

12 **CERCLA Sec. 9659. CITIZEN SUITS**

13 **125.** any person may commence a civil action on his own behalf--  
14 against the President or any other officer of the United States (including the Administrator of the  
15 Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a  
16 failure of the President or of such other officer to perform any act or duty under this chapter, in-  
17 cluding an act or duty under section 9620 of this title (relating to Federal facilities), which is not  
18 discretionary with the President or such other officer.

19 **NOTICE OF ENDANGERMENT!**

20 **126.** Iron Mountain Mines, Inc. Brick Flat pit mine. (Mountain Copper, Richmond, Hornet,, etc.)  
21 is collapsing under the EPA Superfund 500,000 ton sludge disposal cell. An imminent and substan-  
22 tial endangerment exists. The center of the mountain is disintegrating along the Camden faults, and  
23 the entire mine, approximately 327 acres, is collapsing; the disposal cell has failed.

24 The siting of a toxic disposal cell upon known Holocene faults in an active geologic zone violates  
25 the California Toxic Pits Control Act, other provisions of California Health and Safety, & Water  
26 Codes, the siting provisions of RCRA, requirements of the NCP, C.F.R. 440 as required by the Re-  
27 cord of Decision. Petitioners also allege that the selected response does not comply with the reme-  
28

1 dial investigation/ feasibility requirements of the NCP 300.430 concerning considerations of alter-  
2 natives:

3 **INTERVENTION BY RIGHT**

4 **127.**If a party enters upon a mining claim bona fide, under color of title, as under a deed or lease,  
5 the possession of part as against any one but the true owner or prior occupant is the possession of  
6 the entire claim described by the paper; and this, though the paper did not convey title. A third per-  
7 son could not invade the possession of the party taking it under such circumstances, and set up, as  
8 against him, outstanding title in a stranger with which he had no connection. (Attwood v Fricott, 17  
9 Cal. 37.) Cited 38 Cal 487; 73 Cal. 543; 89 Cal. 315.

10 128. As to the extent of a miner’s possession where he enters under a written claim or color of title,  
11 his possession, except as against the true owner or prior occupant, is good to the extent of the  
12 whole limits described in the paper, though the possession be only of a part of the claim.  
13 ( English v. Johnson, 17 Cal. 107.)

14 129. The Office of Warden of the Forest Prosecutes Trespassers at Iron Mountain Mines, Inc. Peti-  
15 tioner is the Warden of the Forest for Iron Mountain Mines, Inc.

16 130. Artesian Mineral Development & Consolidated Sludge, Inc. (AMD&CSI.) recycles wastes at  
17 Iron Mountain.Mines, Inc. and Petitioner is President, Chairman, and CEO of AMD&CSI, reclama-  
18 tion and restoration, agency and factor.

19 131. The Office of the Warden of the Forest for Iron Mountain Mines, Inc. Charges the U.S Envi-  
20 ronmental Protection Agency with Trespass.

21 132. Iron Mountain Mines, Inc. demands just compensation for the taking of private property for  
22 the public benefit.

23 **ADDITIONAL GROUNDS FOR INTERVENTION, CERCLA 113**

24 133. i) Intervention  
25 In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C.  
26 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when  
27 such person claims an interest relating to the subject of the action and is so situated that the disposi-  
28 tion of the action may, as a practical matter, impair or impede the person’s ability to protect that

1 interest, unless the President or the State shows that the person’s interest is adequately represented  
2 by existing parties.

3 **MORE GROUNDS FOR INTERVENTION, RCRA 7002(a)(1)(A)(B), (a)(2) 7003(a)**

4 134. (a) In general

5 Except as provided in subsection (b) or (c) of this section, any person may commence a civil action  
6 on his own behalf—

7 (1) (A) against any person (including (a) the United States, and (b) any other governmental instru-  
8 mentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is  
9 alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or  
10 order which has become effective pursuant to this chapter; or

11 (B) against any person, including the United States and any other governmental instrumentality or  
12 agency, to the extent permitted by the eleventh amendment to the Constitution, and including any  
13 past or present generator, past or present transporter, or past or present owner or operator of a  
14 treatment, storage, or disposal facility, who has contributed or who is contributing to the past or  
15 present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste  
16 which may present an imminent and substantial endangerment to health or the environment; or

17 (2) against the Administrator where there is alleged a failure of the Administrator to perform any  
18 act or duty under this chapter which is not discretionary with the Administrator.

19 Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the  
20 district in which the alleged violation occurred or the alleged endangerment may occur. Any action  
21 brought under paragraph (a)(2) of this subsection may be brought in the district court for the district  
22 in which the alleged violation occurred or in the District Court of the District of Columbia. The dis-  
23 trict court shall have jurisdiction, without regard to the amount in controversy or the citizenship of  
24 the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order,  
25 referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to  
26 the past or present handling, storage, treatment, transportation, or disposal of any solid or hazard-  
27 ous waste referred to in paragraph (1)(B), to order such person to take such other action as may be  
28 necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph

1 (2), as the case may be, and to apply any appropriate civil penalties under section 6928 (a) and (g)  
2 of this title.

3 **VERIFICATION AND DECLARATION OF NOTICE**

4 135. Although no notice is required for imminent and substantial endangerment, the President and  
5 respondents were provided proper 60 day prior notice, and the violations were also reported to the  
6 State of California Department of Toxic Substance Control 24 hour hotline.

7 136. Under California's civil procedure rules, trial courts have discretion to grant permissive inter-  
8 vention when: 1) the moving party's interest is "direct and immediate;" 2) allowing intervention  
9 will not "enlarge the issues in the litigation;" and 3) the balance of "reasons for the intervention  
10 outweigh any opposition by the parties presently in the action." [4] These standards are comparable  
11 to the analysis that federal courts engage in when determining whether to allow permissive inter-  
12 vention under the Federal Rules of Civil Procedure. [5] In exercising its discretion under the Cali-  
13 fornia rules, a trial court has to determine "whether the original action between the existing parties  
14 should be allowed to proceed undisturbed by an intervenor's claim; and the more indirect the con-  
15 nection of that claim with the issues raised in the original action, the less likelihood there is of the  
16 court permitting intervention."

17 137. The issue is whether the circuit court abused its discretion in ruling that the Petitioners is not  
18 entitled to intervention of right. Rule 24(a)(2) of the Federal Rules of Civil Procedure allows inter-  
19 vention of right when:

20 138. ...the applicant claims an interest relating to the property or transaction which is the subject of  
21 the action and the applicant is so situated that the disposition of the action may as a practical matter  
22 impair or impede the applicant's ability to protect that interest, unless the applicant's interest is ade-  
23 quately represented by existing parties. Fed.R.Civ.P. 24(a)(2). The courts have interpreted Rule  
24 24(a)(2) to entitle an applicant to intervention of right if the applicant can demonstrate: (1) an inter-  
25 est in the subject matter of the action; (2) that the protection of this interest would be impaired be-  
26 cause of the action; and (3) that the applicant's interest is not adequately represented by existing  
27 parties to the litigation. *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir.1976).

1 Applying this standard, Petitioner's motion to intervene of right complied with the rule and it  
2 should have been granted.

3 139. First, Petitioner has an interest in the subject matter of EPA's action, the minerals, water,  
4 property, facilities. etc. Petitioner has an interest in the subject matter of EPA's determination of  
5 what constitutes perfection and preservation, and rightful authority to provide that protection. At  
6 the time the circuit court ruled on the motion to intervene, the Petitioner ' class action suit had not  
7 yet been ruled upon. While Rule 24(a) does not specify the nature of the interest required for a  
8 party to intervene as a matter of right, the Supreme Court has recognized that "[w]hat is obviously  
9 meant ... is a significantly protectable interest." *Donaldson v. United States*, 400 U.S. 517, 531, 91  
10 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971). Whether an interest contingent upon the outcome of other  
11 pending litigation constitutes a "significantly protectable interest" has been the source of much dis-  
12 agreement. Some courts have concluded that an intervenor must demonstrate more than "a mere  
13 provable claim" in order to be entitled to intervention of right, see *Independent Petrochemical*  
14 *Corp. v. Aetna Casualty & Sur. Co.*, 105 F.R.D. 106, 110 (D.D.C.1985), (a ridiculous and illogical  
15 and unjust rule if ever there was one), while others have allowed intervention in a dispute between  
16 an insurer and its insured even when the intervenor's interest is contingent on the outcome of other  
17 litigation. See *New Hampshire Ins. Co. v. Greaves*, 110 F.R.D. 549 (D.R.I.1986); *Hartford Acci-*  
18 *dent & Indem. Co. v. Crider*, 58 F.R.D. 15 (N.D.Ill.1973). The Courts reasoning in this latter au-  
19 thority is persuasive. It cannot now be held that the Petitioner (and the class action) lacks a suffi-  
20 cient interest to oppose such declaratory judgment. Accordingly, Petitioner interest in the subject  
21 matter of this litigation is a "significantly protectable interest."

22 140. Petitioner has met the third requirement for Rule 24(a)(2) intervention by demonstrating that  
23 the present litigants fail adequately to represent their interests. While some Courts may hold that a  
24 presumption of adequate representation arises in some cases, Petitioner has presented facts con-  
25 cerning a lack of adequate representation and informed counsel causing unspeakable and manifest  
26 errors of impunity and miscarriage of justice and fraud upon the court. The circuit court has failed  
27 to heed the Supreme Court's determination that the burden on the applicant of demonstrating a lack  
28 of adequate representation "should be treated as minimal." *Trbovich v. United Mine Workers*, 404

1 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972). It is undisputed that the peti-  
2 tioner and defendants in this case have limited financial resources. At the time of the petitioner s'  
3 motion to intervene, defendants property was being held in EPA federal preservation and perfec-  
4 tion, with no significant source of income, and Petitioner did not retain counsel to prosecute this  
5 action. Defendant's property was and is still in EPA federal preservation and perfection, and De-  
6 fendant said publicly that he was "without any income." Defendant T.W. Arman, while represented  
7 by counsel in this case, describes himself in the class action as "of quite modest means". Given the  
8 financial constraints on the Defendant's ability to pay to prosecute this action, there is a significant  
9 chance that they might be less vigorous than the Petitioner in prosecuting their claim or for the Pe-  
10 titioner to be joined under the existing case. Petitioner therefore submits that the circuit court erred  
11 in ruling that the interests of the Petitioner are adequately represented by the present litigants in this  
12 action.

### 13 CONCLUSION

14 141. For the foregoing reasons, the court should consider the petitions and hold that the Petitioner  
15 is entitled to intervention of right pursuant to Rule 24(a)(2).

16 ...while it may be preferred that the people act through their legislative representatives, they have  
17 the power to determine as conditions demand, what services and functions the public welfare re-  
18 quires. So it is provided by 811, 1085, and 1160 Code of Civil Procedure, with verification by affi-  
19 davit, § 3729. False claims:

20 *Preemptory Mandamus;*

21 **142.** You should consider that due notice was given, so you are commanded by 1086, 1088, 1094,  
22 and 1107 of the Code of Civil Procedure to issue the Writs. You are required to grant the quo War-  
23 ranto with Incidental and Preemptory Mandamus because there is no other plain, speedy, and ade-  
24 quate remedy to compel the admission of the Petitioner to the use and enjoyment of the right and  
25 office to which the Petitioner is entitled, and from which the Petitioner is unlawfully precluded by  
26 such inferior agency, tribunal, corporation, board, or person, so proceed to hear or fix a day for  
27 hearing the argument of the case.



1 **143.** You are further commanded by 1094.5 of the Code of Civil Procedure to inquire of the pro-  
2 cedure with a finding of an abuse of discretion in this matter, and where the party seeking the writ  
3 has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously  
4 as possible.

5 **144.** (b) The inquiry in such a case shall extend to the questions whether the respondent has pro-  
6 ceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was  
7 any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not pro-  
8 ceeded in the manner required by law, the order or decision is not supported by the findings, or the  
9 findings are not supported by the evidence.

10 **145.** (c) Where it is claimed that the findings are not supported by the evidence, in cases in which  
11 the court is authorized by law to exercise its independent judgment on the evidence, abuse of dis-  
12 cretion is established if the court determines that the findings are not supported by the weight of the  
13 evidence. In all other cases, abuse of discretion is established if the court determines that the find-  
14 ings are not supported by substantial evidence in the light of the whole record. Please also consider  
15 the stigmatic injury as a grant of standing *ex parte*.

16 146. ... "In the mining partnership those occurrences make no dissolution, but the others go on;  
17 and, in case a stranger has bought the interest of a member, the stranger takes the place of him who  
18 sold his interest, and cannot be excluded. If, death, insolvency, or sale were to close up vast mining  
19 enterprises, in which many persons and large interests participate, it would entail disastrous conse-  
20 quences. From the absence of this *delectus personae* in mining companies flows another result, dis-  
21 tinguishing them from the common partnership, and that is a more limited authority in the individ-  
22 ual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or  
23 accept bills of exchange binding the partnership or its members, unless it is shown that he had au-  
24 thority; nor can a general superintendent or manager. They can only bind the partnership for such  
25 things as are necessary in the transaction of the particular business, and are usual in such business.  
26 Charles v. Eshleman, 5 Colo. 107; Shillman v. Lachman, 83 Am Dec. 96, and note; McConnell v.  
27 Denver, 35 Cal. 365; Jones v. Clark, 42 Cal. 181; Manville v. Parks, 7 Colo. 128, 2 Pac. 212;  
28 Congdon v. Olds, 18 Mont. 487, 46 Pac. 261. 29 S.E. 505. In fact, it is a rule that a nontrading

1 partnership, as distinguished from a trading commercial firm, does not confer the same authority by  
2 implication on its members to bind the firm; as. e.g. a partnership to run a theater or other single  
3 enterprise only. Pease v. Cole, 53 Conn. 53, 22 Atl. 681; Deardorf's Adm'r v. Tacher, 78 Mo. 128;  
4 Smith, Merc. Law, 82; T Pars. Partn. § 85; Pooley v. Whitmore, 27 Am. Rep. 733.

5 **147.** A mining partnership is a nontrading partnership, and its members are limited to expenditures  
6 necessary and usual in the particular business. Bates, Partn. , § 329. Members of a mining partner-  
7 ship, holding the major portion of the property, have power to do what may be necessary and  
8 proper for carrying on the business, and control the work, in case all cannot agree, provided the ex-  
9 ercise of such power is necessary and proper for carrying on the enterprise for the benefit of all  
10 concerned. Dougherty v. Creary, 89 Am. Dec. 116. These principles settle much of this case. The  
11 demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction  
12 to settle partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, 1273. \* \* \*

13 Justice Brannon

14 148. In Dalliba v. Riggs, 7 Ida. 779, 82 Pac. 107, it was laid down that while a court of equity can  
15 appoint a receiver to perfect and preserve mining property, it “ has no authority to place its receiver  
16 in charge of such property and operate the same, carrying on a general mining business, and while  
17 it turns out to be at a loss, as is likely to be the result in such cases, charge the same up as a pre-  
18 ferred claim and lien against the property, to the prejudice and loss of the holders of prior recorded  
19 liens on the same property” (82 Pac. At pp. 108-109). In that case the receiver appeared to have  
20 carried on the mining operations without any order of court directing him to do so and with reck-  
21 less extravagance, and in addition was shown not only not to have kept accurate accounts but also  
22 to have made in the account filed “many charges against the estate where no charge whatever  
23 should have been made and none in fact existed.” The court accordingly denied the receiver any  
24 allowance for his own time or services and any allowance for attorney’s fees.

25 Government and settling parties cannot receive better treatment than these.

26 The perfection and preservation and complete development of Iron Mountain Mines, Inc. proper-  
27 ties includes all vested and accrued rights to water and every other entitlement, rights, privileges,  
28

1 immunities, and appurtenances of whatsoever nature thereunto belonging to said grantee and to  
2 their heirs, or successors, and assigns of said grantee forever.

3 To the extent that there are any rules for working the mining claim or premises involving ease-  
4 ments, drainage, and other necessary means to its complete development, those rules may only  
5 come from the Legislature of California. Therefore, by the entitlements, rights, privileges, immuni-  
6 ties of Patent Title and State Sovereignty, Iron Mountain Mines, Inc. and the office of the Warden  
7 of the Forest Charge the U.S Environmental Protection Agency with trespass, usurpation, illegiti-  
8 mate animus, and fraud upon the Court. Iron Mountain Mines, Inc. demands just compensation for  
9 the taking of private property.

### 10 CITIZEN SUITS

#### 11 § 3729. False claims

12 **149.** Petitioner allege that the respondents assertion that EPA actions constitute a “remedial ac-  
13 tion” are entirely false, and further allege that such assertions were perpetrated to defraud the peti-  
14 tioners and property owner and to facilitate a fraud upon the court to conceal the fact that the EPA  
15 actions are entirely in the nature of a “removal action”.

16 **150.** In support of these allegations petitioners submit that there are no aspects of these EPA “re-  
17 medial actions” consistent with a “permanent” solution, that no recycling or resource recovery has  
18 or is taking place, and that no consideration was given to such known and viable permanent solu-  
19 tions and recycling and recovery.

#### 20 § 6972. Citizen suits, section III violations (a)(1)(A)&(a)(1)(B)&(2)

21 **151.** any person may commence a civil action on his own behalf—

22 **(1)**

23 **(A)** against any person (including (a) the United States, and (b) any other governmental instrumen-  
24 tality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is al-  
25 leged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or  
26 order which has become effective pursuant to this chapter; or

27 **(B)** against any person, including the United States and any other governmental instrumentality or  
28 agency, to the extent permitted by the eleventh amendment to the Constitution, and including any

1 past or present generator, past or present transporter, or past or present owner or operator of a  
2 treatment, storage, or disposal facility, who has contributed or who is contributing to the past or  
3 present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste  
4 which may present an imminent and substantial endangerment to health or the environment; or  
5 (2) against the Administrator where there is alleged a failure of the Administrator to perform any  
6 act or duty under this chapter which is not discretionary with the Administrator.

7 In any action under subsection (a)(1)(A) of this section in a court of the United States, any person  
8 may intervene as a matter of right.

9 **152. (d) Intervention**

10 In any action under this section the Administrator, if not a party, may intervene as a matter of right.

11 **153. The administrator is a party in this matter.**

12 **(f) Other rights preserved**

13 **154.** Nothing in this section shall restrict any right which any person (or class of persons) may  
14 have under any statute or common law to seek enforcement of any standard or requirement relating  
15 to the management of solid waste or hazardous waste, or to seek any other relief (including relief  
16 against the Administrator or a State agency).

17 **155.** (under RCRA, 42 U.S.C. Sec. § 6972(c), suit may be brought against the Administrator  
18 immediately after notice is given provided the action alleges violation of the Hazardous Waste  
19 Management provisions, 42 U.S.C. Sec§. 6912 et seq., while under 33 U.S.C. Sec. § 1365(b)(2),  
20 FWPCA citizen suits may be brought against the Administrator immediately after giving notice  
21 when a violation of National Toxic Waste Standards is alleged under 33 U.S.C. Secs. §1316 and §  
22 1317(a))

23 § 6979b. Law enforcement authority

24 **156.** With respect to violations of the criminal provisions of this chapter, and on the basis of a  
25 showing of need, the Attorney General of the United States shall deputize qualified employees of  
26 the Office of the *Warden of the Forest* for the equal protection of the petitioner and these defen-  
27 dants and properties, and to serve as special deputy United States marshals in criminal investiga-  
28 tions with respect to violations of the criminal provisions of this chapter.

1 **(a) Authority of Administrator**

2 **157.** Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or  
3 present handling, storage, treatment, transportation or disposal of any solid waste or hazardous  
4 waste may present an imminent and substantial endangerment to health or the environment, the  
5 Administrator may bring suit on behalf of the United States in the appropriate district court against  
6 any person (including any past or present generator, past or present transporter, or past or present  
7 owner or operator of a treatment, storage, or disposal facility) who has contributed or who is con-  
8 tributing to such handling, storage, treatment, transportation or disposal to restrain such person  
9 from such handling, storage, treatment, transportation, or disposal, to order such person to take  
10 such other action as may be necessary, or both. A transporter shall not be deemed to have contrib-  
11 uted or to be contributing to such handling, storage, treatment, or disposal taking place after such  
12 solid waste or hazardous waste has left the possession or control of such transporter if the transpor-  
13 tation of such waste was under a sole contractual <sup>[1]</sup> arrangement arising from a published tariff  
14 and acceptance for carriage by common carrier by rail and such transporter has exercised due care  
15 in the past or present handling, storage, treatment, transportation and disposal of such waste. The  
16 Administrator shall provide notice to the affected State of any such suit. The Administrator may  
17 also, after notice to the affected State, take other action under this section including, but not limited  
18 to, issuing such orders as may be necessary to protect public health and the environment.

19 **(b) Violations**

20 **158.** Any person who willfully violates, or fails or refuses to comply with, any order of the Admin-  
21 istrator under subsection (a) of this section may, in an action brought in the appropriate United  
22 States district court to enforce such order, be fined not more than \$5,000 for each day in which  
23 such violation occurs or such failure to comply continues.

24 **(c) Immediate notice**

25 **159.** Upon receipt of information that there is hazardous waste at any site which has presented an  
26 imminent and substantial endangerment to human health or the environment, the Administrator  
27 shall provide immediate notice to the appropriate local government agencies. In addition, the Ad-  
28

1 administrator shall require notice of such endangerment to be promptly posted at the site where the  
2 waste is located.

3 **(d) Public participation in settlements**

4 **160.** Whenever the United States or the Administrator proposes to covenant not to sue or to forbear  
5 from suit or to settle any claim arising under this section, notice, and opportunity for a public meet-  
6 ing in the affected area, and a reasonable opportunity to comment on the proposed settlement prior  
7 to its final entry shall be afforded to the public. The decision of the United States or the Adminis-  
8 trator to enter into or not to enter into such Consent Decree, covenant or agreement shall not consti-  
9 tute a final agency action subject to judicial review under this chapter or chapter 7 of title 5.

10 We therefore now reject, as unsound in principle and unworkable in practice, a rule of immunity  
11 from federal regulation that turns on a judicial appraisal of [whether] a [469 U.S. 528, 547] par-  
12 ticular governmental function [is "integral" or "traditional."]. Any such rule leads to inconsistent  
13 results at the same time that it disserves principles of democratic self-governance, and it breeds in-  
14 consistency precisely because it is divorced from those principles. If there are to be limits on the  
15 Federal Government's power to interfere with state functions - as undoubtedly there are - we must  
16 look elsewhere to find them. We accordingly return to the underlying issue that confronted this  
17 Court in National League of Cities - the manner in which the Constitution insulates States from the  
18 reach of Congress' power under the Commerce Clause. GARCIA v. SAN ANTONIO METRO.  
19 TRANSIT AUTH., 469 U.S. 528 (1985)

20 **161.** ...the Constitution offers no guidance about where the frontier between state and federal  
21 power lies. In short, we have no license to employ freestanding conceptions of state sovereignty  
22 when measuring congressional authority under the Commerce Clause. When we look for the  
23 States'" residuary and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961)  
24 (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sov-  
25 ereign power, a different measure of state sovereignty emerges. Apart from the limitation on fed-  
26 eral authority inherent in the delegated nature of Congress' Article I powers, the principal means  
27 chosen by the Framers to ensure the role of the States in the federal system lies in the structure of  
28 the Federal Government itself. It is no novelty to observe that the composition of the Federal [469

1 U.S. 528, 551] Government was designed in large part to protect the States from overreaching by  
2 Congress. 11 The Framers thus gave the States a role in the selection both of the Executive and the  
3 Legislative Branches of the Federal Government. The States were vested with indirect influence  
4 over the House of Representatives and the Presidency by their control of electoral qualifications  
5 and their role in Presidential elections. U.S. Const., Art. I, 2, and Art. II, 1. They were given more  
6 direct influence in the Senate, where each State received equal representation and each Senator was  
7 to be selected by the legislature of his State. Art. I, 3. The significance attached to the States' equal  
8 representation in the Senate is underscored by the prohibition of any constitutional amendment di-  
9 vesting a State of equal representation without the State's consent. Art. V.

10 **162.** The extent to which the structure of the Federal Government itself was relied on to insulate  
11 the interests of the States is evident in the views of the Framers. James Madison explained that the  
12 Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to in-  
13 vade the rights of the individual States, or the prerogatives of their governments." The Federalist  
14 No. 46, p. 332 (B. Wright ed. 1961). Similarly, James Wilson observed that "it was a favorite ob-  
15 ject in the Convention" to provide for the security of the States against federal encroachment and  
16 that the structure of the Federal Government itself served that end. 2 Elliot, at 438-439. Madison  
17 placed particular reliance on the equal representation of the States in the Senate, which he saw as  
18 "at once a constitutional recognition of the portion of sovereignty remaining in the individual [469  
19 U.S. 528, 552] States, and an instrument for preserving that residuary sovereignty." The Federalist  
20 No. 62, p. 408 (B. Wright ed. 1961). He further noted that "the residuary sovereignty of the States  
21 [is] implied and secured by that principle of representation in one branch of the [federal] legisla-  
22 ture" (emphasis added). The Federalist No. 43, p. 315 (B. Wright ed. 1961). See also *McCulloch v.*  
23 *Maryland*, 4 Wheat. 316, 435 (1819). In short, the Framers chose to rely on a federal system in  
24 which special restraints on federal power over the States inhered principally in the workings of the  
25 National Government itself, rather than in discrete limitations on the objects of federal authority.  
26 State sovereign interests, then, are more properly protected by procedural safeguards inherent in the  
27 structure of the federal system than by judicially created limitations on federal power.

1 **163.** “An enlightened zeal for the energy and efficiency of government will be stigmatized as the  
2 offspring of a temper fond of despotic power and hostile to the principles of liberty. An over-  
3 scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the  
4 head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity  
5 at the expense of the public good. It will be forgotten, on the one hand, that jealousy is the usual  
6 concomitant of love, and that the noble enthusiasm of liberty is apt to be infected with a spirit of  
7 narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of gov-  
8 ernment is essential to the security of liberty; that, in the contemplation of a sound and well-  
9 informed judgment, their interest can never be separated; and that a dangerous ambition more often  
10 lurks behind the specious mask of zeal for the rights of the people than under the forbidden appear-  
11 ance of zeal for the firmness and efficiency of government. History will teach us that the former  
12 has been found a much more certain road to the introduction of despotism than the latter, and that  
13 of those men who have overturned the liberties of republics, the greatest number have begun their  
14 career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”

15 James Madison, the Federalist

16 **164.** But the model of democratic decision making the [469 U.S. 528, 557] Court there identified  
17 the solicitude of the national political process for the continued vitality of the States. Attempts by  
18 other courts since then to draw guidance from this model have proved it both impracticable and  
19 doctrinally barren. In sum, in National League of Cities the Court tried to repair what did not need  
20 repair. You have not lightly overruled recent precedent. You “have not hesitated, however, when it  
21 has become apparent that a prior decision has departed from a proper understanding of congress-  
22 sional power under the Commerce Clause.” See United States v. Darby, 312 U.S. 100, 116 -117  
23 (1941).

24 **165.** Due respect for the reach of congressional power within the federal system mandates that you  
25 do so now.

26 **NOTICE OF IMMINENT HAZARD AND SUBSTANTIAL ENDANGERMENT**

27 **166.** The EPA plans to put another 2 million tons of sludge in the Brick Flat Pit, and then it will  
28 need to build another 25 or more multi-million ton disposal pits somewhere else to store all the



1 sludge it plans to make at Iron Mountain. This sludge is not legal to dispose in the manner EPA  
2 allows because it contains toxic levels of cadmium, arsenic, lead, uranium, and other toxic metals,  
3 the sludge also forms acid mine drainage itself at a pH of <2. This sludge disposal is not legal be-  
4 cause the acid mine drainage that the EPA treats to produce the sludge was being recycled by the  
5 mine owner before the EPA declared Iron Mountain Mines a Superfund site, and the technology  
6 has always existed to recycle the metals in the acid mine drainage and not make sludge for dis-  
7 posal. The EPA selected remedy is not the best available technology, and the water discharged by  
8 the treatment does not meet Clean Water Act standards, which is another negligent endangerment.

9 **167.** The metals in the sludge were always known by the EPA to be recyclable at a profit, and the  
10 EPA chose to defy the protests of the property owner and the responsible parties (the previous  
11 owners), as well as interested citizens and public servants who's input was ignored by the EPA. The  
12 sludge disposal is also in violation of California health, safety, environmental, recycling, and dis-  
13 posal laws. The State of California has permitted these violations in deference to the EPA's "in-  
14 terim authority" (3000 years?), while continuously recommending that the EPA implement re-  
15 source recovery technologies.

16 **168.** The EPA's engineering firm informed the EPA that all the sludge could be recycled when  
17 they started making it and could be easily worth well over \$25,000 per day or over \$136 million  
18 dollars so far. These same metals have been imported, primarily from China, during the EPA  
19 treatment. The EPA has also prevented any recycling or reclamation of the millions of tons of  
20 waste rock that was left from hardrock mining. This has caused the loss of many millions more in  
21 revenue. The mine owner's proposal, known as insitu mining, would have solved the pollution  
22 problem by now, and the mine owners could have made another \$350 million in recycling those  
23 wastes, thus the EPA has recklessly and negligently cost the mine owner over \$500 million in lost  
24 revenues. This is the very definition of despotism and tyranny, and EPA fraud and trespass.

25 **169. EVIDENCE IN SUPPORT OF A FINDING OF FRAUD, MALICE, OPPRESSION AND**  
26 **DECEIT WITH BREACH OF GENERAL MINING LAW AND VIOLATION OF RCRA (THE**  
27 **RESOURCE CONSERVATION AND RECOVERY ACT).**

28 WITH GROUNDS FOR INTERVENTION AND IN SUPPORT OF CLAIMS 1 - 33

1 **170.** None of the expense of building a dam and disposal cell on top of Iron Mountain at the Brick  
2 Flat Pit for the sludge disposal was necessary, nor was the expense of transporting the sludge to the  
3 disposal cell each year, and such actions have resulted in negligent endangerment.

4 Items 56184 and 56213 (1994) of the EPA administrative record are memorandum from Jim Mavis  
5 to John Spitzley, both of whom were engineers for CH2MHill, the EPA remedial action contractor,  
6 and to Rick Sugarek and the EPA. It provides some details of the evaluation process and  
7 CH2MHill recommendations for the evaluation of resource recovery.

8 **171.** It begins with a background of the Byproduct Recovery Proposals which had been consid-  
9 ered up to that time, the first acknowledging that about a dozen different alternatives had been con-  
10 sidered since the early 80's.

11 **172.** It is clear from this draft memorandum and from all other memorandum concerning resource  
12 recovery approaches that the only aspect given any significant consideration is the cost basis of the  
13 treatment. No mention is ever made of possible benefits such as recovery of strategic metals, bal-  
14 ance of trade issues, any of the principles provided by Congress in RCRA, or concern for issues  
15 such as the EPA "derived from" rule, the recurrence of acid mine drainage (AMD) in the sludge,  
16 how much sludge would ultimately be produced and where it would be disposed, or even a com-  
17 prehensive evaluation of the elements present and the possible value of the recovery of substan-  
18 tially all of the elements present in the AMD.

19 **173.** Under Background and Objectives, it announces that "A potential alternative to (Stauffer  
20 Management Companies) SMCs by-product recovery processes has been identified. This alterna-  
21 tive uses sludge from the high density sludge treatment process.

22 The by-product recovery process outlined below was prepared in response to SMC's proposed re-  
23 covery alternatives. SMC's proposed alternatives were both speculative and more costly than sim-  
24 ple neutralization. The process outlined below was developed to overcome the high cost of SMC's  
25 alternatives, and to use the waste sludge from the planned high density sludge plant as a starting  
26 material for by-product recovery.

27 **174.** It should be noted that the following discussion is not a proposal to develop the described  
28 process; it is simply presented as an example of the direction that parties that are interested in by-

1 product recovery might investigate in lieu of more expensive alternatives that are currently being  
2 discussed”

3 **175.** The process description goes on to explain (with a process drawing, Figure 1) how the sludge  
4 can be processed using known technologies to recycle the sludge into marketable products.

5 **176.** On page 2, this recommendation of the recovery of iron oxides by CH2MHill to the EPA  
6 suggests that a net return of \$2,165 per day for crude iron oxides would be achievable, and then  
7 points out that “the value could exceed \$16,000 per day if higher quality pigment grade iron oxide  
8 were produced.”

9 **177.** In fact many of the elements disposed are considered strategic minerals, and all of them are  
10 imported to some extent, adding a balance of trade consideration into the equation.

11 **178.** Since Iron Mountain Mines, Inc. is the owner, it would be entitled to any profits in excess of  
12 the cost of treatment, so it is apparent that IMMI has been unlawfully deprived of the revenue it  
13 was anticipating from its own treatment proposal in 1986, that as a for profit concern it would have  
14 developed these technologies to maximize its return by producing materials such as the “pigment  
15 grade” iron oxides.

16 **179.** Assuming that IMMI would have incurred perhaps \$100 million in costs to date, it is reason-  
17 able to estimate that IMMI has so far been deprived of well over \$400 million in lost profits just  
18 from the AMD. Since IMMI also planned to finish the open pit mining of the Brick Flat Pit mine, it  
19 has also been deprived of approximately \$100 million in revenue from there as well.

20 Without elaborating on other details, it will suffice to notice that the proposed alternative saves  
21 over \$700 per day from the treatment only proposal, (\$5,302 per day as opposed to \$5,994 per  
22 day), but the evaluation then includes additional costs associated with zinc sulfide and ammonium  
23 sulfate recovery, supposedly bringing the cost up to \$6,762 per day.

24 **180.** No evaluation is made based upon a pigment grade iron oxide product with a potential value  
25 of \$16,000 per day resulting in a net profitability of over \$10,000 per day after treatment costs.

26 **181.** In every other document pertaining to the EPA evaluation of treatment alternatives, no men-  
27 tion has been found of iron oxides recovery.

1 **182.** Also, on April 15, 1994, in administrative record 56214, also a technical memorandum from  
2 Jim Mavis/ CH2MHill to Rick Sugarek/ EPA, with the subject of Review of SMC By-Product Re-  
3 covery Proposal Iron Mountain Mine.

4 **183.** The first item of interest in this document is a reference to SMC's proposal from December.  
5 In that proposal SMC indicated some excitement over technologies they were developing that util-  
6 ized cadmium and purported to have a cadmium value of \$25,000 to 50,000 / ton. CH2MHill con-  
7 sidered this value extreme, although not material to the cost evaluation.

8 Petitioner submits that in fact such a value was consistent with the emerging technology of thin  
9 film solar panels using cadmium sulfide and cadmium telluride, a technology finally brought to  
10 market some 10 years later by First Solar, Inc.

11 **184.** The other significant aspect of this document is that although it was transmitted the same  
12 day, no mention of iron oxides recovery is present.

13 **185.** In fact throughout the evaluations that are documented, no mention is ever made of any of  
14 the other elements beside sulfur, copper, cadmium, and zinc as being beneficially recoverable.

15 In fact it was well known and documented by laboratory assays that the Iron Mountain Mines  
16 AMD contained significant and recoverable quantities of silver, aluminum, cobalt, gallium, magne-  
17 sium, manganese, molybdenum, nickel, titanium, and vanadium.

18 **186.** An accounting informs us that the AMD could have easily provided in excess of \$10,000 per  
19 day in profit after paying for the costs associated with treatment, and the EPA knew it.

20 There is no indication in the record that this information was ever shared with the PRP's.

21 **187.** The Court must decide if these decisions were made in violation of civil rights including  
22 equal protection and due process of T.W. Arman and Iron Mountain Mines, Inc. et al.

23 **BACKGROUND**

24 **188.** This matter is before the Court on petitioners allegations of fraud upon the Court, fraudulent  
25 misrepresentations, intentional violation of environmental laws to interfere with the right to resume  
26 mining with malice, fraud, oppression, and deceit, for equal protection and due process and other  
27 civil rights retained by the people, and defendant's objections to the governments arbitrary and ca-  
28 pricious conduct, abuse of discretion, and for actions not in accordance with public law by the

1 United States Environmental Protection Agency (EPA), and for actions by the EPA causing an  
2 imminent and substantial endangerment to the public health and the environment, and particularly  
3 to the defendant's health and property, and for losses and damages to the defendant's property, for  
4 failure to perform or to respond to an environmental emergency on a timely basis or with remedies  
5 consistent with the National Contingency plan, and for the taking of defendant's property for the  
6 public benefit without just compensation.

7 **189.** This matter is also before the court for arbitrary and capricious interpretations of environ-  
8 mental laws and for intentionally negligent disregard for state and federal solid waste laws and  
9 mining laws contrary to the legislations purpose and intent; for actions contrary to established ju-  
10 risprudence; for fraud upon the Court; for abuse of discretion by the District Court in failing to pro-  
11 tect the defendants civil rights including equal protection and due process under the law, the failure  
12 to settle all liability for the pollution and the failure to provide for natural resource damages consis-  
13 tent with the National Contingency Plan; for plaintiff's misapplication and false and malicious  
14 prosecution of the Comprehensive Environmental Response, Compensation, and Liability Act, as  
15 amended (CERCLA), 42 U.S.C. §§ 9601-9675; for the governments deprivation of constitutionally  
16 protected rights and civil liberties; and for the Presidents failure in the protection of defendant's  
17 constitutional rights, with questions of material facts and constitutional law.

18 190. This matter is also before the Court to adjudicate counterclaims of plaintiff's liabilities for vio-  
19 lations of the National Environmental Policy Act (NEPA) 42 U.S.C. 4321, the Comprehensive En-  
20 vironmental Response, Compensation, and Liability Act (CERCLA) U.S.C. §§ 9604 (3)(A), the  
21 Resource Conservation and Recovery Act (RCRA) 42 U.S.C. §§ 6901, the California Toxic Pits  
22 Recovery Act and other pendant State claims, and to resolve allegations of liability and defenses to  
23 liability and actions for contribution under 101, 104, 106, 107 and 113 of CERCLA.

24 191. Motion to certify this action or by severance to establish an action as a citizens suit for viola-  
25 tions of State and Federal Environmental laws by the government agency.

26 192. This matter is also before the Court to establish a reasonable basis to believe that a constitu-  
27 tional takings claim exists and the defendants petition to adjudicate Just Compensation in the pre-  
28 sent case and on behalf of a class.

1 193. Motion to certify for review of the constitutional questions of law.

2 194. This matter is also before the Court to establish a reasonable basis to believe that the policies  
3 implemented by the EPA to carry out its objectives have caused many thousands of inactive mines  
4 to be abandoned by their owners to the public's peril, contrary to the protections enumerated in the  
5 Constitution of the United State and amendments thereto. Defendants submit that the government's  
6 policies have disenfranchised thousands of property owners from their rightful possession of mine  
7 lands and mining claims because of liabilities associated with the punitive application of CERCLA  
8 environmental laws *ex post facto* and as a *Bill of Attainder*, by means and methods not in accor-  
9 dance with the limitations of the legislations text or the legislative intent, resulting in the taking of  
10 private properties for the public's benefit without just compensation, and the publics deprivation of  
11 any realizable benefits from these confiscations, but instead the public's liabilities and obligations  
12 to remedy pollution at taxpayer expense which by last estimate from the EPA was a liability in ex-  
13 cess of \$72 billion dollars to clean-up abandoned mine sites.

14 195. "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every  
15 person within the State's jurisdiction against intentional and arbitrary discrimination, whether occa-  
16 sioned by express terms of a statute or by its improper execution through duly constituted agents."'  
17 *Sioux City Bridge Co., supra*, at 445 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247  
18 U.S. 350, 352 (1918))."

19 See *Willowbrook v. Olech*

20 See *Pennsylvania Coal Company v. Mahon*

21 See *BASSETT , NEW MEXICO LLC, v. UNITED STATES*

22 196. Motion for certification of class action under the equal protection clause.

23 The distinction between removal and remedial actions is critical under CERCLA because "[b]oth  
24 types of actions have substantial requirements, but the requirements for remedial actions are much  
25 more detailed and onerous." *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1136 (10th  
26 Cir.2002). For example, remedial actions are only eligible for Superfund financing when the site is  
27 listed on the National Priorities List.<sup>7</sup> See 40 C.F.R. § 300.425(b)(1). Further, the EPA is required  
28 to consider costs when selecting remedial alternatives whereas "CERCLA contains no correspond-

1 ing mandate for removal actions." *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir.1992);  
2 see also 40 C.F.R. § 300.430 (listing requirements for a selection of remedy including considera-  
3 tion of effectiveness, permanence, and cost). Because CERCLA provides that responsible parties  
4 shall be liable for "all costs of removal or remedial action incurred by the United States Govern-  
5 ment ... not inconsistent with the national contingency plan," this distinction is vital to those held  
6 liable. 42 U.S.C. § 9607(a)(4).

7 **197.** Without the benefit of a definitive committee report or other deliberate congressional docu-  
8 ments describing the genesis of the final bill, we are hesitant to rely on legislative history for guid-  
9 ance, especially in regard to the nuanced inquiry as to which side an action falls on the re-  
10 moval/remedial line. See *United States v. Adams*, 343 F.3d 1024, 1032 n. 8 (9th Cir.2003) (warn-  
11 ing that subsequent legislative history is a "hazardous basis for inferring the intent of an earlier  
12 Congress") (quoting *United States v. McCoy*, 323 F.3d 1114, 1121 (9th Cir.2003)).

13 **198.** What we can take away from the legislative history is the drafters' overarching concern that  
14 aggressive action be taken to protect the public health. See, e.g., 126 Cong. Rec. S14,714 (daily ed.  
15 Nov. 19, 1980), reprinted in 1 Superfund History, supra, at 90 (statement of Sen. Mitchell) ("The  
16 Surgeon General of the United States has stated that toxic wastes may be the most serious threat to  
17 public health in our country in the next decade. So it is in this spirit of urgency that I cosponsor this  
18 substitute [bill] today."); S.Rep. No. 96-848, at 2 (1980) (stating in report for unadopted draft of  
19 CERCLA that "the potential impact of toxic chemicals on the general public and environment  
20 through unsound hazardous disposal sites and other releases of chemicals is tremendous"); see also  
21 55 Fed.Reg. 8666, 8725 (Mar. 8, 1990) (statement in comments to 1990 amendments to the Na-  
22 tional Contingency Plan that "Section 121 of CERCLA makes clear, and the legislative history con-  
23 firms, that the overarching mandate of the Superfund program is to protect human health and the  
24 environment from the current and potential threats posed by uncontrolled hazardous waste sites.").  
25 Such statements encourage us to construe "removal" liberally to effectuate CERCLA's remedial  
26 purpose, but they do not illuminate the removal/remedial distinction. Cf. *Seaboard Farms*, 387 F.3d  
27 at 1172 ("[CERCLA] must be interpreted liberally so as to accomplish its remedial goals."); *Kelley*  
28 *v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir.1994) (You concluded that Congress



1 intended that the term `removal action' be given a broad interpretation." ). We conclude that  
2 CERCLA no longer serves section 121

3 **199.** In sum, we are unable to discern Congress's clear intent through the normal tools of statutory  
4 interpretation. The meanings of "removal" and "remedial action" under CERCLA are inescapably  
5 vague.

6 *prohibition:*

7 **200.** You should consider that the respondents alleged an unquantifiable and unlimited CERCLA  
8 liability against T.W. Arman and IMMI. Thereafter Stauffer Chemical was found to be a PRP. As  
9 successor in interest, Rhone Polenc took responsibility for the cleanup of the Mountain Copper Co.  
10 et al “disposal” of “hazardous waste”. Having so alleged, the respondents then offered a settlement  
11 to relieve the unquantified and unlimited liability of the polluter, such settlement relieving and  
12 avoiding any admission of guilt, causation, comparative harm, injury, or damages, and such settle-  
13 ment relieving unquantified natural resource damage liability and unlimited perpetual liabilities by  
14 fraudulent *delectus personae* for those settling defendants, and by default transferring any remain-  
15 ing liabilities and any guilt, causation, and responsibility for injury or damages from comparative  
16 harm to T.W. Arman and IMMI, with stigmatic injuries, libel and slander, and without informed  
17 counsel.

18 **201.** The terms of the consent decree expressly deny any liability on the part of the government.  
19 Therefore the EPA and DOJ have acted in excess of jurisdiction, and without a fair trial incrimi-  
20 nated the non-settling and innocent landowner defendants, and by an abuse of discretion and fraud  
21 upon the court defamed and dishonored with infamy these defendants, abrogated their Letters Pat-  
22 ents from the President of the United States, ignored Deeds and Freeholds, and libeled and slan-  
23 dered the defendants and all miners; deceived and misled the innocent landowner defendants and  
24 the Court to believe that the remedial actions of the EPA were supported by the evidence, that the  
25 Consent Decree was by every measure procedurally fair, just, and consistent with the law; and a  
26 benefit to T.W. Arman and IMMI. Despite the settlement, Bayer Crop Sciences, Inc., (successor in  
27 interest to Mountain Copper Co. et al.), remains indemnified against claims by Iron Mountain  
28 Mines, Inc. under covenants of a purchase agreement with AstraZeneca, prior successor in interest



1 to Aventis Crop Sciences. Petitioner did contact Bayer Crop Sciences, Inc. to alert them to this  
2 matter and the charges.

3 **202.** The invitation to join this matter was declined, counsel stating on behalf of the settling parties  
4 that the terms of the consent decree were agreed to without reservation, and they considered the  
5 matter closed as to them.

6 **203.** You should consider that AIG, through its wholly owned subsidiaries AISLIC and AIG Con-  
7 sultants, Inc., indemnified Stauffer Chemical Co. et al for these environmental liabilities, and is  
8 trustee, fiduciary, and operator. Now the United States owns a majority in AIG.

9 Petition for writ of prohibition, for the honor and integrity of the United States is in peril. The only  
10 course to redress the grievances and restore dignity is to make the consent decree a benefit to T.W.  
11 Arman and IMMI, and there is no other plain, speedy, and adequate remedy.

12 You should reverse the dismissed counterclaim of \$10 million and find for the defendants.

13 **204.** You should strike and release the liens.

14 **205.** “A patent to land, issued by the United States under authority of law, is the highest evidence  
15 of title, something upon which its holder can rely for peace and security in his possession. It is con-  
16 clusive evidence of title against the United States and all the world. ..” 2 The American Law of  
17 Mining, § 1.29 at 357. Nichols v. Rysavy, (S.D. 1985) 610 F. Supp. 1245.

18 **206.** "Congress has the sole power to declare the dignity and effect of titles emanating from the  
19 United States ... and [Congress] [D]eclares the patent the superior and conclusive evidence of legal  
20 title." Langdon v. Sherwood, 124 U.S. 74 (1888).

21 **207.** The “general rule” at least is, “that while property may be regulated to a certain extent, if  
22 regulation goes too far it will be recognized as a taking.” [Pennsylvania Coal Co. v. Mahon , 260  
23 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).]

24 **208.** “A valid and subsisting location of mineral lands, made and kept in accordance with the pro-  
25 visions of the statutes of the United States , has the effect of a grant by the United States of the  
26 right of present and exclusive possession of the lands located.”

27 U.S. Supreme Court, 1884  
28

1 **209.** "With the title passes away all authority or control of the executive department over the land  
2 and over the title which it has conveyed. It would be as reasonable to hold that any private owner  
3 who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument  
4 which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of  
5 justice present the only remedy. These courts are as open to the United States to sue for the cancel-  
6 lation of the deed or reconveyance of the land as to individuals, and if the government is the party  
7 injured this is the proper course".

8 Moore v. Robbins, 96 U.S. 530, 533, 24 L. Ed. 848.

9 **210.** "That whenever the question in any court, state or federal, is whether a title to land which has  
10 once been the property of the United States has passed, that question must be resolved by the laws  
11 of the United States; but that whenever, according to those laws, the title shall have passed, then  
12 that property, like all other property in the state, is subject to state legislation, so far as that legisla-  
13 tion is consistent with the admission that the title passed and vested according to the laws of the  
14 United States".

15 Wilcox v. McConnell, 13 Pet. ( U.S. ) 498, 517, 10 L. Ed. 264.

16 **211.** "Title by patent from the United States to a tract of ground, theretofore public, prima facie  
17 carries ownership of all beneath the surface, and possession under such patent of the surface is pre-  
18 sumptively possession of all beneath the surface.

19 Lawson v. United States Min. Co. 207 U.S. 1, 8, 28 Sup. Ct. 15, 17, 52, L. Ed. 65.

## 20 CONSTITUTIONALITY

21 **212.** "The Government of the United States has been emphatically termed a government of laws,  
22 and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy  
23 for the violation of a vested legal right." Marbury v. Madison 1803

## 24 FREEHOLD

25 **213.** These lands are called "Freehold" land because the enjoyers or their ancestors were soldiers  
26 and helped the President to conquer; and if any of latter years came to buy these freeholds with  
27 money got by trading, it doth not alter the title of the conquest; for evidences are made in the Presi-  
28 dents name, to remove the freeholds bought from one man's hand to another.

1 insitu remediation summary & history of copper cementation and bioleaching

2 **214.** Cementation of copper began with the discovery of copper and the beginning of copper min-  
3 ing at Iron Mountain around 1896. By 1908 the State Geologist reported that the operation was so  
4 extensive that a building was being constructed over and around it.

5 **214.** In 1919 copper prices crashed and the mine closed, in 1920 fish kills were reported.

6 **214.** In 1921 copper cementation resumed and was thereafter operated continuously until the EPA  
7 implemented their High Density Sludge water treatment.

8 **214.** After WWII Iron Mountain mines produced sulfur and iron for fertilizers until 1963.

9 Iron Mountain has 20,000,000 tonnes proven and 5,000,000 tonnes probable ore reserves.

10 **214.** The naturally occurring archaea living in the Richmond mine are reported to be capable of  
11 producing the most acidic natural mine waters on the planet, pH -3.6.

12 **214.** Iron Mountain Mines, Inc. bioleaching naturally produces about 8 tons of metals per day.

13 **214.** One of the earliest records in the west of the practice of leaching is from the island of Cyprus.  
14 Galen, a naturalist and physician reported in AD 166 the operation of in situ leaching of copper.  
15 Surface water was allowed to percolate through the permeable rock, and was collected in ampho-  
16 rae. In the process of percolation through the rock, copper minerals dissolved so that the concentra-  
17 tion of copper sulphate in solution was high. The solution was allowed to evaporate until copper  
18 sulphate crystallized. Pliny (23-79 AD) reported that a similar practice for the extraction of copper  
19 in the form of copper sulphate was widely practiced in Spain.

20 **214.** Prior to the invention of electrolysis, the only practical method for the recovery of copper  
21 from copper sulphate was by cementation, a process that derives its name from the Spanish word  
22 cementacion, meaning precipitation. The cementation of copper was known in Pliny's time, but no  
23 written record of its commercial application seems to have survived. The cementation of copper  
24 was known to the Chinese, as documented by the Chinese king Lui-An (177-122 BC), and the Chi-  
25 nese implemented the commercial production of copper from copper sulphate using a cementation  
26 process in the tenth century. The Chiangshan cementation plant started operation in 1096 with an  
27 annual production of 190 tonnes per year of copper. In the Middle Ages, the alchemist Paracelsus  
28

1 (AD 1493-1541) described the cementation of copper as an example of the transmutation of Mars  
2 (iron) into Venus (copper).

3 **215.** Iron Mountain was originally purchased by preemption with \$100 agricultural college scrip  
4 warrant of Colonel William Magee in 1871.

5 **216.** Under CERCLA, once the response action is selected — in this case as a removal based on  
6 "an imminent and substantial danger to the environment" — then the EPA is authorized to take  
7 necessary actions consistent with the National Contingency Plan. See 42 U.S.C. § 9604(a)(1).  
8 Regulations implementing the Plan provide that "[i]f the [EPA] determines that a removal action is  
9 appropriate, actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize,  
10 stabilize, mitigate, or eliminate the threat to public health or welfare of the United States or the en-  
11 vironment." 40 C.F.R. § 300.415(b)(3). Thus, even if the EPA's selection of a removal action was  
12 proper, the question remains whether the actions actually taken by the EPA to combat the threat are  
13 properly categorized as such.

14 **217.** We agree that this second step of our inquiry is a question of law: Does the EPA's response  
15 action in Iron Mountain Mines fall within the statutory limits of a removal action? Petitioner's  
16 challenge is built on the premise that the EPA termed its cleanup Iron Mountain a remedial action  
17 as a subterfuge when the response was, in substance, a removal action. To resolve this question, we  
18 must explore the statutory confines of removal actions under CERCLA and, within this legal struc-  
19 ture, ask to what extent we should not defer to the EPA's interpretation based on the agency's ex-  
20 pertise.

21 **218.** A. DECISION TO CONDUCT A REMOVAL ACTION at Iron Mountain Mines, Inc.

22 **219.** The EPA's initial decision to conduct a removal action must be upheld unless Petitioner dem-  
23 onstrates on the administrative record that the decision was arbitrary and capricious or otherwise  
24 not in accordance with law. 42 U.S.C. § 9613(j)(2). Petitioner has met this burden.

25 The National Contingency Plan requires the EPA to consider a series of factors to determine that it  
26 was appropriate to initiate a removal action. Cf. Chapman, 146 F.3d at 1171-73 (holding that the  
27 EPA did not act arbitrarily or capriciously in ordering a removal action after considering the §  
28

1 300.415(b)(2) factors). In this case the EPA did do so and its failings are extensively documented  
2 in the administrative record.

3 **220.** There was no current and no potential impact on public health resulting from the acid mine  
4 drainage, and no native fish living in proximity to the site, the fish having vanished long ago by  
5 reason of dams by the federal government, ranching, urban runoff, farming, sewage, mining, and  
6 other factors leading to their demise, so EPA invoked the catch-all eighth factor — "[other situa-  
7 tions or factors that may pose threats to public health or welfare of the United States or the envi-  
8 ronment," 40 C.F.R. § 300.415(b)(2)(viii):

9 **221.** The sheer magnitude of the EPA impact dictates the need for an expedient and thorough re-  
10 view... CERCLA was designed and enacted to prevent illness and death resulting from exposure to  
11 hazardous substances, not cause its occurrence or be a threat.

12 **222.** In light of the EPA's undocumented reasoning, such as its experimental plan to fill the mine  
13 with concrete, a plan that was so ludicrous and ill conceived that it was never seriously considered  
14 after being represented as the "remedial action plan". The continuing false claims and misrepresen-  
15 tations, deliberate ignorance of actual information, and knowingly reckless disregard of the truth,  
16 such as contending that the acid mine drainage is the result of a "unique geo-chemical reactor",  
17 when it was well known by 1977 that the acid mine drainage was due to micro-organisms, and by  
18 2000 known to be entirely dependent upon a family of newly discovered life form called archaea.  
19 While the EPA is pretending to preserve Iron Mountain Mines, the technology of insitu mining that  
20 Iron Mountain Mines, Inc. should have been a leader in has evolved and developed into a major  
21 industry. Iron Mountain Mines, Inc. is informed and believes that the micro-organisms such as its  
22 archaea have been expropriated from Iron Mountain Mines, Inc. without its consent and without  
23 compensation for commercial and industrial exploitation by others. That the EPA is able to persist  
24 in these unlawful and unconscionable activities with impunity and without accountability because  
25 of judicial swaddling and judicial deference resulting in negligent endangerment, shows the EPA's  
26 decision to approve a removal action was arbitrary and capricious. See 42 U.S.C. § 9613(j)(2). This  
27 threshold decision does not, however, end our inquiry. We must consider how to classify the EPA's  
28 action.

1 B. CHARACTERIZATION OF THE EPA'S RESPONSE ACTION

2 **223.** The question remains whether the steps actually taken by the EPA to combat the threat are  
3 properly characterized as a removal action. Whether the EPA's cleanup activity was a removal ac-  
4 tion — or, on the other hand, a removal action in remedial action's clothing — is a question of  
5 statutory interpretation. "Congress provided definitions for `removal' and `remedial action,' and the  
6 classification of the activity is determined as a matter of law." *Geraghty & Miller, Inc. v. Conoco*  
7 *Inc.*, 234 F.3d 917, 925-26 (5th Cir.2000) (footnotes omitted); see also *Sunoco*, 337 F.3d at 1242  
8 ("Nothing in [42 U.S.C.] § 9613(j)(2) refers to the EPA's characterization of a particular action [as  
9 a removal or remedial action]"). The decision to select a removal or remedial action is therefore  
10 distinct from the question whether the action carried out was, in fact, the action selected. It is to this  
11 crucial inquiry that we now turn.

12 **224.** The statutory interpretation of "removal" is a legal issue that we review as a matter of law.  
13 See *Carson Harbor Vill.*, 270 F.3d at 870. But in addressing the statute, the parties disagree as to  
14 the level of deference, if any, that we should grant the EPA's formulation of the term "removal."  
15 Resolving this question requires that we consider the Supreme Court's recent refinement of the tra-  
16 ditional agency-deference analysis under *Chevron*. See 467 U.S. at 842-45, 104 S.Ct. 2778; *United*  
17 *States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (*Chevron*  
18 applies "when it appears that Congress delegated authority to the agency generally to make rules  
19 carrying the force of law, and that the agency interpretation claiming deference was promulgated in  
20 the exercise of that authority.").

21 **225.** Following *Mead*, the continuum of agency deference has been fraught with ambiguity. Com-  
22 pare *Barnhart v. Walton*, 535 U.S. 212, 221, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) (applying  
23 *Chevron* deference even though the EPA reached its interpretation through means less formal than  
24 "notice and comment" rulemaking) with *Mead*, 533 U.S. at 226-27, 121 S.Ct. 2164 (agency's tariff  
25 classification had "no claim to judicial deference under *Chevron*, there being no indication that  
26 Congress intended such a ruling to carry the force of law"). Our decisions understandably have  
27 been conflicted as to whether *Chevron* deference only applies upon formal rulemaking and whether  
28 lesser deference applies in other situations. See, e.g., *Cal. Dep't of Soc. Servs. v. Thompson*, 321

1 F.3d 835, 847-48 (9th Cir.2003) (discussing how Mead and Walton have "further obscured the al-  
2 ready murky administrative law surrounding Chevron"); *Davis v. United States EPA*, 348 F.3d 772,  
3 779 n. 5 (9th Cir.2003) ("The mere fact that the EPA engaged in informal agency adjudication . . .  
4 does not vitiate the Chevron deference owed to the agency's interpretation. . . ."). As Justice Scalia  
5 presciently noted in his dissent in Mead, "We will be sorting out the consequences of the Mead  
6 doctrine, which has today replaced the Chevron doctrine, for years to come." 533 U.S. at 239, 121  
7 S.Ct. 2164 (Scalia, J., dissenting).

8 **226.** The Supreme Court's most recent pronouncement in *National Cable & Telecommunications*  
9 *Ass'n v. Brand X Internet Services*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005), calls  
10 into question whether Mead in fact "replaced" Chevron as Justice Scalia contends. Perhaps because  
11 Brand X involved formal rulemaking, see *id.* at 2699, the Court did not clarify whether there is a  
12 "deference distinction" between Chevron and Mead. Nonetheless, in Brand X the majority's lan-  
13 guage explaining Chevron is quite broad and does not come with a proviso that the Chevron defer-  
14 ence is limited to agency interpretations expressed through formal rulemaking. See *id.* ("In Chev-  
15 ron, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are  
16 delegations of authority to the agency to fill the statutory gap in reasonable fashion."); *id.* at 2700  
17 ("Chevron's premise is that it is for agencies, not courts, to fill statutory gaps.").

18 **227.** The interplay between Chevron and Mead is highlighted in Justice Breyer's concurrence, in  
19 which he writes that "the existence of a formal rulemaking proceeding is neither a necessary nor a  
20 sufficient condition for according Chevron deference to an agency's interpretation of a statute." *Id.*  
21 at 2712 (Breyer, J., concurring). This explanation stands in contrast to Justice Scalia's dissents in  
22 Brand X and Mead. See *id.* at 2713-21; Mead, 533 U.S. at 239-61, 121 S.Ct. 2164. Echoing his dis-  
23 sent in Mead, Justice Scalia proffers in his Brand X dissent that "Mead drastically limited the cate-  
24 gories of agency action that would qualify for deference under Chevron." 125 S.Ct. at 2718 (Scalia,  
25 J., dissenting). Rather than clarifying what these categories are, Justice Scalia advances that, in  
26 Brand X, the Court "continues the administrative-law improvisation project it began years ago in  
27 [Mead]."  
28



1 **228.** Because the discussion in *Brand X* leaves some doubt as to the degree of formality of the un-  
2 derlying agency interpretation that is required for Chevron deference, we look to the post-Mead  
3 Supreme Court decision that most closely resembles the circumstances we face here. The Court  
4 explained in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 487-88,  
5 124 S.Ct. 983, 157 L.Ed.2d 967 (2004), that the EPA's interpretation of a statute in internal guid-  
6 ance memoranda warrants respect but does not qualify for Chevron deference. Although the Court  
7 cited Mead in rejecting Chevron deference, it accorded "respect" to the "EPA's reading of the rele-  
8 vant statutory provisions." *Id.* at 488, 124 S.Ct. 983. Accordingly, at a minimum, we impose a  
9 modified deference standard affording respect to the EPA's informal interpretations here. But either  
10 under modified deference or full Chevron deference, the result would be the same: The EPA's  
11 cleanup activities in Iron Mountain Mines are properly categorized as a removal action.

12 **229.** The arbitrary and capricious or not in accordance with law review applies to all aspects of  
13 your inquiry, and the statute supports this reading. CERCLA requires that we uphold the EPA's  
14 "decision in selecting the response action" unless arbitrary and capricious or otherwise not in ac-  
15 cordance with the law. 42 U.S.C. § 9613(j)(2). Here we address not the EPA's selection of its rem-  
16 edy, but rather whether the actions taken fall within the statutory definition of a removal. Thus, we  
17 consider whether the statutory construction that the EPA advances in this litigation is correct as a  
18 matter of law. The degree of deference granted to the EPA's interpretation of a statute is considered  
19 in light of Chevron and its progeny. See *Alaska Dep't of Env'tl. Conservation*, 540 U.S. at 487-88,  
20 124 S.Ct. 983.

21 **230.** In contrast, an agency's actions exercised under its statutory authority are generally subject to  
22 arbitrary and capricious review. See *id.* at 496-97, 124 S.Ct. 983 (applying arbitrary and capricious  
23 review to the EPA's taken actions under the Clean Air Act); see also 5 U.S.C. § 706(2) (applying  
24 arbitrary and capricious review to agency conclusions and findings).

25 **231.** With the Supreme Court's recent agency-deference cases as a backdrop, we begin with Chev-  
26 ron's first step and ask "whether Congress has directly spoken to the precise question at issue,"  
27 *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778, i.e., whether a response action such as the one carried  
28 out in *Iron Mountain Mines, Inc.* is a removal or remedial action.<sup>17</sup> If Congress has "unambigu-



1 ously expressed [its] intent," then our inquiry ends there, for that intent must be given effect as law.  
2 Id. at 842-43, 104 S.Ct. 2778. If, however, the statute is ambiguous, then we look to the EPA's in-  
3 terpretation of the statute. Even if full-blown Chevron deference is not due because of the informal  
4 nature of the interpretation, we will still accord a modified level of respect because "Chevron did  
5 nothing to eliminate Skidmore's[18] holding that an agency's interpretation may merit some defer-  
6 ence whatever its form." Mead, 533 U.S. at 234, 121 S.Ct. 2164; see also Wilderness Soc'y v.  
7 United States Fish & Wildlife Serv., 353 F.3d 1051, 1059-62 (9th Cir.2003) (en banc), amended by  
8 360 F.3d 1374 (2004) (applying this analytical framework to review of an agency's interpretation).  
9 Put simply, even if EPA manuals, policy statements, and other pronouncements "are beyond the  
10 Chevron pale," Mead, 533 U.S. at 234, 121 S.Ct. 2164, they are not beyond the reach of our defer-  
11 ence.

12 **232.** As elaborated below, the statutory definition of "removal" is vague and, consequently, the  
13 EPA's construction of this statutory term warrants our deference. In light of this deference and the  
14 well-documented record of the scope of cleanup activity, we hold that the EPA's action in Libby is  
15 properly characterized as a removal action. In so holding, we recognized that the emphasis on time-  
16 sensitivity both in the EPA's selection of a removal action and in our decision whether the action  
17 carried out actually was a removal action threatens to collapse the two issues into a single "imme-  
18 diacy" inquiry. Our review of the EPA's decision to conduct a removal action is limited to whether  
19 the EPA considered the eight factors under 40 C.F.R. §300.415(b)(2). In contrast, although imme-  
20 diacy is a paramount consideration when evaluating whether the action indeed was a removal, this  
21 second phase of our inquiry is not bound by those eight factors. For example, we also consider,  
22 among other things, the interplay between a removal and remedial action conducted at a single site  
23 and whether the action comports with the examples in 40 C.F.R. § 300.415(e).

24 **233.** Grantees contests the denomination of the action as a remedial action by the EPA, and shows  
25 that none of the EPA's activities might fall within the ambit of a remedial action. EPA's scientific  
26 and administrative expertise fails the arbitrary and capricious or otherwise not in accordance with  
27 law standard, for example, the excavation of rock or sediments was a removal action because  
28 1,000,000 cubic yards of rock and sediments was removed when perhaps removal of less rock or

1 less drastic measures could have been employed to counteract the immediate threat. We take a  
2 more comprehensive view of the administrative record in concluding that the EPA's response was a  
3 removal action.

#### 4 1. STATUTORY INTERPRETATION: REMOVAL AND REMEDIAL ACTIONS

5 **234.** The first step under Chevron requires a straightforward exercise in statutory interpretation: "If  
6 a court, employing traditional tools of statutory interpretation, ascertains that Congress had an in-  
7 tention on the precise question at issue, that intention is the law and must be given effect." Chev-  
8 ron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778.

9 **235.** We begin with the statutory definitions because "[w]hen a statute includes an explicit defini-  
10 tion, we must follow that definition, even if it varies from that term's ordinary meaning." Stenberg  
11 v. Carhart, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). It has become de rigueur to  
12 criticize CERCLA as a hastily passed statute that is far from a paragon of legislative clarity. See,  
13 e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 363, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986) (commenting  
14 that a provision in CERCLA "is not a model of legislative draftsmanship"); Carson Harbor Vill.,  
15 270 F.3d at 883 ("Clearly, neither a logician nor a grammarian will find comfort in the world of  
16 CERCLA."). The definitions of removal and remedial action exemplify this muddled language. See  
17 42 U.S.C. § 9601(23) (defining "removal"); id. § 9601(24) (defining "remedial action"); id. §  
18 9601(25) (defining "response"); see also supra notes 4, 6 (quoting definitions).

19 **236.** The definition of "removal" is written in sweeping terms. It begins with the general statement  
20 that "removal" means "the cleanup or removal of released hazardous substances from the environ-  
21 ment." 42 U.S.C. § 9601(23). The definition goes on to describe three categories of events that  
22 trigger removal: (1) "such actions as may be necessary[sic] taken in the event of the threat of re-  
23 lease of hazardous substances into the environment"; (2) "such actions as may be necessary to  
24 monitor, assess, and evaluate the release or threat of release of hazardous substances"; and a third  
25 catch-all category, (3) "such other actions as may be necessary to prevent, minimize, or mitigate  
26 damage to the public health or welfare or to the environment, which may otherwise result from a  
27 release or threat of release." Id.

1 **237.** Finally, the definition lists a number of specific activities that fall within the definition of  
2 "removal" — "alternative water supplies," "temporary evacuation and housing," and "emergency  
3 assistance." Although at first glance this half of the definition appears to provide concrete guidance  
4 by listing identifiable activities such as "security fencing," this part too is left vague by the opening  
5 caveat that the term "removal" "includes, in addition, without being limited to, security fencing. . .  
6 ." Id. Consequently, "these examples serve only as a guide to what activities may appropriately be  
7 classified as `removal action.'" Hanford Downwinders Coalition, 71 F.3d at 1478 n. 13.

8 **238.** The definition of "remedial action" is similarly broad, but can be distinguished from "re-  
9 moval" because it refers to "permanent" remedies and its list of specific actions is, in large part,  
10 distinct from the list included under "removal." (For example, "removal" is focused on temporary  
11 and emergency activities.) To begin, the definition states that a "remedial action" is an action "con-  
12 sistent with permanent remedy taken instead of or in addition to removal actions." 42 U.S.C. §  
13 9601(24). Although the section begins with this clear language, it threatens to collapse into the  
14 definition of "removal" because it includes those actions "taken instead of or in addition to removal  
15 actions" and is triggered "in the event of a release or threatened release of a hazardous substance  
16 into the environment, to prevent or minimize the release of hazardous substances so that they do  
17 not migrate to cause substantial danger to present or future public health or welfare or the environ-  
18 ment." Id. Thus, the triggering factors begin to sound virtually similar to the triggering factors for a  
19 "removal" action. In fact, two of the triggering factors for "removal" are almost identical to the fac-  
20 tors for "remedy":

21 **239.** The definition concludes with three lists of specific examples classified as a remedy, such as  
22 "segregation of reactive wastes." NO! The first list details various locations of the release. As with  
23 the term "removal," the definition for the first list diminishes the examples' guidance with the quali-  
24 fying language that the term "includes, but is not limited to," the listed examples. Id. The second  
25 list spells out when permanent relocation of residents, businesses, and community facilities is ap-  
26 propriate. NO! Finally, the third list is a list of actions included within "remedy," ranging from off-  
27 site storage to disposition of hazardous substances. NO!

1 **240.** Adding to the confusion is the overlap between the two definitions. See *Neville Chem. Co.*,  
2 358 F.3d at 667 (noting listing of "provision of alternative water supplies" under both remedial ac-  
3 tion" and "removal"); *Geraghty & Miller*, 234 F.3d at 927 (noting overlap). Attempting to untie the  
4 Gordian knot of these definitions solely based on their plain meanings is thus unavailing.

5 In interpreting "removal" and "remedial," we next follow the Supreme Court's guidance in taking a  
6 comprehensive, holistic view of CERCLA because it is a "fundamental canon of statutory construc-  
7 tion that the words of a statute must be read in their context and with a view to their place in the  
8 overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120  
9 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809,  
10 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

11 **241.** CERCLA makes clear that the EPA has the tools of both removal and remedial actions at its  
12 fingertips when there is a release or threatened release of a hazardous substance. Specifically, the  
13 EPA is authorized "to remove or arrange for the removal of, and provide for remedial action relat-  
14 ing to such hazardous substance, pollutant, or contaminant at any time . . . , or take any other re-  
15 sponse measure consistent with the national contingency plan which the [EPA] deems necessary to  
16 protect the public health or welfare or the environment." 42 U.S.C. § 9604(a)(1). The statute as a  
17 whole, however, does little to clarify how to categorize a given response action except to suggest  
18 that remedial actions may be "long term." See, e.g., *id.* § 9604(a)(2) (indicating that any removal  
19 action should contribute to the efficient performance of any "long term" remedial actions without  
20 further elaboration).

21 **242.** Nor does the purpose of the statute provide definitive guidance, though it points towards a  
22 liberal reading of "removal" in order to effectuate CERCLA's underlying purpose of "protect[ing]  
23 and preserv[ing] public health and the environment by facilitating the expeditious and efficient  
24 cleanup of hazardous waste sites." *Carson Harbor Vill.*, 270 F.3d at 880 (quoting *Pritikin v. Dept.*  
25 *of Energy*, 254 F.3d 791, 794-95 (9th Cir.2001) (internal quotation marks and citation omitted));  
26 see also, e.g., *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir.2004) (advocat-  
27 ing that CERCLA be interpreted liberally so as to accomplish its remedial goals). Specifically, be-  
28 cause a removal action can be initiated promptly after notification of a threat, a liberal reading pro-

1 vides the EPA with greater flexibility to use this tool for the protection of the public health. THE  
2 EPA FAILS HERE!

3 **243.** Last, we turn to CERCLA's legislative history for guidance. See *BedRoc Ltd. v. United*  
4 *States*, 541 U.S. 176, 187 n. 8, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (noting "longstanding  
5 precedents that permit resort to legislative history only when necessary to interpret ambiguous  
6 statutory text"). But see *Johnson v. United States*, 529 U.S. 694, 723, 120 S.Ct. 1795, 146 L.Ed.2d  
7 727 (2000) (Scalia, J., dissenting) (criticizing majority's reliance on legislative history be-  
8 cause "[o]ur obligation is to go as far in achieving the general congressional purpose as the text of  
9 the statute fairly prescribes — and no further").

10 **244.** No! You must safeguard the safety and general welfare of the citizens and the nation.

11 **245.** Unfortunately, legislative history is particularly unhelpful because of the haphazard passage  
12 of CERCLA with many of the more lucid descriptions of the statute falling under the oxymoronic  
13 category of post-enactment "history." See, e.g., 126 Cong. Rec. S16,428 (daily ed. Dec. 12, 1980),  
14 reprinted in 1 *The Environmental Law Institute, Superfund: A Legislative History* 87 (Helen Cohn  
15 Needham & Mark Menefee eds., 1982) (hereinafter "Superfund History") (post-passage "clarifica-  
16 tion" by Sen. Stafford that "the purpose of [CERCLA] and the response plan is to protect the public  
17 health and welfare in its broadest sense"); see also Alfred R. Light, *CERCLA Law and Procedure*  
18 12-18 (1991) (describing the "unusual back-room congressional compromise process" behind  
19 CERCLA); 1 *Superfund History*, supra, at xiii ("The emergence of this last-minute compromise  
20 hampers the ability of researchers to draw definitive conclusions from the otherwise extensive leg-  
21 islative history of CERCLA."). Considering that no committee or conference reports address the  
22 version of CERCLA that ultimately became law, it is apt to describe the search for legislative his-  
23 tory as "somewhat of a snark hunt." *Carson Harbor Vill.*, 270 F.3d at 885.

24 **246.** In sum, we are unable to discern Congress's clear intent through the normal tools of statutory  
25 interpretation. The meanings of "removal" and "remedial action" under CERCLA are inescapably  
26 vague. Ipso facto, CERCLA is unconstitutional.

## 27 2. DEFERENCE TO THE EPA'S CHARACTERIZATION

1 **247.** Having concluded that Congress did not draw a clear line between removal and remedial ac-  
2 tions, we turn to the second step under Chevron and ask whether, in view of the deference owed to  
3 the EPA, the Libby cleanup was a removal action as a matter of law. As noted earlier, the level of  
4 deference we accord to a given agency interpretation is directed by its form.

5 **248.** The administrative posture of CERCLA presents two types of agency interpretations. One is  
6 the National Contingency Plan, which carries the force of law. The second relates to informal  
7 agency interpretations, which at a minimum receive respect and, depending on the interplay of  
8 Mead and Brand X, may even deserve Chevron deference. Whichever of these applies, we reach  
9 the same result: We hold that the EPA has rationally construed CERCLA and that construction de-  
10 serves our respect. Cf. Alaska Dep't of Env'tl. Conservation, 540 U.S. at 485-88, 124 S.Ct. 983  
11 (EPA "rationally construed" Clean Air Act in internal guidance memoranda, which construction  
12 deserved "respect and approbation" but not Chevron deference). As interpreted by the EPA, the  
13 removal/remedial distinction boils down to whether the exigencies of the situation were such that  
14 the EPA did not have to undertake the procedural steps required for a remedial action, and, in re-  
15 sponding to such a time-sensitive threat, the EPA sought to minimize and stabilize imminent harms  
16 to human health and the environment. The EPA did not adequately do so here.

17 **249.** The definitions of "removal" and "remedial action" in the EPA-promulgated National Contin-  
18 gency Plan merely parrot CERCLA's definitions, aside from a few minor revisions for the National  
19 Contingency Plan context. See, e.g., 40 C.F.R. § 300.5 (replacing "EPA" for "the President" in  
20 definition of "remedial action" and noting that, for the purpose of the National Contingency Plan,  
21 "remedial" and "removal" include enforcement activities related thereto). Because these definitions  
22 do nothing to interpret the definitions in CERCLA, they are unhelpful to our inquiry.

23 **250.** That being said, other parts of the National Contingency Plan offer some guidance. For in-  
24 stance, 40 C.F.R. § 300.415(e) sets forth examples of activities that are "as a general rule," appro-  
25 priate as part of a removal action, but notes that the list "is not exhaustive and is not intended to  
26 prevent the lead agency from taking any other actions deemed necessary under CERCLA." See also  
27 42 U.S.C. § 9601(23) (providing that the scope of removals is not limited to the examples in the  
28 statutory definition). The examples include, among others, fences or other site control precautions;

1 capping of contaminated soils to reduce migration; excavation, consolidation, or removal of highly  
2 contaminated soils; and removal and treatment of hazardous materials where it will reduce the like-  
3 lihood of human exposure. 40 C.F.R. § 300.415(e). The bulk of activities carried out in Libby eas-  
4 ily fall within the scope of the listed examples. For instance, the EPA removed hazardous soil from  
5 the screening plant, restricted access to contaminated roads, installed a temporary cover on a  
6 school's ice skating rink, excavated and backfilled contaminated soil, and removed exposed piles of  
7 vermiculite.

8 **251.** The need for immediate action permeates the EPA's activities. So why did they take 8 years  
9 to implement the removal action and why is there no remedial action plan after 25 years?

10 The sequence of activities in Iron Mountain Mines further fails to comport with the EPA's descrip-  
11 tion in the National Contingency Plan of the preferred development of response actions. The Na-  
12 tional Contingency Plan provides that the agency should orderly transition from a removal to a re-  
13 medial action if it "determines that the removal action will not fully address the threat posed by the  
14 release." 40 C.F.R. § 300.415(g).

15 **252.** Looking beyond the National Contingency Plan, the EPA's characterization of response ac-  
16 tions in documents that do not have the heft of regulations still carry weight because "[c]ogent  
17 `administrative interpretations . . . not [the] products of formal rulemaking. . . nevertheless warrant  
18 respect.'" Alaska Dep't of Env'tl. Conservation, 540 U.S. at 488, 124 S.Ct. 983 (quoting Wash. State  
19 Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385, 123 S.Ct.  
20 1017, 154 L.Ed.2d 972 (2003) (alterations in original)); see also FTC v. Garvey, 383 F.3d 891, 903  
21 (9th Cir.2004) (where Chevron deference does not apply, "[an agency's] pronouncement's persua-  
22 siveness may nevertheless entitle it to respect"). The need for agency expertise is particularly acute  
23 when we are faced with a complex regulatory regime, such as CERCLA. In this situation, we rec-  
24 ognize that the "well-reasoned views of an expert administrator rest on a body of experience and  
25 informed judgment to which courts and litigants may properly resort for guidance." Alaska Dep't of  
26 Env'tl. Conservation, 540 U.S. at 487, 124 S.Ct. 983 (internal citations and quotation marks omit-  
27 ted). The EPA failed to follow its guidance to utilize solvent extraction, which was known to be the  
28 best available technology for treating metal oxide contaminated waters, but implemented lime



1 treatment instead, and made sludge instead of recycling metals that were then imported. The EPA  
2 further ignored recycling alternatives, disposal issues, the permanency of the response measures, or  
3 environmental impact.

4 **253.** Most notably, the EPA issued a memo in 2000 to guide project managers during the decision  
5 making process of selecting between remedial and removal actions. See Stephen Luftig, Director,  
6 Office of Emergency and Remedial Response, Use of Non-Time-Critical Removal

7 **254.** Authority in Superfund Response Actions (Feb. 14, 2000), available at

8 <http://www.epa.gov/superfund/resources/remedy/pdf/memofeb2000-s.pdf> (last visited July 26,  
9 2005) (hereinafter "Removal Memo"). Amplifying the National Contingency Plan's focus on the

10 immediacy of the threat, the Removal Memo emphasizes "time sensitivity," i.e., "the need to take  
11 relatively prompt action," as a key characteristic of removal actions: "[E]ven expensive and com-  
12 plex response actions may be removal action candidates if they are relatively time-sensitive." Re-

13 moval Memo, *supra*, at 3-4 ("For example, dredging large quantities of contaminated sediment  
14 could be conducted using removal authority where such action was the appropriate course for abat-  
15 ing or controlling a time-sensitive threat.").<sup>23</sup> An EPA report published in 2000 describing the re-

16 moval program reiterates that "[t]he critical element in all cases is time — prompt action is cru-  
17 cial." Office of Emergency and Remedial Response, EPA, EPA 540-K-00-002, The Emergency  
18 Response and Removal Program 3 (2000), available at

19 [http://www.epa.gov/superfund/resources/emer\\_res.htm](http://www.epa.gov/superfund/resources/emer_res.htm) (last visited July 26, 2005) (hereinafter  
20 "Removal Program Report").

21 **255.** Courts have also stressed the immediacy of a threat in deciding whether a cleanup is a re-  
22 moval action. See, e.g., *City of Wichita v. Trs. of APCO Oil Corp. Liquidating Trust*, 306

23 F.Supp.2d 1040, 1077-78 (D.Kan.2003) (city's cleanup was "remedial in nature" under CERCLA

24 where "[t]he court has heard no evidence that the contamination at the Site posed a threat to human  
25 health or the environment which required an immediate response"); *Carson Harbor Vill., Ltd. v.*

26 *Unocal Corp.*, 287 F.Supp.2d 1118, 1157 (C.D.Cal.2003) (finding action was remedial where

27 "[t]here is no evidence in the record that the materials posed the type of threat to human health and  
28 welfare that required immediate action"); *Hatco Corp. v. W.R. Grace & Co.-Conn.*, 849 F.Supp.



1 931, 963 (D.N.J.1994) (in finding response was a removal, placing "significant weight upon the  
2 fact that the release of [the hazardous substance] was not only imminent, but actually occurring").  
3 **256.** While stressing time sensitivity some courts have placed on duration, i.e., "how long the re-  
4 sponse action will take to build or implement," because "removal actions are most often of short  
5 duration, but they certainly can be long-running responses, too, thereby undercutting the probative  
6 value of duration . . . in deciding whether an action is removal rather than remedial in nature." Re-  
7 moval Memo, supra, at 3 n. 2. But see *Sherwin-Williams Co. v. City of Hamtramck*, 840 F.Supp.  
8 470, 475-76 (E.D.Mich.1993) ("[T]he extended and protracted nature of the cleanup indicate that  
9 the City has engaged in a remedial action."). Accordingly, the action in Libby is not disqualified  
10 from being a removal action just because it took several years. Cf. *Vill. of Milford v. K-H Holding*  
11 *Corp.*, 390 F.3d 926, 934 (6th Cir.2004) (explaining that the court has "never held" that the short-  
12 term nature of an action is required for finding costs recoverable as removal costs). **256.** The  
13 length of the cleanup in Libby is especially understandable given that harsh winters truncated the  
14 construction season and that the sheer magnitude of the initial cleanup far exceeded the normal  
15 situation faced by the EPA. Cf. *Sunoco*, 337 F.3d at 1244 (concluding that action was a removal in  
16 part because it was finished in about 14 months, "a relatively short time frame in the context of a  
17 clean-up lasting more than a decade in a harsh environment" (internal quotation marks omitted)).  
18 Instead of adopting a known and viable remedial action plan that would be completed in less than  
19 fifty years, the EPA implemented a removal action that will last 3000 years, cost 100 times as  
20 much, leave at least 50 million tons of acutely toxic hazardous waste sludge with no disposal site or  
21 financial assurances.

22 **257.** Likewise, the courts' reliance on the "permanence" of the response as is misleading: "As a  
23 practical matter, removal actions are often permanent solutions such as can be the case in a typical  
24 soil or drum removal." Removal Memo, supra, at 3 n. 3; cf. *Geraghty & Miller*, 234 F.3d at 927  
25 ("Even if the replacements for these wells are integral to the long-term remediation of the site, that  
26 does not mean that their initial placement cannot be categorized as removal."). This observation  
27 seems logical, as we do not want to tie the EPA's hands or compel it to adopt short-term remedies  
28 for fear that any more permanent solutions automatically will be dubbed "remedial actions." Nor

1 would it make economic or practical sense to impose a requirement that removal actions must be  
2 only temporary in nature. The term "comprehensiveness" to distinguish between the use of removal  
3 authority to conduct interim or partial response actions that are focused on immediate risk reduc-  
4 tion as compared with a final or "comprehensive" response at the site. Removal Memo, supra, at 3  
5 n. 3. The Libby cleanup exhibits this two-tier approach of an interim removal action that the EPA  
6 transforms into a comprehensive remedial action. Cf. Geraghty & Miller, 234 F.3d at 926 (noting  
7 that "removal actions generally are immediate or interim responses").

8 **258.** These informal interpretations combined with the descriptions in the National Contingency  
9 Plan provide a persuasive interpretation that removal actions encompass interim, partial time-  
10 sensitive responses taken to counter serious threats to public health. As the EPA explained in the  
11 Second Action Memo, "CERCLA was designed and enacted to prevent illness and death resulting  
12 from exposure to hazardous substances, not wait for its occurrence to prove a threat."

13 Another layer of complexity to our analysis is challenging various scientific and other methodology  
14 judgments made by the EPA as part of the cleanup. Once we determine that a response action on  
15 the whole is, by nature, falsely classified as a remedial action under the law, we will delve further  
16 to second-guess the underlying data with a showing of specific evidence that the EPA's conclusions  
17 were not warranted. See *Balt. Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103,  
18 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). ("When examining this kind of scientific determination, as  
19 opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

20 **259.** 'This is the most dangerous and unconscionable aspect of our inquiry into the state of envi-  
21 ronmental laws, here the courts must be the most astute, critical, scientific, and not deferential.

22 **260.** Grantees argues in its briefs that the EPA's data and conclusions were wrong, and presented  
23 evidence to support its claim that the EPA's selection of a remedial action was arbitrary and capri-  
24 cious, see 42 U.S.C. § 9613(j)(2), or that its characterization of the action as a remedial action did  
25 not comport with the statutory definition, see 42 U.S.C. § 9601(23). Of course, the EPA does not  
26 have free rein to ignore accepted scientific principle or to adopt findings that are wholly at odds  
27 with the record evidence. See *Great Basin Mine Watch v. United States EPA*, 401 F.3d 1094, 1098  
28 (9th Cir.2005) (court will overturn a final agency action if the agency "entirely failed to consider an

1 important aspect of the problem, offered an explanation for its decision that runs counter to the evi-  
2 dence before the agency, or is so implausible that it could not be ascribed to a difference in view or  
3 the product of agency expertise") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*  
4 *Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Such is the case here. It may be said  
5 that the EPA's conclusions are arbitrary and capricious. See *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d  
6 832, 858 n. 36 (9th Cir.2003) (an agency decision is arbitrary and capricious if there is no rational  
7 connection between the decision and the facts in the record).

8 The disputes between Iron Mountain Mines and the EPA are not exceedingly complex. The admin-  
9 istrative record includes, for instance, the EPA's failure to respond to Iron Mountains contention  
10 that the EPA "inappropriately calculated liability". We are scientists, and we will play armchair  
11 EPA administrator. It is our role to evaluate the record evidence against the standard of review. We  
12 do not defer to the EPA's unreasoned judgment. See *Sunoco*, 337 F.3d at 1243 ("[Skidmore] defer-  
13 ence seems particularly inappropriate where an action reasonably cannot be classified as either a  
14 'removal' or 'remedial' under CERCLA's complex definitional provisions."). We say that every  
15 judge must be able to be a scientist for the safety of the nation and its citizens; when judges dis-  
16 avow logic and reason it is knowingly reckless and deliberate ignorance of actual information, and  
17 it is unconstitutional and unconscionable.

18 **261.** We think you should resign if you are unable to serve the nations safety and general welfare.

19 **262.** The EPA's scientific basis for finding an immediate threat to the environment is thoroughly  
20 unfounded over thousands of pages. In addition to no detailed evaluation of the threat, the adminis-  
21 trative record includes, for example, conflicting reports.

22 **263.** Beyond the findings that prompted the EPA to undertake the removal action, the administra-  
23 tive record also disguises the conflicting steps taken, the exaggerated threat, the minimization of  
24 disposal issues, the reliance on insurance, and the transfer of blame to an innocent landowner, with  
25 libel and slander, and with malice, fraud, oppression and deceit, despotism and tyranny.

26 In sum, given the sweeping language in the definition of "removal," the significant deference due  
27 to the EPA's interpretation of this language, and the failure of the interim cleanup to provide a rem-  
28 edy, the EPA's cleanup in Iron Mountain Mines falls within the bounds of a removal action. The

1 EPA "has irrationally construed the Act's text and [the] EPA's construction does not warrant our  
2 respect and approbation." Alaska Dep't of Env'tl. Conservation, 540 U.S. at 485, 124 S.Ct. 983.  
3 This holding comports with CERCLA's fundamental goal of protecting the public health. See, e.g.,  
4 Hanford Downwinders Coalition, 71 F.3d at 1481 ("[T]his circuit has joined others in recognizing  
5 that protection of the public health was one of the remedial goals of CERCLA."). Considering the  
6 chaotic history behind CERCLA's passage, we are particularly sensitive not to adopt a reading that  
7 would undermine its remedial purpose. See Clark v. Uebersee Finanz-Korporation, 332 U.S. 480,  
8 488, 68 S.Ct. 174, 92 L.Ed. 88 (1947) (advising that courts should not adopt an interpretation of  
9 statutory language that would "run counter to the policy of the Act and be disruptive of its purpose  
10 . . . [when] dealing with hasty legislation which Congress did not stop to perfect as an integrated  
11 whole").

12 **264.** In so holding that Congress created a bifurcated scheme of removal and remedial actions and,  
13 accordingly, there must be outer limits to removal actions. The EPA did exceed these limits in this  
14 case. We delineate the outer parameters. We simply conclude that the EPA's characterization of the  
15 cleanup in Iron Mountain Mines as a remedial action is not supported by the administrative record  
16 and utterly fails scrutiny under the modified level of interpretive deference afforded by Mead and  
17 Alaska Department of Environmental Conservation. Although deference to the EPA's interpretation  
18 is insignificant, it is not blind. Courts must, as a matter of law, ultimately determine if the EPA's  
19 characterization of a given response action accords with CERCLA, it does not at Iron Mountain  
20 Mines, as we so determine here.

21 **265.** Crucial to our determination is the documented evidence that, absent immediate attention,  
22 there was not substantial threat to public health. The EPA had a choice to undertake an aggressive  
23 remedial action of an expansive scope. The removal activities easily fall within the statutory defini-  
24 tion of removal. Notably, the definitions for removal and remedial actions consciously include  
25 some overlap. Because of the nature of the removal, none of the measures taken by the EPA as part  
26 of the removal action might also effect a permanent solution for a particular location. But by no  
27 means did the removal action fully eliminate the environmental collapse or fish habitat, or amount  
28 to a full-blown remediation. According to the EPA's CERCLIS database, the EPA is continuing

1 work to ensure that potential or actual human exposures are under control. Iron Mountain Mines  
2 problems appear far from solved, the owner continues to insist on implementation of the actual  
3 remedy, but the EPA refuses to allow any progress. This was not envisioned by CERCLA; the EPA  
4 has no plans to affect a comprehensive resolution to the Iron Mountain Mines contamination  
5 through a pending remedial action, and is therefore an abuse of discretion.

6 II. EXEMPTIONS FROM THE \$2 MILLION, 12-MONTH STATUTORY CAP APPLICABLE  
7 TO REMOVAL ACTIONS

8 **266.** Having determined that the action is properly characterized as a removal action, the inquiry  
9 turns to whether the EPA can recover costs, or costs in excess of the \$2 million, 12-month statutory  
10 cap on removal actions. See 40 C.F.R. § 300.415(b)(5). The district court found persuasive the  
11 EPA's explanations. We disagree and hold that, considering the unnecessary and wasteful disposal  
12 of recyclable hazardous waste materials in an illegal dump, and that the EPA still cannot even meet  
13 Clean Water Act limits and the removal action was neither timely or in accordance with the NCP,  
14 the EPA should recover nothing.

15 We begin with the language of 42 U.S.C. § 9604(c)(1):

16 **267.** Unless (A) [the EPA] finds that (i) continued response actions are immediately required to  
17 prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare  
18 or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, . . .  
19 obligations from the Fund . . . shall not continue after \$2,000,000 has been obligated for response  
20 actions or 12 months has elapsed from the date of initial response to a release or threatened release  
21 of hazardous substances.

22 **268.** See also 40 C.F.R. § 300.415(b) (5) (limiting actions to \$2 million and 12 months "unless the  
23 lead agency determines that" one of the exemptions applies). Despite an assertion that the decision  
24 to exceed the cap is not subject to arbitrary and capricious review, the fact that the statute allows  
25 the EPA to invoke the exemptions when it "finds" certain conditions counsels otherwise. See 5  
26 U.S.C. § 706(2) (courts should set aside agency conclusions and findings where "arbitrary, capri-  
27 cious, an abuse of discretion, or otherwise not in accordance with law"). The EPA's determinations  
28 in this case that there was an emergency, that the risk to the environment was immediate, and that

1 the assistance would not otherwise be forthcoming are inherently fact-based. The owner had a bet-  
2 ter plan with an actual remedy, the engineering was significantly more developed than the EPA  
3 plan, and the owner was prepared to proceed without EPA financing or assistance. The EPA  
4 usurped the owner's authority to implement a remedy and embarked upon a 3000 year removal  
5 plan.

6 **269.** The EPA determined that the removal action was a remedial action because of the plan to fill  
7 the mine with concrete. Although this plan was abandoned, the EPA has never acknowledged that  
8 the EPA actions no longer constitute a remedial action. We hold that the EPA "failed to articulate a  
9 rational connection between the facts found and the conclusions made." *Env'tl. Def. Ctr.*, 344 F.3d  
10 at 858 n. 36.

11 **270.** Given these daunting realities and the EPA's careless documentation of its reasons for invok-  
12 ing the emergency and consistency exemptions, we hold that the EPA's decision to exceed the  
13 statutory cap was based on irrelevant factors, there has been a clear error of judgment, and the deci-  
14 sion was arbitrary and capricious. See *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 378, 109  
15 S.Ct. 1851, 104 L.Ed.2d 377 (1989); *Env'tl. Def. Ctr.*, 344 F.3d at 858 n. 36. Therefore, the EPA is  
16 not entitled to recover any costs of its removal action in Iron Mountain Mines as found by the dis-  
17 trict court.

### 18 III. INDIRECT COSTS CALCULATION

19 **271.** CERCLA authorizes the EPA to recover "all costs of removal or remedial action . . . [that are]  
20 not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). "All costs" in-  
21 clude indirect costs such as administrative and other overhead costs incurred in managing the  
22 greater Superfund program. See, e.g., *United States v. Dico*, 266 F.3d 864, 878 (8th Cir.2001)  
23 (concluding that "oversight and indirect costs are recoverable in remedial actions under  
24 CERCLA"). In order to capture these costs from disparate CERCLA response actions, "Allocating  
25 indirect costs that cannot be directly accounted for as costs of a specific project is a well-  
26 established accounting practice." *Kennecott Utah Copper Corp. v. United States DOI*, 88 F.3d  
27 1191, 1224 (D.C.Cir.1996).

1 **272.** Petitioner has shown that the EPA actions are inconsistent with the national contingency plan,  
2 arbitrary and capricious, an abuse of discretion, and therefore no cost recovery is allowed.

3 CONCLUSION

4 **273.** You should REVERSE the district court's order granting the EPA a recovery of response  
5 costs and judgment on the liability issue. You should also reverse the district court's order awarding  
6 the EPA costs and a declaratory judgment on the liability of Iron Mountain Mines for future costs.  
7 You should vacate the consent decree with a stay and order the EPA to enter into good faith nego-  
8 tiations for a memorandum of understanding concerning a joint hazardous waste repository on pri-  
9 vate property.

10 **274.** You should declare CERCLA void for vagueness and therefore unconstitutional.

11 **275.** The EPA negligently violated the express terms of 9604 (3) (A) and (4) which states:

12 (3) Limitations on Response.--The President shall not provide for a removal or remedial action un-  
13 der this section in response to a release or threat of release-- (A) of a naturally occurring sub-  
14 stance in its unaltered form, or altered solely through naturally occurring processes or phenomena,  
15 from a location where it is naturally found; (4) Exception to Limitations.--Notwithstanding para-  
16 graph (3) of this subsection, to the extent authorized by this section, the President may respond to  
17 any release or threat of release if in the President's discretion, it constitutes a public health or envi-  
18 ronmental emergency and no other person with the authority and capability to respond to the emer-  
19 gency will do so in a timely manner. Petitioner submits and the Administrative Record shows that  
20 previous co-defendants were willing and had the authority and capability to respond to the emer-  
21 gency in a timely manner, that said co-defendants did so respond to the emergency, that these re-  
22 maining defendants did submit plans for the remedy that was supported by those co-defendants, but  
23 were prevented from exercising this duty and implementing the remedy by the EPA. Petitioner  
24 submits that nowhere in this section is the agency afforded discretion based upon a determination  
25 of the adequacy of financial assurances as grounds for interfering with the owners right to imple-  
26 ment a remedy or relief from the obligation imposed by 9604 (3)(A) and (4) and other provisions of  
27 CERCLA, CWA, CAA, NCP, EPCRA, and State Laws. The grantees allege that the governments  
28 violated grantees' civil rights in failing to perform in accordance with 9604 (3)(A) and (4).



1 **276.** You should determine that the United States is liable under §1346, false claims with vindic-  
2 tive actions, illegitimate animus and despotism and tyranny, negligently arbitrary and capricious.  
3 § 6973. Imminent hazard

4 (a) Authority of Administrator

5 **277.** Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or  
6 present handling, storage, treatment, transportation or disposal of any solid waste or hazardous  
7 waste may present an imminent and substantial endangerment to health or the environment, the  
8 Administrator may bring suit on behalf of the United States in the appropriate district court against  
9 any person (including any past or present generator, past or present transporter, or past or present  
10 owner or operator of a treatment, storage, or disposal facility) who has contributed or who is con-  
11 tributing to such handling, storage, treatment, transportation or disposal to restrain such person  
12 from such handling, storage, treatment, transportation, or disposal, to order such person to take  
13 such other action as may be necessary, or both. A transporter shall not be deemed to have contrib-  
14 uted or to be contributing to such handling, storage, treatment, or disposal taking place after such  
15 solid waste or hazardous waste has left the possession or control of such transporter if the transpor-  
16 tation of such waste was under a sole contractual [1] arrangement arising from a published tariff  
17 and acceptance for carriage by common carrier by rail and such transporter has exercised due care  
18 in the past or present handling, storage, treatment, transportation and disposal of such waste. The  
19 Administrator shall provide notice to the affected State of any such suit. The Administrator may  
20 also, after notice to the affected State, take other action under this section including, but not limited  
21 to, issuing such orders as may be necessary to protect public health and the environment.

22 (b) Violations

23 **278.** Any person who willfully violates, or fails or refuses to comply with, any order of the Admin-  
24 istrator under subsection (a) of this section may, in an action brought in the appropriate United  
25 States district court to enforce such order, be fined not more than \$5,000 for each day in which  
26 such violation occurs or such failure to comply continues.

27 (c) Immediate notice  
28

1 **279.** Upon receipt of information that there is hazardous waste at any site which has presented an  
2 imminent and substantial endangerment to human health or the environment, the Administrator  
3 shall provide immediate notice to the appropriate local government agencies. In addition, the Ad-  
4 ministrator shall require notice of such endangerment to be promptly posted at the site where the  
5 waste is located.

6 (d) Public participation in settlements

7 **280.** Whenever the United States or the Administrator proposes to covenant not to sue or to forbear  
8 from suit or to settle any claim arising under this section, notice, and opportunity for a public meet-  
9 ing in the affected area, and a reasonable opportunity to comment on the proposed settlement prior  
10 to its final entry shall be afforded to the public. The decision of the United States or the Adminis-  
11 trator to enter into or not to enter into such Consent Decree, covenant or agreement shall not consti-  
12 tute a final agency action subject to judicial review under this chapter or chapter 7 of title 5.

13 EPA GUIDANCE ON THE USE OF SECTION 7003 OF RCRA

14 I. INTRODUCTION

15 Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.

16 **281.** § 6973, provides the U.S. Environmental Protection Agency (EPA) with broad and effective  
17 enforcement tools that can be used to abate conditions that may present an imminent and substan-  
18 tial endangerment to health or the environment. Section 7003 allows EPA to address situations  
19 where the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste  
20 may present such an endangerment. In these situations, EPA can initiate judicial action or issue an  
21 administrative order to any person who has contributed or is contributing to such handling, storage,  
22 treatment, transportation, or disposal to require the person to refrain from those activities or to take  
23 any necessary action.

24 **282.** Among its many benefits, Section 7003 provides EPA with a strong and effective means of  
25 furthering risk-based enforcement and implementing its strategy for addressing the worst RCRA  
26 sites first, a strategy which EPA developed in response to its 1990 RCRA Implementation Study.  
27 Under this strategy, EPA is addressing the universe of waste management facilities on the basis of  
28 environmental priorities. Furthermore, at any given site, EPA is attempting to use whatever legal

1 authority is best suited to achieving environmental success. Section 7003 provides an invaluable  
2 means for achieving environmental success at many of these sites.

3 **283.** In consultation with EPA regional offices and other headquarters offices, the Office of Site  
4 Remediation Enforcement and the Office of Regulatory Enforcement have developed this guidance  
5 document to assist the regional offices in exercising the Agency’s authorities under RCRA § 7003.  
6 In addition to providing practical advice on the use of Section 7003, this document summarizes  
7 significant legal decisions that have addressed Section 7003

8 .2 This document supersedes (1) the “Final Revised Guidance Memorandum on the Use and Issu-  
9 ance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery  
10 Act (RCRA)” which was issued on September 26, 1984 (“1984 Guidance”), and (2) the fact sheet  
11 entitled “The Imminent and Substantial Endangerment Provision of Section 7003,” which was is-  
12 sued by the Office of Site Remediation Enforcement in May 1996.

13 EPA references RCRA § 7003 in various policy and guidance documents. In light of the issuance  
14 of this guidance, the Region should consult with headquarters regarding the applicability of any of  
15 those documents to particular actions described in this guidance. Before taking any particular ac-  
16 tion, the Region should examine Attachment 1 regarding delegations, consultations, and concur-  
17 rence.

18 Section 7003 when there is an ongoing criminal investigation or prosecution against the same per-  
19 son concerning the same or a related matter, the Regions should consult the June 22, 1994 memo-  
20 randum from Steven A. Herman entitled “Parallel Proceedings Policy” and the applicable DOJ par-  
21 allel proceedings policy.

22 RCRA § 7003(a) is also similar in some respects to the citizen suit provision set forth in RCRA §  
23 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). That provision allows any person, including any state, to  
24 initiate a civil action against any person who has contributed or is contributing to certain activities  
25 which may present an imminent and substantial endangerment to health or the environment. Be-  
26 cause Section 7002(a)(1)(B) contains an endangerment standard and many terms that are identical  
27 to those used in Section 7003(a), some court decisions addressing Section 7002(a)(1)(B) may assist  
28 the Regions in interpreting Section 7003.

1 It is EPA’s position, and at least one court agrees, that EPA may take action under  
2 Section 7003 even if the government is simultaneously taking action against the defendant under  
3 CERCLA. The Regions may therefore use Section 7003 either independently or as a supplement to  
4 actions taken under CERCLA or other statutes.

5 In practice, the Regions may find that they sometimes need to choose between using Section 7003  
6 over CERCLA § 106(a) or RCRA § 3008(h). The following discussion describes when to consider  
7 using RCRA § 7003 instead of those two authorities.

8 1. Comparison of RCRA § 7003 and CERCLA § 106(a)

9 Under CERCLA § 106(a), EPA may initiate a judicial action or issue an administrative order when  
10 there may be an imminent and substantial endangerment because of an actual or threatened release  
11 of a “hazardous substance.”

12 a. Advantages of RCRA § 7003

13 The Regions may consider using RCRA § 7003 instead of CERCLA § 106(a) in order to:

14 C Address potential endangerments caused by materials that meet RCRA’s statutory definition of  
15 “solid waste” but are not “hazardous substances” under CERCLA – The definition of “hazardous  
16 substance” in Section 101(14) of CERCLA, 42 U.S.C.

17 § 9601(14), does not include all materials that qualify as “solid waste” under RCRA

18 § 1004(27), 42 U.S.C. § 6903(27). Note, however, that the CERCLA definition of

19 “hazardous substances” does encompass some materials, such as radionuclides, which are not  
20 “solid waste” under RCRA.

21 C Address potential endangerments caused by “hazardous waste” that meets the broad definition of  
22 that term under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), but which is not a CERCLA “haz-  
23 arduous substance” because it fails to meet the more narrow definitions of “hazardous waste” prom-  
24 ulgated in 40 C.F.R. Part 261 pursuant to RCRA § 3001 -- CERCLA’s definition of “hazardous  
25 substance” includes “hazardous waste” having characteristics identified under or listed pursuant to  
26 Section 3001 of RCRA, 42 U.S.C. §6921. It does not include all materials that qualify as “hazard-  
27 ous waste” as defined in RCRA § 1004(5).

1 On July 9, 2008, the U.S. Court of Appeals for the First Circuit held that a state could intervene,  
2 through a consent decree, in a trifurcated CERCLA action four years after first invited and after the  
3 trial court had made initial findings of liability. *City of Bangor v. Citizens Comm'ns Co.*, 532  
4 F.3d 70 (1st Cir. 2008). Here petitioner and defendant intervene. Void for vagueness with illegiti-  
5 mate animus and vindictive actions; CERCLA displays some of Judge Calabresi's  
6 characteristics of an obsolete statute. CERCLA's problems, however, go further than that. The hur-  
7 ried enactment of CERCLA by obsolete representatives--a lame-duck Congress and a lame-duck  
8 President--explains many of the problems CERCLA encounters today, but it does little to aid those  
9 who continue to grapple with the law's meaning.

10 With a Supreme Court that is unwilling to tackle CERCLA and an EPA that is unable to change or  
11 definitively to interpret the law, the task of reading CERCLA falls to affected parties and the lower  
12 federal courts. The lower courts can exercise a great influence on statutory interpretation simply by  
13 the large number of cases they decide. But the lower courts' struggle to produce a consistent inter-  
14 pretation of CERCLA suggests that Supreme Court opinions may play a more important role in  
15 statutory interpretation than previously recognized. In most other contexts, the Court's general dis-  
16 cussion of a statutory scheme provides clues about how the Court thinks the statute should be inter-  
17 preted. The lower courts cannot grasp any interpretive wisdom from the Supreme Court in  
18 CERCLA cases, which explains why so many courts try many different ways to make sense of  
19 CERCLA's mistakes.

20 **284.** What to do? The examples detailed in this case represent the many cases in which the inter-  
21 pretation of CERCLA has confounded every theory of statutory interpretation. But the steady flow  
22 of CERCLA litigation demands a coherent approach to reading the statute. Textualist inclinations  
23 teach to begin with the statutory text, to understand how the result is so truly absurd. CERCLA's  
24 language yields strange results, and these decisions show that other sources of interpretive insight  
25 cannot be expected to resolve difficult issues themselves. The fact that the statutory language yields  
26 absurd results is troubling. The only answer is that the Courts can find the law obsolete, and Con-  
27 gress can write a new law that does not violate civil rights and facilitates an equitable liability  
28 scheme. The only remedy to all of CERCLA's failings is in one comprehensive reform act.

1 **285.** The Supreme Court held, in *Ex Parte Milligan* 71 U.S. 2: No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

4 INTERVENTION

5 **286.** This matter is before the Court because the Property Owners have proposed to remedy the pollution at the Iron Mountain Mines, Inc. EPA Superfund site. The same remedy that has been waiting for 25 years since the EPA first placed Iron Mountain Mines on the National Priority List (NPL), the remedy that should have been complete by now if the Grantees had not been prevented by the EPA from implementing this remedy in the course of the proper care and maintenance of Iron Mountain Mines, Inc., the remedy as was proposed and under contract before the EPA commenced the "Removal Actions" that is still underway, the remedy of solution mining technologies that are accepted as standard practice in mining, technologies that are the recommended practice in EPA, DOE, and DOI guidance documents as best practices in active mining operations and for care and maintenance of inactive mining operations.

15 Reuse and recycling of mine waters is the preferred method of control according to EPA Guidance. Nevertheless, for the last 25 years the EPA has failed to implement a remedy at the Iron Mountain Mines, Inc. EPA Superfund site, after abandoning the EPA's originally proposed "remedy", which was the insane notion to plug the mine with concrete. Instead the EPA has embarked upon a 3000 year removal action that has so far accumulated 2 billion lbs. of acutely toxic hazardous waste on the Iron Mountain Mines, Inc. property.

21 **287.** The high density sludge that the EPA said was not a hazardous waste leaches at a pH of 2 or less and those leachate may contain cadmium in excess of 110 ppb, a bio-accumulative hazardous substance, in violation of EPCRA, the "Community right to know act", and other provisions of the environmental laws.

25 **288.** These wastes continue to accumulate unnecessarily at the rate of 60 to 80 million lbs a year. Furthermore, Petitioner and Grantees have discovered that the microorganisms that inhabit the mine have been unlawfully expropriated from the Iron Mountain Mines, Inc. property for commercial and industrial exploitation by others.

1 **289.** Petitioner and property owners command the Court to issue an injunction to protect the peti-  
2 tioner, the property owners, and the Public Health and the Environment from these wastes and  
3 other improper actions by the EPA and other government agencies, including provisions for im-  
4 plementing the proper recycling and reuse of these wastes in accordance with the law, particularly  
5 the Resource Conservation and Recovery Act, (RCRA) and California recycling laws.

6 **290.** Petitioner and Grantees plan includes clean up of the 2 billion lbs. of acutely toxic hazardous  
7 waste sludge negligently disposed upon Grantees property, and command the court to deliver in  
8 constructive trust the “billion dollar settlement”.

9 **291.** The failure of the EPA to facilitate this remedy is a violation of environmental laws and a vio-  
10 lation of the EPA legislative mandate, and a violation of Petitioners and Grantees constitutionally  
11 protected Rights to Due Process, Equal Protection, and other rights retained by the people.

12 **292.** Grantees have been segregated and discriminated against, the EPA invasion and occupation  
13 of Defendant's property is a Takings of Private Property for the Public Benefit requiring Just Com-  
14 pensation, the terms of the Consent Decree and the settlement of Dec. 2000 is a manifest injustice,  
15 with errors of impunity and miscarriage of Justice, the EPA failure to allow the Grantees to imple-  
16 ment appropriate care and maintenance of Iron Mountain Mines, Inc. is an act of Tyranny protected  
17 by Judicial Swaddling and Judicial Deference for the State and Federal Conspirators under Color of  
18 Law, to the detriment of the Public Welfare, the Public Treasury, the Public Interest, and the Public  
19 Benefit. The Consent Decree and settlement is unfair and unjust, it is a trespass, it is a negligent  
20 endangerment, it is a Fraud upon the Court.

21 **293.** The EPA has levied a lien in the amount of \$51 million against the Grantees properties to re-  
22 cover “unrecovered past response costs” that Grantees have shown were entirely unnecessary, costs  
23 that were incurred by fraudulent misrepresentations of the cause of the pollution, and costs that  
24 continue only because of the unlawful interference by the EPA with the rights of the Grantees as  
25 mine owner to proceed with the proper care and maintenance of the mine properties. The EPA is  
26 only able to perpetuate this fraud because of the judicial swaddling and judicial deference that pre-  
27 cludes any accountability by the EPA for its actions.



1 **294.** Grantees have further shown that the “unrecovered past response costs” as well as any “re-  
2 covered past response costs” were not only entirely unnecessary but contrary to the public interest,  
3 and that interpretations of law that facilitate or reinforce such actions are a violation of established  
4 U.S. Supreme Court case law, of Petitioner and Grantees civil rights, and in violation of the Consti-  
5 tutions of the United States and of California.

6 **295.** ("Fraud upon the court" has been defined by the 7th Circuit Court of Appeals to "embrace  
7 that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by  
8 officers of the court so that the judicial machinery can not perform in the usual manner its impartial  
9 task of adjudging cases that are presented for adjudication." Kenner v. C.I.R., 387 F.3d 689 (1968);  
10 7 Moore 's Federal Practice, 2d ed., p. 512, ¶ 60.23. The 7th Circuit further stated "a decision pro-  
11 duced by fraud upon the court is not in essence a decision at all, and never becomes final.")

12 False Claims of Imminent and Substantial Endangerment.

13 False Claims of Remedial Action

14 False Claims to obtain a DETERMINATION OF PROBABLE CAUSE

15 False Claims under Section 107(1) of CERCLA, 42 U.S.C. §9607 (1) CERCLA lien provisions.

16 False Claims under CERCLA Due Process Requirements.

17 False Claims of agents and agencies with malice and oppression under color of law.

18 False Claims of Steven W. Anderson, Regional Judicial Officer for EPA.(May 4, 2000)

19 "In order to establish that it had no reason to know of the disposal of hazardous substances at the  
20 facility, a defendant must have undertaken, at the time of acquisition, all appropriate inquiry into  
21 the previous ownership and uses of the property consistent with good commercial or customary  
22 practice in an effort to minimize liability. . . . The court shall take into account commonly known or  
23 reasonably ascertainable information about the property, the obviousness of the presence or likely  
24 presence of contamination at the property, and the ability to detect such contamination by appropri-  
25 ate inspection.

26 IMMI has failed to show by a preponderance of the evidence that it meets this condition."

27 CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B). (This is CERCLA as amended represented  
28 here to regulate "Due Care" purchase of real property in 1976 and as grounds for denial of third

1 party and innocent landowner defenses and requiring knowledge a priori. hence ex post facto, and  
2 also suggesting EPA actions constitute a benefit to the True and Rightful Owners deserving of EPA  
3 recoupment by a "Windfall lien".)

4 This is the EPA's only basis for denial of the innocent landowner defense to the grantees, and re-  
5 quires knowledge of a hazardous substance a priori, which is before the law designated copper,  
6 zinc, and cadmium as hazardous substance.

#### 7 CONCLUSION

8 **296.** Therefore, irreparable harm has taken place and is believed to be ongoing, and the relief  
9 should be granted as requested. Affirmed under penalty of perjury.

10 For the reasons heretofore established, grantees petition to vacate the finding of Probable Cause of  
11 May, 2000, the Consent Decree of Dec. 2000, the Partial Summary Judgment of 10-04-2005 deny-  
12 ing property owner an innocent land owner defense under 101(35) as void, and because it is no  
13 longer equitable that the judgments should have prospective application; and any other reason justi-  
14 fying relief from the operation of the judgment, and because it was the result of fraud upon the  
15 Court. Sworn and affirmed by verified affidavit this day.

#### 16 EQUAL PROTECTION OF THE WARDEN OF THE FOREST

17 **297.** Petitioner first addresses the theory that state law is controlling. Section 6125 of California  
18 Code provides that: "No person shall practice law in California unless the person is an active mem-  
19 ber of the State Bar." Cal. Bus. & Prof. Code § 6125 (2003). This "prohibition against unauthorized  
20 law practice is . . . designed to ensure that those performing legal services do so competently." Bir-  
21 brower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1, 5 (Cal. 1998).<sup>2</sup> Accordingly,  
22 a violation of section 6125 is considered a misdemeanor, and "[n]o one may recover compensation  
23 for services as an attorney at law in [California] unless the person was at the time the services were  
24 performed a member of The State Bar." Id. (quoting Hardy v. San Fernando Valley Chamber of  
25 Commerce, 222 P.2d 314, 317 (Cal. Ct. App. 1950)) (alterations omitted).

26 **298.** California courts have yet to fully articulate the scope of what constitutes "practicing law in  
27 California" under section 6125. They have made clear that section 6125 covers representation be-  
28 fore California courts. Birbrower, 949 P.2d at 5. On the other hand, section 6125 "does not regulate

1 practice before United States courts,” *id.* at 6, and therefore does not restrict the receipt of attorney’s fees for services related to federal court proceedings. *Cowen v. Calabrese*, 230 Cal. App. 2d 3 870, 872-73 (Cal. Ct. App. 1964). In *Z.A. v. San Bruno Park School District*, 165 F.3d 1273 (9th 4 Cir. 1999), the Ninth Circuit determined that section 6125 covered practice before state agencies 5 even when the state agencies are enforcing federal law. *Id.* at 1276.

6 **299.** Although the Ninth Circuit applied section 6125 to practice before state administrative agencies, our attention has not been directed to any instance in which section 6125 has been applied to 7 restrict attorney practice before a federal administrative agency. To the contrary, a 1994 memorandum issued by the Office of Professional Competence, Planning & Development of the State Bar of 8 California indicated that the bar at least does not view section 6125 as covering federal administrative 9 proceedings:

10 **300.** The State Bar takes the general position that where a non-member is permitted to practice before a federal court (district, appellate, admiralty) or a federal agency (INS, Patent Office), such 11 individual is not engaged in the unauthorized practice of law while performing activities before 12 such federal courts or agencies in California.

13 **301.** The Petitioner vigorously disputes whether the activities of petitioner’s would violate California law. Whether or not California law applies, it is quite clear that state law purporting to govern 14 practice before a federal administrative agency would be invalid. It is long established that any 15 state or local law which attempts to impede or control the federal government or its instrumentalities is deemed presumptively invalid under the Supremacy Clause. *Leslie Miller, Inc. v. Arkansas*, 16 352 U.S. 187, 189-90 (1956); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920); *McCulloch v. Maryland*, 17 17 U.S. 316, 429-430 (1819); *Mount Olivet Cemetery Ass’n. v. Salt Lake City*, 164 F.3d 480, 18 486 (10th Cir. 1998); *Don’t Tear It Down, Inc. v. Pa. Ave. Dev. Corp.*, 642 F.2d 527, 534-35 (D.C. 19 20 Cir. 1980).<sup>3</sup>

21 **302.** As a consequence, the Supreme Court and the courts of appeals have frequently invalidated 22 state licensing requirements for federal employees and federal contractors. See *Leslie Miller Inc.*, 23 352 U.S. at 190 (holding that the United States Air Force alone has the authority to determine the 24 type of license that is required of its independent contractors); *Johnson*, 254 U.S. at 57 (holding 25 26 27 28

1 that a state could not require the driver of a United States Postal truck to obtain a state driver's li-  
2 cense before performing his duties); *United States v. Virginia*, 139 F.3d 984, 987-88 (4th Cir.  
3 1998) (holding that the Virginia Criminal Justice Services Board could not require private investi-  
4 gators under contract with the FBI to obtain state private investigator licenses); *Taylor v. United*  
5 303. While there is no bright line rule regarding what constitutes a "federal instrumentality," the  
6 Supreme Court has looked to several factors, including: whether the entity was created by the gov-  
7 ernment; whether it was established to pursue governmental objectives; whether government offi-  
8 cials handle and control its operations; and whether the officers of the entity are appointed by the  
9 government. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397-98 (1995) (considering these  
10 factors to find that Amtrak was an instrumentality of the United States).  
11 *States*, 821 F.2d 1428, 1431-32 (9th Cir. 1987) (noting that California could not require an army  
12 hospital or its health care providers to be licensed under state law).

13 304. So too state licensing requirements which purport to regulate private individuals who appear  
14 before a federal agency are invalid. In *Sperry v. Florida*, 373 U.S. 379 (1963), the Florida Bar at-  
15 tempted to enjoin a non-attorney from performing services in the state relating to a patent prosecu-  
16 tion occurring before the United States Patent and Trademark Office ("PTO"). *Id.* at 381. The Flor-  
17 ida Bar argued that the non-attorney was engaged in the "unauthorized practice of law" because the  
18 Florida Bar had not licensed him. *Id.* at 382. The Supreme Court held that a "State may not enforce  
19 licensing requirements which . . . give 'the State's licensing board a virtual power of review over  
20 the federal determination' that a person or agency is qualified and entitled to perform certain func-  
21 tions," and found that the state's licensing requirements could not govern practice before the PTO.  
22 *Id.* at 385, 388 (quoting *Leslie Miller, Inc.*, 352 U.S. at 190).

23 305. Just as the states cannot regulate practice before the PTO, they cannot regulate practice before  
24 the EPA and DOJ. Allowing state control would plainly impede the conduct of federal proceedings  
25 even though the EPA does not have procedures for admitting counsel to practice before it. The  
26 EPA "is an independent Government agency that operates like a court." 5 C.F.R. § 1200.1 (2004).  
27 California has no authority to require that attorneys practicing before the Board obtain a state li-  
28

1 cense or to regulate the award of fees for work before federal agencies. To the extent that the EPA  
2 holds otherwise, that decision cannot stand.

3 We turn now to the second question—whether federal law incorporates state law. This in turn re-  
4 quires consideration of two subsidiary questions: whether federal law incorporates state law as to  
5 the right to practice before the Board; and whether federal law incorporates state law as to who is  
6 entitled to fees.

7 306. Although a state cannot regulate the licensing requirements of attorneys before the EPA, fed-  
8 eral law may adopt or incorporate state law standards as its own. See, e.g., *NLRB v. Natural Gas*  
9 *Util. Dist. of Hawkins County*, 402 U.S. 600, 603 (1971) (“There are, of course, instances in which  
10 the application of certain federal statutes may depend on state law.”) (quoting *NLRB v. Randolph*  
11 *Elec. Membership Corp.*, 343 F.2d 60, 62 (4th Cir. 1965)). But incorporation “is controlled by the  
12 will of Congress. In the absence of a plain indication to the contrary . . . it is to be assumed when  
13 Congress enacts a statute that it does not intend to make its application dependent on state law.” *Id.*  
14 (internal quotation marks omitted).

15 307. The relevant statute regarding appeals to the Board states that: “An appellant [before the  
16 Board] shall have the right . . . to be represented by an attorney or other representative.” 5 U.S.C. §  
17 7701(a)(2) (2000). The regulation states that “[a] party may choose any representative as long as  
18 that person is willing and available to serve.” 5 C.F.R. § 1201.31(b) (2004). Here, neither the stat-  
19 ute nor the regulation imposes a requirement that an attorney appearing before the Board be li-  
20 censed in the state in which the services are rendered. Thus, we must assume that neither Congress  
21 nor the Board had intended to incorporate state law.

22 308. Quite apart from the statutory and regulatory silence, it seems clear that federal law here does  
23 not incorporate state-law rules governing the unauthorized practice of law. Congress has addressed  
24 the role of state law most directly in connection with the application of state-law rules to govern-  
25 ment attorneys. In 1998, Congress, concerned that government attorneys should abide by state eth-  
26 ics standards, enacted 28 U.S.C. § 530B, which provides:

1 309. An attorney for the Government shall be subject to State laws and rules, and local Federal  
2 court rules, governing attorneys in each State where such attorney engages in that attorney’s duties,  
3 to the same extent and in the same manner as other attorneys in that State.

4 310. 28 U.S.C. § 530B(a) (2000). But nothing in section 530B suggests that government attorneys  
5 must abide by state licensing requirements. To the contrary, 28 C.F.R. § 77.2 (which is referred to  
6 by section 530B(c) for the definition of “attorney for the Government”) explicitly rejects the propo-  
7 sition that government attorneys must comply with state licensing requirements. The regulation  
8 states that the “phrase state laws and rules and local federal court rules governing attorneys . . . .  
9 does not include . . . [a] statute, rule, or regulation requiring licensure or membership in a particular  
10 state bar.” 28 C.F.R. § 77.2(h) (2004). Thus, while government attorneys must abide by the ethical  
11 codes of conduct of each state in which they perform their services, they do not have to be licensed  
12 by those states to practice law.

13 311. In *Collins v. Department of Justice*, 94 M.S.P.R. 62 (2003), the Board held that private attor-  
14 neys appearing before it will also be expected to conform to applicable state rules governing attor-  
15 ney conduct but did not suggest that they must abide by state licensing requirements. The issue in  
16 *Collins* was whether a particular attorney should be disqualified to serve as a representative under 5  
17 C.F.R. § 1201.31(b). Although the regulation allows a party to choose “any representative as long  
18 as that person is willing representative had previously established an attorney-client relationship  
19 with a witness opposing Collins and therefore had a potential conflict of interest. *Collins*, 94  
20 M.S.P.R. at 63-64. The Board reasoned that private attorneys should follow the same state ethics  
21 rules as government attorneys, referring to section 530B. *Id.* at 68-69. It found that under Califor-  
22 nia’s ethics rules, Collins’ attorney was disqualified. *Id.* But Collins and available to serve,” the  
23 regulation provides that “[t]he other party or parties may challenge the designation, however, on  
24 the ground that it involves a conflict of interest or a conflict of position.” 5 C.F.R. § 1201.31(b). In  
25 *Collins*, Collins’ designated attorney did not suggest that private attorneys should be subject to  
26 state licensing requirements.

27 312. It would indeed adversely affect proceedings before federal administrative agencies if state  
28 licensing rules were applied, since the pool of available attorney representatives would be severely

1 impaired. In addition to finding an attorney who is accessible and familiar with Board practice, the  
2 private party would also have to find an attorney who is licensed in the state in which services are  
3 to be rendered. In a similar situation, the Supreme Court in *Sperry*, while not directly addressing  
4 the incorporation issue, concluded that applying state licensing requirements to practitioners ap-  
5 pearing before the PTO would have a “disruptive effect,” given that one-quarter of the attorney  
6 practitioners before the PTO would have been disqualified because they were not licensed in the  
7 state in which they were practicing. 373 U.S. at 401. Moreover, the various state bar rules govern-  
8 ing unauthorized practice are not uniform. See generally ABA Section of Legal Educ. and Admis-  
9 sions to the Bar & Nat’l Conference of Bar Examiners, *Comprehensive Guide to Bar Admissions*  
10 *Requirements* (2005). To require the federal agency and those practicing before it to determine in  
11 every case whether a representative was authorized to perform particular services within the state  
12 as an attorney would burden both the bar and the agencies themselves. We thus conclude that the  
13 federal statute here does not incorporate state law and that an attorney licensed in any state or fed-  
14 eral jurisdiction is authorized to practice as an attorney before the EPA.

15 313. The government will nonetheless argue that even if petitioner could properly prosecute before  
16 the Circuit Court as a private attorney general, his entitlement to fees is determined by state law,  
17 and that no federal interest is undermined in determining fees in accordance with state law. As with  
18 the first issue regarding the right to prosecute before the Circuit Court, there is nothing in the text  
19 of the fee-shifting statute to suggest incorporation of state law. Here, the fee-shifting provision of  
20 the VEOA states: “A preference eligible who prevails in an action under section 3330a or 3330b  
21 shall be awarded reasonable attorney fees, expert witness fees, and other litigation expenses.” 5  
22 U.S.C. § 3330c(b) (2000). The Board’s regulation governing attorney’s fees merely states that the  
23 fee application must show why the applicant is “entitled to an award under the applicable statutory  
24 standard,” and must show “an established attorney-client relationship.” 5 C.F.R. § 1201.203  
25 (2004). Given the statutory and regulatory silence, the presumption here again is that federal law  
26 does not incorporate state standards. There is also no legislative history suggesting an intent to in-  
27 corporate state law.



1 314. Petitioner is also not aware of any suggestion in the myriad of Supreme Court cases concern-  
2 ing attorney’s fees statutes that state law limits fee awards under federal law. In fact, it is quite  
3 clear that denying fees to attorneys authorized to practice before federal agencies would severely  
4 undermine the congressional purpose. The federal fee-shifting statutes recognize that awarding  
5 compensation to the prevailing party plays an important role in allowing clients to secure counsel  
6 in the first place. The Supreme Court has, on numerous occasions, explained that the “fundamental  
7 aim of [fee-shifting] statutes is to make it possible for those who cannot pay a lawyer for his time  
8 and effort to obtain competent counsel, this by providing lawyers with reasonable fees to be paid  
9 by the losing defendants.” *Pennsylvania v. Del. Valley Citizens’ Council*, 483 U.S. 711, 725 (1987)

10 315. It seems axiomatic that the denial of fees to attorneys practicing before federal agencies would  
11 discourage such representation by attorneys. To allow attorneys to practice before federal agencies,  
12 while barring them from collecting fees under the attorney’s fees statute, would, as a practical mat-  
13 ter, bar such private representation entirely in many cases and limit representation to the few attor-  
14 neys willing to serve without compensation. Under the government’s theory it might even be im-  
15 permissible for the attorney to receive compensation out of the client’s own monetary recovery. A  
16 restrictive reading of the term “attorney” in the fee-shifting statute would thus naturally limit the  
17 opportunities that veterans would have in obtaining counsel.

18 Under these circumstances, the purposes of the fee-shifting statute can be served only by allowing  
19 fees for representatives.

20 316. Where a statute’s text and legislative history are silent on an issue of statutory construction,  
21 the overriding purpose of the provision is highly relevant in resolving the ambiguity. *Candle Corp.*  
22 *of Am. v. U.S. Int’l. Trade Comm’n*, 374 F.3d 1087, 1093 (Fed. Cir. 2004); *Warner-Lambert Co. v.*  
23 *Apotex Corp.*, 316 F.3d 1348, 1355 (Fed. Cir. 2003) (“When interpreting a statute, the court will  
24 not look merely to a particular clause in which general words may be used, but will take in connec-  
25 tion with it the whole statute (or statutes on the same subject) and the objects and policy of the law,  
26 as indicated by its various provisions, and give it such a construction as will carry into execution  
27 the will of the Legislature.”) (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)).

1 317. Generally, the various federal fee-shifting statutes are to be interpreted consistently. *Buckhan-*  
2 *non Bd. & Care Home, Inc. v. W.V. Dep't of Health and Human Res.*, 532 U.S. 598, 603 n.4  
3 (2001); *Indep. Fed'n. of Flight Attendants*, 491 U.S. at 758 n.2 (1989); *Hensley v. Eckerhart*, 461  
4 U.S. 424, 433 n.7 (1983). lawyers with reasonable fees to be paid by the losing defendants.” *Penn-*  
5 *sylvania v. Del. Valley Citizens' Council*, 483 U.S. 711, 725 (1987).

6 318. See also *Kay v. Ehrler*, 499 U.S. 432, 436-38 (1991) (finding that the purpose of the fee-  
7 shifting provision in 42 U.S.C. § 1988 was “to enable potential plaintiffs to obtain the assistance of  
8 competent counsel in vindicating their rights”); *Pennsylvania v. Del. Valley Citizens' Council*, 478  
9 U.S. 546, 565 (1986) (“[T]he aim of [fee-shifting] statutes was to enable private parties to obtain  
10 legal help in seeking redress for injuries resulting from the actual or threatened violation of specific  
11 federal laws.”); *Hensley*, 461 U.S. at 429 (“The purpose of § 1988 is to ensure effective access to  
12 the judicial process for persons with civil rights grievances.”) (internal quotation marks omitted);  
13 *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (“It is clear that [in the fee-shifting pro-  
14 vision of the Civil Rights Act] Congress intended to facilitate the bringing of discrimination com-  
15 plaints. Permitting an attorney's fee award . . . furthers this goal, while a contrary rule would force  
16 the complainant to bear the costs . . . and thereby would inhibit the enforcement of a meritorious  
17 discrimination claim.”); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978) (noting  
18 that Congress' primary purpose in enacting the fee-shifting provision of the Civil Rights Act was to  
19 “make it easier for a plaintiff of limited means to bring a meritorious suit”); *Martin v. Hadix*, 527  
20 U.S. 343, 364 n.1 (1999) (Scalia, J., concurring in part and concurring in the judgment)

21 319. Agency's factual findings are reviewed under the substantial evidence standard. *See Dickinson*  
22 *v. Zurko*, 527 U.S. 150, 153-61 (1999) (rejecting “clearly erroneous” review and reaffirming sub-  
23 stantial evidence); *Alaska Dept. of Health and Soc. Servs. v. Centers for Medicare and Medicaid*  
24 *Servs.*, 424 F.3d 931, 938 (9th Cir. 2005); *Lucas v. NLRB*, 333 F.3d 927, 931  
25 (9th Cir. 2003). Substantial evidence means more than a mere scintilla but less than a preponder-  
26 ance; it means such relevant evidence as a reasonable mind might accept as adequate to support a  
27 conclusion. *See NLRB v. International Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th  
28 Cir. 2003); *De la Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003). The

1 standard, however, is “extremely deferential” and a reviewing court must uphold the agency’s find-  
2 ings “unless the evidence presented would *compel* a reasonable factfinder to reach a contrary re-  
3 sult.” *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.), *amended by* 339 F.3d 1012 (9th  
4 Cir. 2003).<sup>7</sup> If the evidence is susceptible to more than one rational interpretation, the court may  
5 not substitute its judgment for that of the agency. *See Bear Lake Watch, Inc. v. FEC.*, 324 F.3d  
6 1071, 1076 (9th Cir. 2003); *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002).

7 320. The substantial evidence standard requires the appellate court to review the administrative re-  
8 cord as a whole, weighing both the evidence that supports the agency’s determination as well as the  
9 evidence that detracts from it. *See De la Fuente*, 332 F.3d at 1220 (reviewing the record as a  
10 whole); *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001); *Smolen v. Chater*, 80 F.3d  
11 1273, 1279 (9th Cir. 1996).

12 321. A district court’s decision to exclude extra-record evidence when reviewing an agency’s deci-  
13 sion is reviewed for an abuse of discretion. *See Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir.  
14 1998); *Southwest Ctr. For Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447  
15 (9<sup>th</sup> Cir. 1996); *see also Bear Lake Watch*, 324 F.3d at 1077 n.8 (declining to  
16 review extra-record evidence).

17 322. Note that when an agency and a hearings officer disagree, the court reviews the decision of the  
18 agency, not the hearings officer. *See Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990), *amended*  
19 *by* 932 F.2d 1352 (9<sup>th</sup> Cir. 1991); *NLRB v. International Bhd. of Elec. Workers, Local 77*, 895 F.2d  
20 1570, 1573 (9th Cir. 1990).<sup>8</sup> Thus, the standard of review is not modified when such a disagree-  
21 ment occurs. *See Maka*, 904 F.2d at 1355; *International Bhd.*, 895 F.2d at 1573. When the agency  
22 rejects the hearings officer’s credibility findings, however, it must state its reasons and those rea-  
23 sons must be based on substantial evidence. *See Maka*, 904 F.2d at 1355;  
24 *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986).

25 323. This court defers to credibility determinations made by hearings officers. *See Manimbao v.*  
26 *Ashcroft*, 329 F.3d 655, 658 (9th Cir. 2003); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1050 (9th  
27 Cir. 2002); *Underwriters Lab., Inc. v. NLRB*, 147 F.3d 1048, 1051 (9th Cir. 1998). Such credibility  
28 determinations must be upheld unless they are “inherently or patently unreasonable.” *Retlaw*

1 *Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995) (internal quotation omitted). Although  
2 deference is given, a hearings officer must give specific, cogent reasons for adverse credibility  
3 findings. See *Manimbao*, 329 F.3d at 658; *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002); *Red-*  
4 *dick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

#### 5 ENVIRONMENTAL PROTECTION AGENCY REVIEW

6 324. Final administrative actions of the EPA are reviewed under the standards established by the  
7 Administrative Procedures Act. See *Ober v. Whitman*, 243 F.3d 1190, 193 (9th Cir. 2001); *Defend-*  
8 *ers of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.), amended by 197 F.3d 1035 (9th  
9 Cir. 1999). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed  
10 de novo. See *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001).

11 The court may reverse the EPA's decision only if it is arbitrary, capricious, an abuse of discretion,  
12 or otherwise not in accordance with law. See *Defenders of Wildlife v. United States Env't Prot.*  
13 *Agency*, 420 F.3d 946, 958-59 (9th Cir. 2005) (discussing what is "arbitrary and capricious");  
14 *Ober*, 243 F.3d at 1193; *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Defer-  
15 ence is owed to the EPA's interpretation of its own regulations if those regulations are not unrea-  
16 sonable. See *Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996); see also  
17 *Pronsolino v. standard*); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d  
18 843, 848-49 (9th Cir. 2001) (noting court may reject a construction inconsistent with statutory  
19 mandates or that frustrate the statutory policies that Congress sought to implement). *Nastri*, 291  
20 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference owed to the EPA).

21 \_\_\_\_\_  
22 1 See *Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003), cert. denied,  
23 541 U.S. 1085 (2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003);  
24 *Arizona Cattle Growers' Ass'n*, 273 F.3d at 1236; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir.  
25 2001); *United States v. Snoring Relief Lab Inc.*, 210 F.3d 1081, 1085 (9th Cir. 2000).  
26 2 *Fry v. DEA*, 353 F.3d 1041, 1043 (9th Cir. 2003); *Environmental Def. Ctr.*, 344 F.3d at 858 n.36;  
27 *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1235 (9th Cir. 2001) (not-  
28

1 ing “narrow scope” of review); *Hells Canyon Alliance*, 227 F.3d at 1177; *Ninilchik Traditional*  
2 *Council*, 227 F.3d at 1194; *Snoring Relief Lab Inc.*, 210 F.3d at 1085.

3 3 See also *Community Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 792 (9th Cir.  
4 2003) (“considerable less deference” is owed to agency’s interpretation that conflicts with prior  
5 interpretation); *Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 n.7 (9th Cir. 1996) (no deference  
6 owed to interpretation that is contrary to plain and sensible meaning of regulation); *United States v.*  
7 *Trident Seafoods, Inc.*, 60 F.3d 556, 559 (9th Cir. 1995) (no deference owed to interpretation of-  
8 fered by counsel where the agency has not established a position).

9 4 See also *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9<sup>th</sup> Cir.) (describing two-step  
10 *Chevron* review, and noting when Congress leaves a statutory gap for the agency to fill, any admin-  
11 istrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to  
12 the statute), *amended by* 197 F.3d 1035 (9th Cir. 1999).

13 5 See also *American Fed. of Government Employees v. FLRA*, 204 F.3d 1272, 1275 (2000) (noting  
14 agency’s interpretation of a statute outside of its administration is reviewed de novo).

15 6 See also *Resources Invs., Inc. v. U.S. Army Corps of Eng’rs*, 151 F.3d 1162, 1165 (9th Cir. 1998)  
16 (deference does not extend to agency litigating positions that are wholly unsupported by regula-  
17 tions, rulings, or administrative practice).

18 7 See also *Krull v. SEC*, 248 F.3d 907, 911 (9th Cir. 2001) (noting court must “weigh pros and  
19 cons in the whole record with a deferential eye”); *Alderman v. SEC*, 104 F.3d 285, 288 (1997).

20 8 See also *Northern Montana Health Care Ctr. v. NLRB*, 178 F.3d 1089, 1093 (9th Cir. 1999)  
21 (“We employ the substantial evidence test even if the Boards decision differs materially from the  
22 ALJ’s.”); *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996) (where BIA conducts independent review  
23 of the IJ’s findings, court reviews BIA’s decision, not IJ’s).

24 9. The Supreme Court held, in *Ex Parte Milligan* 71 U.S. 2: No doctrine, involving more pernicious  
25 consequences, was ever invented by the wit of man than that any of its provisions can be suspended  
26 during any of the great exigencies of government."

27 **SUPREME AUTHORITY**

28

1 325. ... “In the mining partnership those occurrences make no dissolution, but the others go on;  
2 and, in case a stranger has bought the interest of a member, the stranger takes the place of him who  
3 sold his interest, and cannot be excluded. If, death, insolvency, or sale were to close up vast mining  
4 enterprises, in which many persons and large interests participate, it would entail disastrous conse-  
5 quences. From the absence of this *delectus personae* in mining companies flows another result, dis-  
6 tinguishing them from the common partnership, and that is a more limited authority in the individ-  
7 ual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or  
8 accept bills of exchange binding the partnership or its members, unless it is shown that he had au-  
9 thority; nor can a general superintendent or manager. They can only bind the partnership for such  
10 things as are necessary in the transaction of the particular business, and are usual in such business.  
11 Charles v. Eshleman, 5 Colo. 107; Shillman v. Lachman, 83 Am Dec. 96, and note; McConnell v.  
12 Denver, 35 Cal. 365; Jones v. Clark, 42 Cal. 181; Manville v. Parks, 7 Colo. 128, 2 Pac. 212;  
13 Congdon v. Olds, 18 Mont. 487, 46 Pac. 261. 29 S.E. 505. In fact, it is a rule that a nontrading  
14 partnership, as distinguished from a trading commercial firm, does not confer the same authority by  
15 implication on its members to bind the firm; as. e.g. a partnership to run a theater or other single  
16 enterprise only. Pease v. Cole, 53 Conn. 53, 22 Atl. 681; Deardorf’s Adm’r v. Tacher, 78 Mo. 128;  
17 Smith, Merc. Law, 82; T Pars. Partn. § 85; Pooley v. Whitmore, 27 Am. Rep. 733. ( **e.g. an insur-**  
18 **ance company or a bank.**)

19 A mining partnership is a nontrading partnership, and its members are limited to expenditures nec-  
20 essary and usual in the particular business. Bates, Partn. , § 329. Members of a mining partnership,  
21 holding the major portion of the property, have power to do what may be necessary and proper for  
22 carrying on the business, and control the work, in case all cannot agree, provided the exercise of  
23 such power is necessary and proper for carrying on the enterprise for the benefit of all concerned.  
24 Dougherty v. Creary, 89 Am. Dec. 116. These principles settle much of this case. The demurrer  
25 was properly overruled, because there was a partnership, and equity only has jurisdiction to settle  
26 partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, 1273. \* \* \* **Justice**

27 **Brannon**

1 326. In *Dalliba v. Riggs*, 7 Ida. 779, 82 Pac. 107, it was laid down that while a court of equity can  
2 appoint a receiver to perfect and preserve mining property, it “ has no authority to place its receiver  
3 in charge of such property and operate the same, carrying on a general mining business, and while  
4 it turns out to be at a loss, as is likely to be the result in such cases, charge the same up as a pre-  
5 ferred claim and lien against the property, to the prejudice and loss of the holders of prior recorded  
6 liens on the same property” (82 Pac. At pp. 108-109). In that case the receiver appeared to have  
7 carried on the mining operations without any order of court directing him to do so and with reck-  
8 less extravagance, and in addition was shown not only not to have kept accurate accounts but also  
9 to have made in the account filed “many charges against the estate where no charge whatever  
10 should have been made and none in fact existed.” The court accordingly denied the receiver any  
11 allowance for his own time or services and any allowance for attorney’s fees. Government and set-  
12 tling parties cannot receive better treatment than these. **The government parties have demon-**  
13 **strably interfered with the proper care and operation of the mine, the complete development**  
14 **of the mine, and have by their misconduct acted to the negligent endangerment of the mine**  
15 **owners and failed to perfect and preserve the mining property. *Detinue sur bailment* should**  
16 **be granted immediately.**

17 **327.** AFTER an unequivocal experience of the inefficiency of the subsisting federal government,  
18 you are called upon to deliberate on a alternative.

19 **328.** Here, in strictness, the people surrender nothing; and as they retain every thing they have no  
20 need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of  
21 liberty to ourselves and our posterity, do ORDAIN and ESTABLISH this Constitution for the  
22 United States of America." Here is a better recognition of popular rights, than volumes of those  
23 aphorisms which make the principal figure in several of our State bills of rights, and which would  
24 sound much better in a treatise of ethics than in a constitution of government.

#### 25 **FACTS SHOWING EXISTENCE OF THE CLAIMED EMERGENCY**

26 **329.** The real parties in interest, T.W. Arman and John F. Hutchens, Grantees in a joint venture to  
27 re-mine mining wastes at Iron Mountain Mines, Inc. (EPA Superfund site), have SUBMITTED  
28 EVIDENCE AND INFORMATION OF A SUBSTANTIAL NATURE TO INDICATE THAT



1 THEY HAVE BEEN SLANDERED, LIBELLED, DEFRAUDED, AND ROBBED BY THE  
2 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY OF OVER \$500 MILLION  
3 DOLLARS IN REVENUES FROM THE SALE OF PRODUCTS RECOVERED FROM ACID  
4 MINE DRAINAGE, PRODUCT THAT WAS PREVIOUSLY RECOVERED AND RECYCLED,  
5 AND THAT THIS FRAUD CONTINUES BY FALSE CLAIMS AND FRAUD UPON THE  
6 COURT WITH NEGLIGENT ENDANGERMENT, TRESPASS, VIOLATIONS OF  
7 CONSTITUTIONALLY PROTECTED DUE PROCESS AND EQUAL PROTECTION, THE  
8 TAKING OF PRIVATE PROPERTY REQUIRING JUST COMPENSATION, FRAUDULENT  
9 DECEIT UNDER COLOR OF LAW, KNOWINGLY RECKLESS DISREGARD OF THE  
10 TRUTH, DELIBERATE IGNORANCE OF ACTUAL INFORMATION, AND MALICE,  
11 OPPRESSION, DESPOTISM, TYRANNY, ULTERIOR GOVERNMENT MOTIVES, BREACH  
12 OF LETTERS PATENTS, CONCEALMENT AND NON-DISCLOSURE, NEGLIGENT  
13 MISREPRESENTATION, INTERFERENCE IN THE COMPLETE DEVELOPMENT OF  
14 MINERAL PATENTS, CLOUDING TITLE, INTENTIONAL VIOLATION OF CIVIL RIGHTS,  
15 ARBITRARY AND CAPRICIOUS THEFT OF NATURAL RESOURCES DEVOID OF A  
16 RATIONAL BASIS, ALL TO THE DAMAGE OF THE PETITIONER, THE OWNERS AND  
17 OPERATORS, THE PUBLIC WELFARE, THE PUBLIC BENEFIT, AND THE  
18 ENVIRONMENT REQUIRING JUDICIAL REVIEW.

19 THE GRANTEES CLAIM THE BIOLOGICAL ARCHAE AND OTHER BACTERIA  
20 CULTIVATED WITHIN THE IRON MOUNTAIN MINE AS A NATURAL RESOURCE, AND  
21 DEMAND AN IMMEDIATE INJUNCTION TO HALT ANY ATTEMPT BY THE EPA, THE  
22 SITE OPERATOR, OR ANY OTHER PARTY TO DAMAGE OR DISTURB THE BIOTA  
23 CULTIVATED WITHIN ANY PORTION OF THE IRON MOUNTAIN MINES.

#### 24 CONCLUSION

25 **330.** For the foregoing reasons, viz. peace and plenty, further consideration of Petitioner's claims  
26 of class action, claims for equal protection and due process and rights held by the people, claims to  
27 attorney's fees and costs, and claims and applications for injunctive relief is appropriate.

1 Irreparable harm has taken place and is believed to be ongoing, and the relief should be granted  
2 as requested. Affirmed under penalty of perjury, Feb. 20th, 2009

3 PETITIONER COMMANDS THIS COURT TO ORDER THE MARSHALL TO DELIVER  
4 THESE PREMISES TO THE TRUE AND RIGHTFUL OWNER, WITH IMMEDIATE  
5 PRODUCTION OF KEYS AND CODES TO THE GATES, UNRESTRICTED ACCESS TO THE  
6 PREMISES; A SIGN ON THE GATE; THE ERECTION OF FLAG POLES, AND RELIEF AS  
7 THE COURT MAY FIND JUST AND PROPER TO PRESERVE AND PERFECT PATENT  
8 TITLE FOR IRON MOUNTAIN MINES, INC., AND RESTORE DIGNITY TO T.W. (TED)  
9 ARMAN.

10 DECLARATIONS OF REMISSION AND REVERSION AND DETINUE SUR BAILMENT.

11 **WARNING! IMMINENT HAZARD AND SUBSTANTIAL ENDANGERMENT!**

12 **UNSPEAKABLE ERRORS! TORT CLAIMS!**

13 **331.** It is not material whether the Libel be true, or whether the party against whom the Libel is  
14 made, be of good or ill fame; for in a settled state of Government the party grieved ought to com-  
15 plain for every injury done him in an ordinary course of Law, and not by any means to revenge  
16 himself, either by the odious course of libeling, or otherwise: He who kills a man with his sword in  
17 fight is a great offender, but he is a greater offender who poisons another, for in the one case he  
18 who is the party assaulted may defend himself, and knows his adversary, and may endeavour to  
19 prevent it: But poisoning may be done so secret that none can defend himself against it; for which  
20 cause the offence is the more grievous, because the offender cannot easily be known; And of such  
21 nature is libeling, it is secret, and robs a man of his good name, which ought to be more precious to  
22 him than his life, & difficillimum est invenire authorem infamatoriae scripturae; because that when  
23 the offender is known, he ought to be severely punished. Every infamous libel, aut est in scriptis,  
24 aut sine scriptis; a scandalous libel, in scriptis; when an epigram, rhyme, or other writing is com-  
25 posed or published to the scandal or contumely of another, by which his fame and dignity may be  
26 prejudiced. And such libel may be published, 1. Verbis aut cantilenis: As where it is maliciously  
27 repeated or sung in the presence of others. 2. Traditione,<sup>7</sup> when the libel or copy of it is delivered  
28 over to scandalize the party. Famosus libellus sine scriptis<sup>8</sup> may be, 1. Picturis, as to paint the party

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INTERVENTION BRIEF for joint and several trespassers ejection; *parens patriae* 09-207L

1 in any shameful and ignominious manner. 2. Signis, as to fix a Gallows, or other reproachful and  
2 ignominious signs at the parties door or elsewhere. That if anyone finds a Libel (and would keep  
3 himself out of danger), if it be composed against a private man, the finder either may burn it, or  
4 presently deliver it to a Magistrate: But if it concerns a Magistrate, or other public person, the  
5 finder of it ought presently to deliver it to a Magistrate, to the Intent that by examination and indus-  
6 try, the Author may be found out and punished. And libelling and calumniation is an offence  
7 against the Law of God. For Leviticus 17, Non facias calumniam proximo. Exod. 22 ver. 28, Prin-  
8 cipi populi tui non maledices. Ecclesiastes 10, In cogitatione [[126 a] tua ne detrahas Regi, nec in  
9 secreto cubiculi tui diviti maledices, quia volucres coeli portabunt vocem tuam, & qui habet pennas  
10 annuntiabit sententiam. Psal. 69. 13, Adversus me loquebantur qui sedebant in porta, & in me  
11 psallebant qui bibebant vinum. Job. 30. ver. 7. & 8, Filii stultorum & ignobilium, & in terra penitus  
12 non parentes, nunc in eorum canticum versus sum, & factus sum eis in proverbium.<sup>9</sup> And it was  
13 observed, that Job, who was the Mirrour of patience, as appeareth by his words, became quodam-  
14 modo impatient when Libels were made of him; And therefore it appeareth of what force they are  
15 to provoke impatience and contention. And there are certain marks by which a Libeller may be  
16 known: Quia tria sequuntur defamatorem famosum: 11 1. Pravitatis incrementum, increase of lewd-  
17 ness: 2. Bursae decrementum, decrease of money, and beggary: 3. Conscientiae detrimentum,  
18 shipwreck of conscience.

19 Selected Writings of Sir Edward Coke, vol. I

20 **332.** The assassination of character of the brave mining men who mined these mountains after  
21 serving as soldiers of the United States and to the dishonor of our warrants by letters patents lies as  
22 stigmatic and defamatory injury upon the grantees and their heirs and assigns forever.

### 23 STATEMENT OF INTERVENTIONS

24 333. Petitioner submits that nowhere in the governments previous opposition is the showing of  
25 whether the Petitioner's interest is adequately represented by existing parties, or whether, "as a  
26 practical matter", the failure to join the party would "impair or impede the person's ability to pro-  
27 tect that interest" ever addressed. Petitioner further submits that 9613 and 6921 provides for no  
28 other objection to such claim of Intervention as a matter of right as provided by the statute.

1 334. The Solid Waste Disposal Act also provides at 6921(b)(3)(A)(ii), "suit may be brought against  
2 the EPA for failure to perform a non-discretionary act or duty under RCRA. 42 U.S.C. §  
3 6972(a)(1)(A),(2)." CERCLA provides for citizen suits for failures to perform as when: "Each re-  
4 medial action shall utilize permanent solutions and alternative treatment technologies or resource  
5 recovery technologies to the maximum extent practicable. (NCP §300.430(f)(5)(ii))

#### 6 **PETITIONER'S LEGAL INTERESTS**

7 335. Petitioner and Grantees have asserted the right as joint venturers to perform work and engage  
8 in the business of re-mining the wastes at Iron Mountain Mines, Inc., work that is governed by the  
9 rights and provisions of the General Mining Law, and work that is by definition Resource Conser-  
10 vation and Recovery as defined in 42 U.S.C § 6901,.

11 336. The "subject" of this action is the Acid Mine Drainage and the resulting High Density Sludge,  
12 which contain substantial quantities of valuable heavy metals, some that are listed as hazardous  
13 materials by the EPA, particularly copper, cadmium, and zinc.

14 33. Therefore, Petitioner' interest is substantially more than a mere "interest in property", and the  
15 Petitioner's interest relates explicitly to the "subject of the action".

16 337. Grantees have delegated to Petitioner a fiduciary responsibility, and with these rights is con-  
17 veyed the responsibility for achieving a fair and just conclusion to any remaining issues of envi-  
18 ronmental liability with the United States of America and the State of California.

#### 19 **STANDING FOR CLASS ACTIONS**

20 **338.** *Bolling v Sharpe* (1954), in which the Court found segregation in the public schools of Wash-  
21 ington, D.C. violated the Constitution. Chief Justice Warren wrote: "The Fifth Amendment, which  
22 is applicable in the District of Columbia, does not contain an equal protection clause as does the  
23 Fourteenth Amendment which applies only to the states. But the concepts of equal protection and  
24 due process, both stemming from our American ideal of fairness, are not mutually exclusive. The  
25 "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due proc-  
26 ess of law," and, therefore, we do not imply that the two are always interchangeable phrases. But,  
27 as this Court has recognized, discrimination may be so unjustifiable as to be violative of due proc-  
28 ess."

1 ARBITRARY AND CAPRICIOUS - Absence of a rational connection between the facts found  
2 and the choice made. *Natural Resources. v. U.S.*, 966 F.2d 1292, 97, (9th Cir.'92). A clear error  
3 of judgment; an action not based upon consideration of relevant factors and so is arbitrary, ca-  
4 pricious, an abuse of discretion or otherwise not in accordance with law or if it was taken with-  
5 out observance of procedure required by law. 5 USC. 706(2)(A) (1988).

6 Irrational; capricious.

7 The term arbitrary describes a course of action or a decision that is not based on reason or judg-  
8 ment but on personal will or discretion without regard to rules or standards.

9 An arbitrary decision is one made without regard for the facts and circumstances presented, and  
10 it connotes a disregard of the evidence.

11 In many instances, the term implies an element of bad faith, and it may be used synonymously  
12 with tyrannical or despotic.

13 The term arbitrary refers to the standard of review used by courts when reviewing a variety of  
14 decisions on appeal. For example, the arbitrary and capricious standard of review is the principle  
15 standard of review used by judicial courts hearing appeals that challenge decisions issued by  
16 administrative bodies.

17 At the federal level and in most states, ADMINISTRATIVE LAW is a body of law made by  
18 EXECUTIVE BRANCH agencies that have been delegated power to promulgate rules, regula-  
19 tions, and orders, render decisions, and otherwise decide miscellaneous disputes. Non-elected  
20 officials in administrative agencies are delegated this authority in order to streamline the often  
21 lengthy and more deliberative process of legislative lawmaking that frequently grinds to a halt  
22 amid partisan gridlock. Although administrative agencies are generally designed to make law-  
23 making and regulation simpler, more direct, and less formal, they still must provide DUE  
24 PROCESS to affected parties. They must also comply with administrative procedures created by  
25 popularly elected state and federal legislatures.

26 One important right recognized in most administrative proceedings is the right of JUDICIAL  
27 REVIEW. Citizens aggrieved by the actions of an administrative body may typically ask a judi-  
28

1 cial court to review those actions for error. In establishing the standard by which judicial courts  
2 will review the actions of an administrative body, state and federal legislatures seek to provide  
3 agencies with enough freedom to do their work effectively and efficiently, while ensuring that  
4 individual rights are protected.

5 Congress tried to maintain this delicate balance in the ADMINISTRATIVE PROCEDURE ACT  
6 (APA). The APA limits the scope of a reviewing court's authority to determining whether the  
7 agency acted arbitrarily and capriciously in exercising its discretion. 5 USCA § 701. In making  
8 this determination, the reviewing court will not find that the administrative body acted arbitrarily  
9 unless the agency failed to follow proper procedures or rendered a decision that is so clearly er-  
10 roneous that it must be set aside to avoid doing an injustice to the parties.

11 Specifically, a reviewing court must determine whether the agency articulated a rational connec-  
12 tion between the factual findings it made and the decision it rendered. The reviewing court must  
13 also examine the record to ensure that the agency decision was founded on a reasoned evaluation  
14 of the relevant factors. Although agencies are given wide latitude, reviewing courts must be  
15 careful not to rubber-stamp administrative decisions that they deem inconsistent with a statutory  
16 mandate or that frustrate the congressional policy underlying a statute.

17 Typically, reviewing courts look at the whole record in making this determination, take into ac-  
18 count the agency's expertise on any particular matters, and accept any factual findings made by  
19 the agency. However, the reviewing court is free to determine how the law should apply to those  
20 facts. If the reviewing court concludes that the agency's actions were so arbitrary as to be out-  
21 side any reasonable interpretation of the law, the court may overturn the agency's decision or  
22 remand the case back to the agency for further proceedings in accordance with the court's deci-  
23 sion.

24 A reviewing court's determination that an agency acted in an arbitrary manner will often depend  
25 on the technical requirements of the governing law. For example, courts are often asked to de-  
26 termine whether a federal agency has acted arbitrarily under the NATIONAL ENVIRON-  
27 MENTAL POLICY ACT (NEPA). Pub. L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852, as amended,  
28

1 42U.S.C.A. §§ 4321 et seq. In one case the Ninth Circuit ruled that the TRANSPORTATION  
2 DEPARTMENT acted arbitrarily under NEPA, when it failed to prepare an environmental im-  
3 pact statement, failed to consider whether its regulations would have violated air quality limits,  
4 and failed to perform localized analyses for areas most likely to be affected by increased truck  
5 traffic. Public Citizen v. Department of Transportation, 316 F. 3d 1002 (9th Cir. 2003).

6 CROSS-REFERENCES Administrative Procedure Act of 1946; Due Process of Law; Judicial  
7 Review.

8 **339.** In Village of Willowbrook v. Olech, the Supreme Court held that equal protection claims can  
9 be brought by those claiming to have been singled out for discriminatory treatment even if they are  
10 a class of one and not a victim of discrimination based on group characteristics.(1)

11 The consequence is that those who have been injured by the government, in situations ranging from  
12 zoning decisions to the denial of government benefits, can assert an equal protection claim. Al-  
13 though this always has been theoretically possible, almost invariably those claims have been based  
14 on alleged discrimination based on group characteristics, such as race and age. Now, however, the  
15 Supreme Court has confirmed that any person who suffers discriminatory treatment, even as a class  
16 of one, is denied equal protection of the laws.

17 **339.** The Court reviewed the case of Thaddeus and Grace Olech, who sought to connect their prop-  
18 erty to the municipal water supply in Willowbrook, Illinois. Previously, the Olechs had success-  
19 fully sued the village over another matter. When Willowbrook delayed processing their water-  
20 supply application and imposed unusually burdensome conditions, the Olechs were convinced that  
21 this was in retaliation for their earlier lawsuit.

22 **339.** Willowbrook demanded from them a 33-foot easement on the property to connect the water  
23 supply. The Olechs objected on the grounds that other property owners had to provide only a 15-  
24 foot easement. After three months, Willowbrook agreed to provide service with a 15-foot easement.

25 **339.** The Olechs sued Willowbrook, alleging that its request for a 33-foot easement was discrimina-  
26 tory and violated the Equal Protection Clause. They alleged that Willowbrook's action was "irra-  
27 tional and wholly arbitrary"(2) and motivated by ill will resulting from their prior lawsuit.

28 **339.** The trial court granted the village's motion to dismiss for failure to state a claim on which re-



1 relief can be granted under Federal Rule of Civil Procedure 12(b)(6). The Seventh Circuit re-  
2 versed.(3)

3 **339.** Then, in a single cryptic paragraph, the Court said that the Olechs stated a cause of action un-  
4 der the Equal Protection Clause because they claimed to be the victims of arbitrary government ac-  
5 tion. The Court said that it was affirming based on this claim and was not considering whether the  
6 Olechs' allegation of retaliation also stated a claim under the clause. The Court declared that their  
7 complaint can fairly be construed as alleging that the village intentionally demanded a 33-foot  
8 easement as a condition of connecting [their] property to the municipal water supply where the vil-  
9 lage required only a 15-foot easement from other similarly situated property owners. The complaint  
10 also alleged that the village's demand was "irrational and wholly arbitrary" and that the village ul-  
11 timately connected [their] property after receiving a clearly adequate 15-foot easement. These alle-  
12 gations, quite apart from the village's subjective motivation, are sufficient to state a claim for relief  
13 under traditional equal protection analysis. We therefore affirm the judgment of the court of ap-  
14 peals but do not reach the alternative theory of "subjective ill will" relied on by that court.

15 **340.** That ended the majority opinion. The Court offered virtually no analysis of what is necessary  
16 to allege a violation of the Equal Protection Clause except to say claims of "arbitrary" actions are  
17 enough. Justice Stephen Breyer wrote a three-paragraph opinion concurring in the result. He noted  
18 that the village and the solicitor general had expressed concern that allowing the Olechs' equal pro-  
19 tection claim "would transform many ordinary violations of city or state law into violations of the  
20 Constitution."(9) Breyer said,

21 **341.** This case ... does not directly raise the question whether the simple and common instance of a  
22 faulty zoning decision would violate the Equal Protection Clause. That is because the court of ap-  
23 peals found that ... respondent had alleged an extra factor as well--a factor that the court of ap-  
24 peals called "vindictive action," "illegitimate animus," or "ill will."(10)

25 Breyer said it was because of the allegations of improper motivations that he concurred in the opin-  
26 ion. He said, "In my view, the presence of that added factor in this case is sufficient to minimize  
27 any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."(11)  
28 However, it should be noted that the allegation of improper motivation, which was crucial for

1 Breyer, was expressly disavowed by the majority as relevant to its decision.

2 **342.** The Court's ruling, that equal protection claims can be brought by a class of one, is not sur-  
3 prising. The Court long has said, especially in recent affirmative action cases, that equal protection  
4 safeguards individuals, not groups.

5 **342.** Besides, if the Court had ruled otherwise, it would have created an impossible line-drawing  
6 problem: How large must a class be to state a claim under equal protection? Was discrimination  
7 against one couple enough? Was the fact that the complaint alleged discrimination against three  
8 other homeowners sufficient to create a large enough class?(12) The Supreme Court understanda-  
9 bly did not want to make those kinds of distinctions the focus of equal protection analysis.

10 However, the Court's decision should be considered by every plaintiff challenging arbitrary gov-  
11 ernment action. Anyone claiming to have been treated in an unfair and discriminatory manner now  
12 can present a claim under equal protection.

13 **342.** For instance, any person who claims to have been arbitrarily denied access to his own prop-  
14 erty, denied control, denied input, denied reasonable consideration of a viable remedy to pollution,  
15 can bring an equal protection challenge. So can anyone denied any government benefit if there is  
16 an allegation of discriminatory and arbitrary treatment. Literally every type of government interac-  
17 tion with individuals might be challenged under equal protection if there is a claim the government  
18 or its officers have treated the plaintiff differently from others in an arbitrary manner.

19 **342.** The Court's decision is clear that an allegation of a retaliatory motive or subjective ill will is  
20 unnecessary. But the Court does not reject improper motivation as an alternative way of showing a  
21 denial of equal protection. The Court just says that it need not reach the issue.

22 **342.** There are understandable reasons why the Court wanted to shy away from the question of  
23 whether improper subjective motivation is sufficient for a claim. It is easy for plaintiffs to allege  
24 such motivation with the hope of gaining needed evidence during discovery and persuading a jury  
25 at trial. The Court also may have been concerned that issues of motivation focus on the govern-  
26 ment's actual purpose, while rational basis review looks solely to whether there is a conceivable  
27 permissible purpose for the government's action.

28 **342.** What options does a defendant have in response to a claim like the *Olechs'*? The defendant

1 would seem to have two possible responses: to deny differential treatment or to claim that any dif-  
2 ference was justified by a legitimate purpose. The former would involve the defendant arguing that  
3 the plaintiff was not treated any differently from others similarly situated. This inherently is a fact-  
4 based inquiry. The latter would involve the government suggesting a legitimate purpose for its dif-  
5 ferential treatment so as to indicate that it is not arbitrary.

6 **342.** Some have criticized the Supreme Court for a perceived trend toward long opinions with  
7 many footnotes. Its decision in *Olech* can be criticized for just the opposite: for being too brief and  
8 offering too little analysis of its implications. Equal protection claims brought by a class of one  
9 raise inherently difficult conceptual problems, all of which are ignored by the short per curiam  
10 opinion. Nevertheless, the *Olech* decision is important for plaintiff attorneys bringing many differ-  
11 ent types of claims against the government.

12 **342.** It means that any person claiming to be a victim of arbitrary government action has a claim  
13 under the Equal Protection Clause, no matter how many or how few others suffer the injury.  
14 *Marbury* shows that there is an important class of cases in which the legislature and the executive  
15 must depend on the judiciary for the efficacy of their judgments. In these cases, it is judicial refus-  
16 als to act that pose a danger “to the political rights of the Constitution.”

17 **343.** *Marbury* itself recognized this threat, when Chief Justice Marshall observed that the govern-  
18 ment of the United States could no longer be “termed a government of laws, and not of men . . . if  
19 the laws furnish no remedy for the violation of a vested legal right.” As the Court stated last term,  
20 in *Bush v. Gore*, although there are “vital limits on judicial authority,” when “contending parties  
21 invoke the process of the courts, . . . it becomes our unsought responsibility to resolve the federal  
22 and constitutional issues the judicial system has been forced to confront.”

23 The other approach, which is more insidious, is for the court to leave the formal right in place, but  
24 to constrict the remedial machinery.

25 **344.** At best, this will dilute the value of the right, since some violations will go unremedied. At  
26 worst, it may signal potential wrongdoers that they can infringe the right with impunity.

27 For the most part, the Court has left the political branches’ power to regulate relatively uncon-  
28 strained. That is, the Court assumes that Congress and the Executive can prohibit various forms of

1 primary conduct. At the same time, however, the Court has launched a wholesale assault on one of  
2 the primary mechanisms Congress has used for enforcing civil rights: the private attorney general.

3 **345.** The idea behind the “private attorney general” can be stated relatively simply: Congress can  
4 vindicate important public policy goals by empowering private individuals to bring suit. While one  
5 can imagine a regime in which Congress simply delegates the government’s own right to enforce  
6 its laws to private bounty hunters—that is essentially what *qui tam* lawsuits envision—the current  
7 reliance on private attorneys general is more modest.

8 It consists essentially of providing a cause of action for individuals who have been injured by the  
9 conduct Congress wishes to proscribe, usually with the additional incentive of attorney’s fees for a  
10 prevailing plaintiff.

11 **346.** Virtually all modern civil rights statutes rely heavily on private attorneys general. As the  
12 Court explained in *Newman v. Piggie Park Enterprises*— one of the earliest cases construing the  
13 Civil Rights Act of 1964, which forbids various kinds of discrimination in public accommodations,  
14 federally funded programs, and employment—Congress recognized that it could not achieve com-  
15 pliance solely through lawsuits initiated by the Attorney General: “A [public accommodations] suit  
16 is thus private in form only. When a plaintiff brings an action . . . he cannot recover damages. If he  
17 obtains an injunction, he does so not for himself alone but also as a ‘private attorney general,’ vin-  
18 dicating a policy that Congress considered of the highest priority.” Thus, *Piggie Park* recognized  
19 the piggybacking function of the Act: Congress harnessed private plaintiffs to pursue a broader  
20 purpose of obtaining equal treatment for the public at large. Later, the Court explained that this  
21 public function exists even when a civil rights plaintiff asks for compensatory damages rather than  
22 injunctive relief.

23 **347.** “Unlike most private tort litigants,” the civil rights plaintiff “seeks to vindicate important civil  
24 and constitutional rights that cannot be valued solely in monetary terms . . . . Regardless of the  
25 form of relief he actually obtains, a successful civil rights plaintiff often secures important social  
26 benefits.”

1 **348.** Thus, when “his day in court is denied him,” the congressional policy which a civil rights  
2 plaintiff “seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the indi-  
3 vidual citizen, suffers.”

4 **349.** When Judge Jerome Frank originally coined the phrase “private attorney general,” he was  
5 thinking about litigation by private plaintiffs “to prevent [a government] official from acting in vio-  
6 lation of his statutory powers.” There is thus something deeply ironic about the fact that the Su-  
7 preme Court has most sharply limited the use of private attorneys general in precisely those cases  
8 which involve claims of unlawful state action.

9 **350.** When Congress wants to regulate activities such as employment, public accommodations,  
10 government programs, or market transactions, it has two broad sources of authority on which to  
11 draw: its enumerated powers under Article I and its enforcement clause powers under the Recon-  
12 struction Amendments. In general, modern Congresses have relied more often on their Article I  
13 powers—particularly the commerce and spending clause powers of Article I, section 8—even when  
14 they are pursuing the values of nondiscrimination more expressly reflected in the substantive com-  
15 mands of the Thirteenth and Fourteenth Amendments. In part, this reliance is a product of the pecu-  
16 liar limitations of the Reconstruction Amendments: the Fourteenth Amendment reaches only state  
17 actors, and in many cases Congress wants to regulate both public and private conduct; the Thir-  
18 teenth Amendment, while it reaches private conduct as well as state action, covers only a narrow  
19 subset of the behavior Congress might want to reach. By contrast, the Commerce Clause gives  
20 Congress tremendous latitude, permitting regulation of virtually any area of economic endeavor.

21 **351.** The general principle—that the scope of prophylactic measures should depend on the degree  
22 of risk of unconstitutional conduct—seems fairly straightforward.

23 **352.** But that does not answer the question of what remedial tools Congress can properly deploy in  
24 the face of actual constitutional violations.

25 **353.** Suppose there were only scattered examples of unconstitutional conduct— by hypothesis, not  
26 enough to justify a ban on constitutionally innocuous activities. Can Congress nonetheless enforce  
27 the core constitutional commands of the Fourteenth Amendment through private attorneys general?  
28

1 **354.** That is, can Congress abrogate a state’s Eleventh Amendment immunity Protection Clause  
2 regardless of the volume of constitutional violations?

3 **355.** The Court’s decision in Garrett, like its prior Eleventh Amendment decisions, suggests the  
4 Court’s reluctance to contemplate purely remedial abrogation. The Court seems to treat the Elev-  
5 enth Amendment and the scope of section 1 of the Fourteenth Amendment as placing separate limi-  
6 tations on Congress’s section 5 powers. It shifts imperceptibly from circumscribing the scope of  
7 Congress’s preventative or prophylactic powers, to restricting the reach of Congress’s ability to  
8 specify remedies for core violations. In other words, the Court’s recent decisions turn Fitzpatrick  
9 on its head. There, the Court saw the later-enacted Fourteenth Amendment as a limitation on the  
10 sovereign immunity recognized by the Eleventh Amendment. Now, the Court sees the Eleventh  
11 Amendment as a curb on the Fourteenth.

12 **356.** There is one additional aspect of the Court’s Eleventh Amendment cases that sheds light on its  
13 view of private attorneys general. The Court has repeatedly softened the bite of its Eleventh  
14 Amendment holdings by noting that damages remedies are not foreclosed altogether: the federal  
15 government retains the right to seek damages on behalf of injured individuals.

16 But the Court sees this latter class of lawsuits as different in an important respect:  
17 The difference between a suit by the United States on behalf of the employees and a suit by the  
18 employees implicates a rule that the National Government must itself deem the case of sufficient  
19 importance to take action against the State; and history, precedent, and the structure of the Consti-  
20 tution make clear that, under the plan of the [Constitutional] Convention, the States have consented  
21 to suits of the first kind but not of the second.

22 **357.** The key assumption underlying the Court’s position seems to be the equation of importance  
23 with centralized enforcement. Only the federal government’s willingness to use its own resources  
24 and send its own lawyer to prosecute a case truly shows that “the federal interest in compensating  
25 [citizens] . . . for alleged past violations of federal law is [actually] compelling  
26 . . . .” Otherwise, Congress is engaged in cheap talk—a sort of unfunded mandate.  
27  
28

1 **358.** That defies the central idea behind the private attorney general—that Congress might decide  
2 that decentralized enforcement better vindicates civil rights policies “that Congress considered of  
3 the highest priority.”

4 **359.** For example, in explaining why § 5 of the Voting Rights Act of 1965 should be construed to  
5 permit private lawsuits, as well as the lawsuits by the Attorney General expressly authorized by the  
6 Act, the Court noted that [t]he Act was drafted to make the guarantees of the Fifteenth  
7 Amendment finally a reality for all citizens. . . . The achievement of the Act’s laudable goal could  
8 be severely hampered, however, if each citizen were required to depend solely on litigation insti-  
9 tuted at the discretion of the Attorney General. For example, the provisions  
10 of the Act extend to States and the subdivisions thereof. The Attorney General has a limited staff  
11 and often might be unable to uncover quickly new regulations and enactments passed at the varying  
12 levels of state government. It is consistent with the broad purpose of the Act to allow the individual  
13 citizen standing to insure that his city or county government complies with the [Act]. Reliance on  
14 private attorneys general elevates full enforcement of broad policy goals over formal political ac-  
15 countability for discrete enforcement decisions. It assumes, of course, that the courts are sympa-  
16 thetic to Congress’s underlying policy goals. Perhaps, then, it is not surprising that a Supreme  
17 Court that seems suspicious of the substantive goals Congress is pursuing is reluctant to see those  
18 goals pursued vigorously.

19 **360.** While *Marbury* may have insisted that “[t]he province of the court is, solely, to decide on the  
20 rights of individuals,” the private attorney general rests on a very different vision of litigation. In  
21 this vision, courts not only resolve the particular dispute before them, but also “explicate and give  
22 force to the values embodied in authoritative texts such as the Constitution and statutes.” The pri-  
23 vate attorney general can assist this project in two ways. First, if the lawsuit persuades a defendant  
24 to change its behavior or results in equitable relief, she vindicates the public interest by bringing  
25 that defendant into compliance with constitutional or statutory commands. And similarly situated  
26 individuals will often benefit directly from the private attorney general’s success, even if the law-  
27 suit is not formally a class action. Second, if a private attorney general obtains a judgment in her  
28 favor, that judgment will often be accompanied by a judicial decision that articulates a rationale for



1 her victory that extends beyond her particular case. The creation of binding precedents is a benefi-  
2 cial byproduct of litigation, which may explain why private attorneys general are often subsidized.  
3 A private attorney general whose activities produce precedent is thus in some important ways  
4 more effective than a private attorney general whose activities produce only local change.

5 **361.** “So long as the prospective litigant effectively may vindicate [his or her] statutory cause of  
6 action in the arbitral forum, the statute will continue to serve both its remedial and deterrent func-  
7 tion.”

8 **362.** Attorney’s fees are the fuel that drives the private attorney general engine. Every significant  
9 contemporary civil rights statute contains some provision for attorney’s fees, and in 1976,  
10 Congress passed a comprehensive attorney’s fee statute that provides for fees under the most im-  
11 portant Reconstruction Era civil rights statutes as well. The rationale for fee awards rests on several  
12 interlocking considerations. First, most civil rights plaintiffs are unable to afford counsel and with-  
13 out a fees statute, the available counsel would be limited to attorneys willing to represent them pro  
14 bono. Second, the absence of statutory fees might skew attorneys’ selection  
15 of cases: they might concentrate on cases involving the possibility of large damages awards and the  
16 attendant contingent fee, and forego cases which involve only equitable relief or where the right,  
17 while important, is not easily translated into a large damages award for the named  
18 plaintiffs. But this latter group of cases—especially those involving structural injunctive relief—  
19 often do the most to vindicate important societal interests. They are the ones where plaintiffs func-  
20 tion most clearly as private attorneys general.

21 **363.** By a 5–4 vote, the Supreme Court held a plaintiff cannot be a “prevailing party” within the  
22 meaning of the fees statutes unless it achieves “a court-ordered ‘change [in] the legal relationship  
23 between [it] and the defendant.’” To be entitled to an award of attorney’s fees, plaintiffs must either  
24 receive an adjudicated judgment on the merits or persuade the defendant to enter into a consent  
25 judgment that provides for some sort of fee award. Otherwise, their achievement “lacks the neces-  
26 sary judicial imprimatur. . . .” Chief Justice Rehnquist’s opinion for the Court downplayed the  
27 negative effects of the decision on plaintiffs’ ability to vindicate their rights. First, he suggested  
28

1 that the danger of defendants unilaterally denying plaintiffs their right to fees was limited to a small  
2 class of cases.

3 **364.** That threat “only materializes in claims for equitable relief, for so long as the plaintiff has a  
4 cause of action for damages, a defendant’s change in conduct will not moot the case.” Of course, as  
5 the Chief Justice himself acknowledged in a footnote, there is a broad class of claims for which  
6 damages are not even theoretically available: those to which the Eleventh Amendment applies.  
7 Moreover, to the extent that suits seeking only equitable relief lie at the core of the vision of the  
8 private attorney general as champion of the public interest, the Court’s theory countenances cutting  
9 off the cases that particularly motivated Congress to provide attorney’s fees. More systematically,  
10 the Court’s decision reintroduces the skewing effect on case selection: civil rights attorneys who  
11 want to safeguard the possibility of recovering fees will choose lawsuits in which damages are  
12 available over lawsuits that involve only injunctive relief, even if the latter lawsuits are more so-  
13 cially valuable. Second, the Chief Justice suggested that the catalyst theory might actually have  
14 perverse consequences for plaintiffs. In a no-catalyst theory  
15 world where fees can be avoided by unilateral abandonment, a defendant whose conduct is detri-  
16 mental to the plaintiff but not actually illegal might change course, thereby giving a plaintiff more  
17 relief than he could win through full-scale adjudication.

18 **365.** Buried in this argument is a less beneficent vision of civil rights plaintiffs. The Court sees the  
19 catalyst theory as giving fees to a “plaintiff who, by simply filing a non-frivolous but nonetheless  
20 potentially merit-less lawsuit (it will never be determined), has reached the ‘sought-after destina-  
21 tion’ without obtaining any judicial relief.” In short, the Court feared a windfall for undeserving  
22 plaintiffs—those who persuade defendants to abandon “conduct that may not be illegal”—if the  
23 lower federal courts could award fees without first being required to find actual violations. Justice  
24 Scalia’s concurrence is blunter: the plaintiff who induces a defendant to abandon conduct that no  
25 court has found to be illegal may be getting rewarded for “a phony claim.” As between giving a fee  
26 to someone with a phony claim and denying a fee to a plaintiff with a solid case whose opponent  
27 manipulates the system to evade the fee statute, Justice Scalia came down squarely against the civil  
28 rights plaintiff:

1 **366.** [I]t seems to me the evil of the former far outweighs the evil of the latter. There is all the dif-  
2 ference in the world between a rule that denies the extraordinary boon of attorney’s fees to some  
3 plaintiffs who are no less “deserving” of them than others who receive them,  
4 and a rule that causes the law to be the very instrument of wrong— exacting the payment of attor-  
5 ney’s fees to the extortionist.

6 **367.** Justice Scalia’s choice of words is deeply revealing. For him, attorney’s fees are an extraordi-  
7 nary boon, and not the centerpiece of an enforcement regime that sees the private attorney general  
8 as an essential tool. And civil rights plaintiffs are potential extortionists, rather than potential vic-  
9 tims of conduct that the Constitution or Congress has proscribed.

10 **368.** The Congress and Supreme Court of an earlier era constructed the institution of the private  
11 attorney general because they recognized that, without private attorneys general, it would be im-  
12 possible to realize some of our most fundamental constitutional and political values. The current  
13 Court seems bent on dismantling this centerpiece of the Second Reconstruction.

14 **369.** For all its invocations of Marbury’s declaration that it “is emphatically the province and the  
15 duty of the judicial department to say what the law is,” the current Court seems to have forgotten  
16 Marbury’s equally important acknowledgment—that “the government of the United States has  
17 been emphatically termed a government of laws, and not of men,” but “will certainly cease to de-  
18 serve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”  
19 When the law furnishes no remedy because the Supreme Court has cast out the remedies that the  
20 political branches have tried to provide, then the courts threaten to become the most dangerous  
21 branch “to the political rights of the Constitution,” and not the least.

22 **§ 2675. Disposition by federal agency as prerequisite; evidence: CLAIM FILED**

23 **370.**

24 (a) An action shall not be instituted upon a claim against the United States for money damages for  
25 injury or loss of property or personal injury or death caused by the negligent or wrongful act or  
26 omission of any employee of the Government while acting within the scope of his office or em-  
27 ployment, unless the claimant shall have first presented the claim to the appropriate Federal agency  
28 and his claim shall have been finally denied by the agency in writing and sent by certified or regis-

1 tered mail. The failure of an agency to make final disposition of a claim within six months after it is  
2 filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim  
3 for purposes of this section. The provisions of this subsection shall not apply to such claims as may  
4 be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or  
5 counterclaim.

6 (b) Action under this section shall not be instituted for any sum in excess of the amount of the  
7 claim presented to the federal agency, except where the increased amount is based upon newly dis-  
8 covered evidence not reasonably discoverable at the time of presenting the claim to the federal  
9 agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

10 (c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be  
11 competent evidence of liability or amount of damages.

12 § 2674. Liability of United States

13 The United States shall be liable, respecting the provisions of this title relating to tort claims, in the  
14 same manner and to the same extent as a private individual under like circumstances, but shall not  
15 be liable for interest prior to judgment or for punitive damages.

16 If, however, in any case wherein death was caused, the law of the place where the act or omission  
17 complained of occurred provides, or has been construed to provide, for damages only punitive in  
18 nature, the United States shall be liable for actual or compensatory damages, measured by the pe-  
19 cuniary injuries resulting from such death to the persons respectively, for whose benefit the action  
20 was brought, in lieu thereof.

21 With respect to any claim under this chapter, the United States shall be entitled to assert any de-  
22 fense based upon judicial or legislative immunity which otherwise would have been available to the  
23 employee of the United States whose act or omission gave rise to the claim, as well as any other  
24 defenses to which the United States is entitled.

25 **§ 1346. United States as defendant**

26 **371.** (a) The district courts shall have original jurisdiction, concurrent with the United States Court  
27 of Federal Claims, of:

1 (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to  
2 have been erroneously or illegally assessed or collected, or any penalty claimed to have been col-  
3 lected without authority or any sum alleged to have been excessive or in any manner wrongfully  
4 collected under the internal-revenue laws;

5 (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount,  
6 founded either upon the Constitution, or any Act of Congress, or any regulation of an executive de-  
7 partment, or upon any express or implied contract with the United States, or for liquidated or unliq-  
8 uidated damages in cases not sounding in tort, except that the district courts shall not have jurisdic-  
9 tion of any civil action or claim against the United States founded upon any express or implied con-  
10 tract with the United States or for liquidated or unliquidated damages in cases not sounding in tort  
11 which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the  
12 purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange  
13 Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Coun-  
14 cils of the National Aeronautics and Space Administration shall be considered an express or im-  
15 plied contract with the United States.

16 (b)

17 (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United  
18 States District Court for the District of the Canal Zone and the District Court of the Virgin Islands,  
19 shall have exclusive jurisdiction of civil actions on claims against the United States, for money  
20 damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or  
21 death caused by the negligent or wrongful act or omission of any employee of the Government  
22 while acting within the scope of his office or employment, under circumstances where the United  
23 States, if a private person, would be liable to the claimant in accordance with the law of the place  
24 where the act or omission occurred.

25 (2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving  
26 a sentence may bring a civil action against the United States or an agency, officer, or employee of  
27 the Government, for mental or emotional injury suffered while in custody without a prior showing  
28 of physical injury.

1 (c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or  
2 other claim or demand whatever on the part of the United States against any plaintiff commencing  
3 an action under this section.

4 (d) The district courts shall not have jurisdiction under this section of any civil action or claim for a  
5 pension.

6 (e) The district courts shall have original jurisdiction of any civil action against the United States  
7 provided in section 6226, 6228 (a), 7426, or 7428 (in the case of the United States district court for  
8 the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

9 (f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a  
10 to quiet title to an estate or interest in real property in which an interest is claimed by the United  
11 States.

12 (g) Subject to the provisions of chapter 179, the district courts of the United States shall have ex-  
13 clusive jurisdiction over any civil action commenced under section 453 (2) of title 3, by a covered  
14 employee under chapter 5 of such title.

15 **§ 2680. Exceptions**

16 **372.** (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious  
17 prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract  
18 rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers  
19 of the United States Government, the provisions of this chapter and section 1346 (b) of this title  
20 shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault,  
21 battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the pur-  
22 pose of this subsection, “investigative or law enforcement officer” means any officer of the United  
23 States who is empowered by law to execute searches, to seize evidence, or to make arrests for vio-  
24 lations of Federal law.

25 ***audita querela*: JUDICIAL REVIEW**

26 **373.:** We being unwilling that such Collusions, Malice and Deceit Should pass unpunished, com-  
27 mand you, that having heard the Complaint of him the said Arman. in this Behalf, and having  
28 called before you the aforesaid EPA. and others whom you shall see fit to be called in this Matter,

1 and having heard the Reasons of the several Parties thereupon, you further cause to be done full  
2 and speedy Justice to the aforesaid Arman as well upon the Restitution and Recovery, as upon the  
3 Collusion, Malice and Deceit aforesaid\*.

4 **374.** The Office of the *Warden of the Forest* will prepare a memorandum of understanding (MOU)  
5 for the site specific joint repository on private property created by CERCLA actions, and a request  
6 to the Public Works Subcommittee and the Court to ADDRESS AND REMEDY the unlawfully  
7 asserted impunity of EPA non-compliance with NEPA

8 **375.** EPA is legally required to comply with the procedural requirements of NEPA for its research  
9 and development activities, facilities construction, wastewater treatment construction grants under  
10 Title II of the Clean Water Act (CWA), EPA-issued National Pollutant Discharge Elimination Sys-  
11 tem (NPDES) permits for new sources, and for certain projects funded through EPA annual Appro-  
12 priations Acts.

13 **376.** Section 511(c) of the CWA supposedly exempts other EPA actions under the CWA from the  
14 requirements of NEPA. Section 7(c) of the Energy Supply and Environmental Coordination Act of  
15 1974 (15 U.S.C. 793(c)(1)) supposedly exempts actions under the Clean Air Act from the require-  
16 ments of NEPA. Supposedly the EPA is also exempted from the procedural requirements of envi-  
17 ronmental laws, including NEPA, for comprehensive Environmental Response, Compensation, and  
18 Liability Act (CERCLA) response actions. Courts also consistently have recognized that EPA pro-  
19 cedures or environmental reviews under enabling legislation are functionally equivalent to the  
20 NEPA process and thus exempt from the procedural requirements in NEPA. The EPA also claims  
21 exemptions under the Beville Act exclusions.

22 **377.** Such exemptions have allowed the EPA to evade environmental regulations with impunity, and  
23 facilitated despotism, tyranny, oppression, waste, unfairness, fraud, and abuse.

24 CERCLA is an unfair and unjust law created by illegitimate animus. We reject it.

25 The EPA is only a part, and can not pretend to be arbiter and preserver of safety for all.

26 **378.** *The powers not delegated to the United States by the Constitution, nor prohibited by it to the*  
27 *States, are reserved to the States respectively, or to the people.*



1 **379.**Constitution and laws of the United States are, made equals and placed upon a like footing as  
2 to political rights immunities, dignity, and power

3 **380.**...are in times of peace dangerous to public liberty, incompatible with the individual right of  
4 the citizen, contrary to the genius and spirit of our free institutions, and exhaustive of the national  
5 resources, and ought not, therefore, to be sanctioned or allowed except in cases of actual necessity  
6 for repelling invasion and suppressing insurrection or rebellion;

7 **381.**That, whenever the laws of the United States shall be opposed, or the execution thereof ob-  
8 structed, in any state, by combinations too powerful to be suppressed by the ordinary course of ju-  
9 dicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the  
10 president of the United States to call forth the militia of such state, or of any other state or states, as  
11 may be necessary to suppress such combinations, and to cause the laws to be duly executed; and  
12 the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty  
13 days after the commencement of the then next session of congress.

14 in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of  
15 pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if  
16 suffered to pass unimproved, it may never be possible afterwards to recall."

17 § 286. Conspiracy to defraud the Government with respect to claims

18 **382.** Whoever enters into any agreement, combination, or conspiracy to defraud the United States,  
19 or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of  
20 any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than  
21 ten years, or both.

22 § 287. False, fictitious or fraudulent claims

23 **383.** Whoever makes or presents to any person or officer in the civil, military, or naval service of  
24 the United States, or to any department or agency thereof, any claim upon or against the United  
25 States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudu-  
26 lent, shall be imprisoned not more than five years and shall be subject to a fine in the amount pro-  
27 vided in this title.

1 **384.** The press of time does not diminish the constitutional concern. A desire for speed is not a  
2 general excuse for ignoring equal protection guarantees.

3 **385.** We start with first principles. The Constitution creates a Federal Government of enumerated  
4 powers. See U.S. Const., Art. I, § 8. As James Madison wrote, "[t]he powers delegated by the  
5 proposed Constitution to the federal government are few and defined. Those which are to remain in  
6 the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C.  
7 Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the  
8 Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458,  
9 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991) (internal quotation marks omitted). "Just as the  
10 separation and independence of the coordinate branches of the Federal Government serves to  
11 prevent the accumulation of excessive power in any one branch, a healthy balance of power  
12 between the States and the Federal Government will reduce the risk of tyranny and abuse from  
13 either front." *Ibid.*

14 **386.** The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Na-  
15 tions, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. The  
16 Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in  
17 *Gibbons v. Ogden*, 9 Wheat. 1, 189-190, 6 L.Ed. 23 (1824).

18 387. "Presumably the concern that actually motivates today's decision is fear that governments will  
19 be forced to defend against a multitude of "class of one" claims unless the Court wields its meat-  
20 axe forthwith. Experience demonstrates, however, that these claims are brought infrequently, that  
21 the vast majority of such claims are asserted in complaints advancing other claims as well, and that  
22 all but a handful are dismissed well in advance of trial. Experience also demonstrates that there are  
23 in fact rare cases in which a petty tyrant has misused governmental, power. Proof that such misuse  
24 was arbitrary because unsupported by any conceivable rational basis should suffice to establish a  
25 violation of the Equal Protection Clause without requiring its victim also to prove that the tyrant  
26 was motivated by a particular variety of class-based animus." Justice John Stevens; See *Engquist v.*  
*Oregon Department of Agriculture*

27 388. This matter is also before the Court to rectify the abusive application by the EPA of the envi-  
28 ronmental statues and the formulation of policies contrary to the effective removal and remediation

1 of hazardous wastes, hazardous substances, solid wastes, pollution of the land, air and waterways,  
2 and resulting in excessive and unproductive litigation rather than constructive pollution remedies,  
3 and demonstrably resulting in the fact that the parties most significantly benefiting or cleaning up  
4 are the attorneys conducting the litigation. "President Clinton complained that "[f]or far too long,  
5 far too many Superfund dollars have been spent on lawyers and not nearly enough have been spent  
6 on clean-up." The chair of the House subcommittee responsible for CERCLA proclaimed that  
7 "Superfund has been enormously costly, grossly inefficient, patently unfair, and short on results."  
8 EPA Administrator Carol Browner acknowledged that "there is a need for major reform." Judge  
9 Posner ridiculed "Superfund Clouduckooland."

10 389. This matter is also before the Court to vindicate grantees from the guilt and infamy associated  
11 with the crime of pollution and natural resource damages resulting from an act of GOD, which is  
12 the biological leaching of naturally occurring hazardous substances from their natural place of ori-  
13 gin by natural processes into the navigable waterways of the United States of America.

14 390. Motion for Summary Judgment on the pleadings and the Court and Administrative Records to  
15 find for grantees' the protections of the "innocent landowner defense" of CERCLA, RCRA and  
16 CWA.

17 This matter is also before the Court to secure the protection of the Court for the Trust I and Trust II  
18 Iron Mountain Mine remediation trusts established for the environmental defense conducted at Iron  
19 Mountain Mine and held in Trust by the Trustee; AIG Consultants, a subsidiary of AIG, Inc.

20 391. Grantees allege that a conflict of interest exists between AIG Consultants, its parent corpora-  
21 tion, and the federal government as majority stockholder and oversight agency.

22 392. Grantees further allege that improprieties and misconduct are implicit in the transactions re-  
23 sulting in the first site operator's failure (IT corp.) and the takeover by AIG Consultants, and now  
24 the bailout of AIG, and the privatization of trust funds under CERCLA and Superfund.

25 393. Grantees allege that while the Court allowed an exception to the usual prohibition against trus-  
26 tees doing business with themselves as fiduciaries when it approved the consent decree and the  
27 subsequent substitution of site operator, under the present circumstances it can no longer be allow-  
28 able for the trustee to be the fiduciary to be the site operator to be the oversight agency.

1 394. Grantees invoke the *intra vires* authorities of the “Too Big to Fail” doctrine of the Federal  
2 Government to sever the company known as AIG Consultants from AIG, Inc. and the Federal Gov-  
3 ernment, and to convey to grantees the positions of Project Manager of the Iron Mountain Mine  
4 Superfund Site, and the Project Management responsibility and authority of AIG Consultants pur-  
5 suant to the terms of the Statement of Work to the grantees, because under the implicit authority  
6 and responsibility of the National Contingency Plan, the Iron Mountain Mine Superfund site is “too  
7 big to fail”.

8 395. Grantees declare that the Partial Summary Judgment Order filed Oct. 1, 2002 and the Consent  
9 Decree of Dec. 8, 2000 are void by acts of fraud upon the Court, and by willfully misleading, de-  
10 ceptive, and fraudulent misrepresentations by officers of the Court.

11 396. Grantees demand payment of rents and wages and other compensation under the equal protec-  
12 tion clause and pursuant to the terms of the Iron Mountain Mine Statement of Work for failure to  
13 pay reasonable rent for the facilities commandeered for the public benefit, for failure to pay the  
14 owner for services rendered, and for the manifest injustice and constitutional violations resulting  
15 from the EPA’s and the site operators actions.

16 397. Grantees declare that a unity of interest exists between the People of the United States and the  
17 grantees for the protection of the trust funds and the remediation of pollution and natural resource  
18 damages, and therefore the Court must assert constitutional authority to perform its obligation to  
19 resolve the just and equitable resolution of this matter.

20 398. Grantees declare that a unity of interest exists between AIG Consultants and grantees, and that  
21 actions of the government have resulted in the compulsory joint venture of AIG and grantees in the  
22 business of environmental remediation of Iron Mountain Mine.

23 399. Grantees declare that a unity of interest exists between the United States of America and the  
24 grantees for the protection of the trust funds and the remediation of pollution and natural resource  
25 damages, and therefore the Court must assert constitutional authority to perform its obligation to  
26 resolve the just and equitable resolution of this matter.

27 400. Grantees declare that the failure to protect the publics interests by jeopardizing the public trust  
28 for environmental defense and the placing of public trust funds in private financial instruments and

1 insurance policies, followed by the subsequent bankruptcy of IT corporation, and then the bailout  
2 of AIG, Inc. by the Federal government, is prima facie evidence of fraud upon the Court and an  
3 abuse of discretion, requiring the Court to intercede and impose judicial oversight of the site opera-  
4 tor, the oversight agency, and the departments of justice.

5 401. Grantees declare that a unity of interest exists between the State of California and the grantees  
6 for the protection of the trust funds and the remediation of pollution and natural resource damages,  
7 and therefore the Court must assert its constitutional authority to perform its obligation to join  
8 grantees and resolve the just and equitable resolution of this matter. The jeopardizing of the public  
9 trust and the failure of the oversight agency in it's duty to provide for the environmental defense or  
10 obligation to act in the public's interest by the placing of public trust funds in private financial in-  
11 struments and insurance policies, and the potential exposure to default on the obligations by allow-  
12 ing the trust funds to be commingled with speculative financial instruments such as derivatives and  
13 credit default swaps and other unregulated financial instruments followed by the subsequent bank-  
14 ruptcy of IT corporation, and then the bailout of AIG, Inc. by the Federal government, is prima fa-  
15 cie evidence of a probable financial fraud requiring the Court to intercede and impose judicial  
16 oversight of the support agencies and the California departments of justice.

17 402. Grantees declare that a unity of interest exists between the People of the United States of  
18 America, the People of the State of California, the co-defendant settling parties to the consent de-  
19 cree, the site operators, their heirs and assigns, and the grantees for the protection of the trust funds  
20 and the remediation of pollution and natural resource damages, and therefore the Court must assert  
21 constitutional authority to perform its obligation to resolve the just and equitable resolution of this  
22 matter.

23 403. Grantees declare that the equitable resolution of this matter and the priority of environmental  
24 protection require that the company AIG Consultants must be sold by AIG, Inc. to grantees' to  
25 eliminate any further conflict of interest, either with it's parent company or with the government.

26 404. Grantees declare that the compulsory joint venture of grantees with AIG Consultants entitles  
27 grantees to an equitable controlling interest in the AIG Consultants Corporation, as the only just  
28 and equitable means to protect and preserve the unity of interest herein described.

1 405. Grantees declare that the false and malicious accusations and prosecution of Iron Mountain  
2 Mines, Inc. et al, under the provisions of CERCLA, for the crime of infamy of responsibility and  
3 liability for the pollution of the navigable waterways of the United States of America, and the alle-  
4 gations of imminent and substantial endangerment to the public health and the environment, and  
5 the allegations of natural resource damages, when in fact Iron Mountain Mine is a biological and  
6 mineral resource of significant strategic and scientific value, and is therefore a national treasure  
7 deserving of the fullest protections of the law, is a violation of grantees civil rights requiring the  
8 constitutional protections of this Court.

9 406. Grantees claim a right to equal protection to and from each and every party to this matter, and  
10 submit themselves to the Courts just and equitable determinations in the resolution of these pro-  
11 ceedings.

12 407. Grantees Claim an undivided interest in the Iron Mountain Mine trust I, and any insurance in-  
13 struments thereto, including 100 % of the \$100 million unforeseen costs coverage and 100% of the  
14 \$35 million litigation indemnification for the oversight agencies and funds remaining in the nota-  
15 tional account for operations and maintenance through the year 2030.

16 408. Grantees claim an undivided interest in the Iron Mountain Mine trust II for \$514 million due  
17 in 2030, and any insurance instruments thereto.

18 409. Grantees claim an undivided interest in the benefit of the fullest protection of the State and the  
19 Federal governments to remedy the pollution by the best available technology and in such a way as  
20 is most protective to the public health and the environment, most protective of the strategic and  
21 biological resources, and in accordance with the National Contingency Plan, the Clean Water Act,  
22 the Solid Waste Act, State and Federal mining laws and the Constitutions of the State of California  
23 and of the United States of America.

24 410. Grantees claim the right to extract, beneficiate, reclaim and recover any and all metals and  
25 minerals, any water resources, any and every improvement attached to the property as a result of  
26 these actions, and including any rights to the ownership of any organisms or micro-organisms in-  
27 habiting the premises, pursuant to the contract and covenant of the mining claims conveyed by the  
28

1 federal government to the mines as referred to herein, which are known collectively as Iron Moun-  
2 tain Mines.

3 411. Grantees aver that the submitted remedial investigation/ feasibility study of April 29, 2008,  
4 the ROD 6 submitted June 4<sup>th</sup>, and the conceptual site model submitted August 7<sup>th</sup>, which grantees  
5 submitted to the EPA in good faith to address the current emergency as well as to offer permanent  
6 solutions for the environmental problems of Iron Mountain Mine as well as for remedy of several  
7 major environmental and economic problems for northern California has been disregarded by the  
8 EPA, and despite the agencies assurance that a reply to grantees proposals would be provided by  
9 September, that thus far no communication of any kind beyond the occasional acknowledgment of  
10 an inquiry has been received by grantees from the EPA.

11 Grantees submit that such conduct is not conducive to the cooperative approach to resource con-  
12 servation and recovery as expressed by Executive Order. Grantees further submit that these propos-  
13 als truly are “too big to fail”, and grantees implore the Court to provide all such remedies as the  
14 Court may find Just and Proper.

15 **A HARD BARGAIN WITH FRAUD, ACCIDENT, TRUST & HARDSHIP**

16 **412.** The miners and mine owners demand the courts intervene to stop this abuse.

17 **413.** The real parties in interest, T.W. Arman and John F. Hutchens, Grantees in a joint venture to  
18 re-mine mining wastes at Iron Mountain Mines, Inc., have SUBMITTED EVIDENCE AND  
19 INFORMATION OF A SUBSTANTIAL NATURE TO INDICATE THAT THEY HAVE BEEN  
20 SLANDERED, LIBELLED, DEFRAUDED, AND ROBBED BY THE UNITED STATES  
21 ENVIRONMENTAL PROTECTION AGENCY OF OVER \$500 MILLION DOLLARS IN  
22 REVENUES FROM THE SALE OF PRODUCTS RECOVERED FROM ACID MINE  
23 DRAINAGE AND OTHER MINE WASTES, PRODUCT THAT WAS PREVIOUSLY  
24 RECOVERED AND RECYCLED, AND THAT THIS FRAUD CONTINUES BY FALSE  
25 CLAIMS AND FRAUD UPON THE COURT WITH NEGLIGENT ENDANGERMENT,  
26 TRESPASS, VIOLATIONS OF CONSTITUTIONALLY PROTECTED DUE PROCESS AND  
27 EQUAL PROTECTION, THE TAKING OF PRIVATE PROPERTY REQUIRING JUST  
28 COMPENSATION, FRAUDULENT DECEIT UNDER COLOR OF LAW, FALSE CLAIMS,



1 KNOWINGLY RECKLESS DISREGARD OF THE TRUTH, DELIBERATE IGNORANCE OF  
2 ACTUAL INFORMATION, MALICE, OPPRESSION, DESPOTISM, TYRANNY, ULTERIOR  
3 GOVERNMENT MOTIVES, BREACH OF LETTERS PATENTS, CONCEALMENT AND  
4 NON-DISCLOSURE, NEGLIGENT MISREPRESENTATION, INTERFERENCE IN THE  
5 COMPLETE DEVELOPMENT OF MINERAL PATENTS, CLOUDING TITLE, INTENTIONAL  
6 VIOLATION OF CIVIL RIGHTS, ARBITRARY AND CAPRICIOUS THEFT OF NATURAL  
7 RESOURCES DEVOID OF A RATIONAL BASIS, AND CONSTRUCTIVE TRUST, ALL TO  
8 THE DAMAGE OF THE PETITIONER, THE OWNERS, THE PUBLIC WELFARE, THE  
9 PUBLIC BENEFIT, AND THE ENVIRONMENT REQUIRING JUDICIAL REVIEW.

10 **414.** THE OWNER'S CLAIM THE BIOLOGICAL ARCHAE AND OTHER BACTERIA  
11 CULTIVATED WITHIN THE IRON MOUNTAIN MINE AS A NATURAL RESOURCE, AND  
12 DEMAND AN IMMEDIATE INJUNCTION TO HALT ANY ATTEMPT BY THE EPA, THE  
13 SITE OPERATOR, OR ANY OTHER PARTY TO DAMAGE OR DISTURB THE BIOTA  
14 CULTIVATED WITHIN ANY PORTION OF THE IRON MOUNTAIN MINES.

15 THE EPA HAS CHANGED THE LOCKS ON THE GATES AND RESISTS THE RIGHT OF  
16 ENTRY AGAINST THE OWNERS AND MINERS, WHO CONTINUE TO DEMAND THAT  
17 THE EPA DELIVER THESE PREMISES TO THE TRUE AND RIGHTFUL OWNER, WITH  
18 IMMEDIATE PRODUCTION OF KEYS AND CODES TO THE GATES, UNRESTRICTED  
19 ACCESS TO THE PREMISES; AND RELIEF AS THE COURT MAY FIND JUST AND  
20 PROPER TO PRESERVE AND PERFECT PATENT TITLE FOR IRON MOUNTAIN MINES,  
21 INC., AND RESTORE DIGNITY TO T.W. (TED) ARMAN.

22 **415.** WITH DECLARATIONS OF REMISSION AND REVERSION AND DETINUE SUR  
23 BAILMENT, AND SURRENDER OF ALL SITE OPERATIONS TO THE OWNERS  
24 DESIGNATED CONTRACTORS.

25 **416.** PETITIONER AND GRANTEES DEMAND DETINUE SUR BAILMENT, REMISSION OF  
26 WAGES AND RENTS, REVERSION OF THE OFFICE OF PROJECT MANAGER, THE  
27 IMMEDIATE COMMUTATION OF TRUST I AND TRUST II, DECLARATIONS OF  
28 CONSTRUCTIVE TRUST, RESTORATION OF LAWFUL PERMITTING AUTHORITY TO

1 SHASTA COUNTY FOR THE ACQUISITION OF BEST VALUE TECHNOLOGY FROM  
2 BATELLE MEMORIAL INSTITUTE LLX (LIQUID/ LIQUID EXCHANGE) FACILITIES AND  
3 SITE OPERATIONS.

4 **417.** EPA is legally required to comply with the procedural requirements of NEPA for its research  
5 and development activities, facilities construction, wastewater treatment construction grants under  
6 Title II of the Clean Water Act (CWA), EPA-issued National Pollutant Discharge Elimination Sys-  
7 tem (NPDES) permits for new sources, and for certain projects funded through EPA annual Appro-  
8 priations Acts.

9 **418.** Section 511(c) of the CWA supposedly exempts other EPA actions under the CWA from the  
10 requirements of NEPA. Section 7(c) of the Energy Supply and Environmental Coordination Act of  
11 1974 (15 U.S.C. 793(c)(1)) supposedly exempts actions under the Clean Air Act from the require-  
12 ments of NEPA. Supposedly the EPA is also exempted from the procedural requirements of envi-  
13 ronmental laws, including NEPA, for comprehensive Environmental Response, Compensation, and  
14 Liability Act (CERCLA) response actions. Courts also consistently have recognized that EPA pro-  
15 cedures or environmental reviews under enabling legislation are functionally equivalent to the  
16 NEPA process and thus exempt from the procedural requirements in NEPA. The EPA also claims  
17 exemptions under the Beville Act exclusions.

18 **419.** Such exemptions have allowed the EPA to evade environmental regulations with impunity,  
19 and facilitated despotism, tyranny, oppression, waste, unfairness, fraud, and abuse.

20 **420.** CERCLA is an unfair and unjust law facilitating tyranny and oppression through illegitimate  
21 animus. We reject it, for CERCLA violates the Constitutions of California and United States.

22 **421.** "Whatever the form of the instrument of conveyance, and even though the parties speak of it  
23 in its terms as a lease, if its fair construction shows that the title to the minerals in place is to pass  
24 upon the delivery of the instrument, while the surface is retained, or vice versa, and, of course, for  
25 all time, if the fee is granted, except that the fee to the space occupied by the minerals seems to  
26 terminate when the mine is exhausted."

27 McConnell v. Pierce, 210 Ill. 627, 71 N.E. 622., Moore v. Indian Camp Coal Co., 493, 0 N.E. 6.  
28

1 There is sufficient “logical relationship” between the claim and the counterclaim to classify the lat-  
2 ter as “compulsory” and hence ancillary jurisdiction extended to additional necessary parties, re-  
3 gardless of a lack of other jurisdictional grounds. *United Artists Corp v. Masterpiece productions*  
4 *Inc.* 221 F.2d 213 (2d Cir. 1955)

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

15 **423.** As long as the reason of man continues fallible, and he is at liberty to exercise it, different  
16 opinions will be formed. As long as the connection subsists between his reason and his self-love,  
17 his opinions and his passions will have a reciprocal influence on each other; and the former will be  
18 objects to which the latter will attach themselves. The diversity in the faculties of men, from which  
19 the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The  
20 protection of these faculties is the first object of government. From the protection of different and  
21 unequal faculties of acquiring property, the possession of different degrees and kinds of property  
22 immediately results; and from the influence of these on the sentiments and views of the respective  
23 proprietors, ensues a division of the society into different interests and parties. \*\*\* James Madison

#### 24 **ARBITRARY AND CAPRICIOUS**

25 **424.** Absence of a rational connection between the facts found and the choice made. *Natural Re-*  
26 *sources. v. U.S.* , 966 F.2d 1292, 97, (9th Cir.'92). A clear error of judgment; an action not based  
27 upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or oth-  
28 erwise not in accordance with law or if it was taken without observance of procedure required by

1 law. 5 USC. 706(2)(A) (1988).

2 Irrational; capricious.

3 The term arbitrary describes a course of action or a decision that is not based on reason or judgment  
4 but on personal will or discretion without regard to rules or standards.

5 An arbitrary decision is one made without regard for the facts and circumstances presented, and it  
6 connotes a disregard of the evidence.

7 In many instances, the term implies an element of bad faith, and it may be used synonymously with  
8 tyrannical or despotic.

9 The Court is free to reconsider its earlier view regarding the type of discrimination that gives rise to  
10 standing. See *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001)  
11 ("law of the case doctrine is wholly inapposite" to "a district court's ... own interlocutory order"  
12 "which the court is free to "reconsider" as long as "court has not been divested of jurisdiction over  
13 the order"); see also *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (dis-  
14 missal order with leave to amend is not final).

15 The Equal Protection Clause prohibits state action that discriminates" See, e.g., *Brown v. Board of*  
16 *Education*, 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873 (1954) The Court, in its Order, recog-  
17 nized that " stigmatic injuries" may satisfy the " injury in fact" component of standing, and that  
18 upon doing so, they also automatically satisfy the other standing requirements of causation and re-  
19 dressability.

20 In *Heckler v. Matthews*, 465 U.S. 728, 139, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984), the Supreme  
21 Court articulated how the non-economic, stigmatic injury that results from discriminatory treatment  
22 confers standing even when the court cannot award the benefit originally denied as a result the dis-  
23 crimination

24 "There can be no doubt that this sort of noneconomic injury is one of the most serious conse-  
25 quences of discriminatory government action and is sufficient in some circumstances to support  
26 standing." 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

27 As early as 1886, the Supreme Court recognized that the Equal Protection clause of the Fourteenth  
28 Amendment to the U.S. Constitution prohibits discrimination even under the auspices of a facially

1 neutral law. In *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 6 L.Ed. 22 (1886) "Though the  
2 law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by  
3 public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal  
4 discriminations between persons in similar circumstances, material to their rights, the denial of  
5 equal justice is still within the prohibition of the constitution." *Yick Wo*, 118 U.S. at 373-74.  
6 "Courts must accept as true all material allegations of the complaint, and must construe the com-  
7 plaint in favor of the complaining party") and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 502, 512,  
8 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (courts cannot require plaintiffs to plead more than is neces-  
9 sary to succeed on the merits in order to survive a motion to dismiss).

10 **425. Arbitrary and Capricious as grounds for Judgment on the Merits**

11 1. The Administrative Procedures Act (APA) sets forth standards governing judicial review of de-  
12 cisions made by federal administrative agencies. See *Dickinson v. Zurko*, 527 U.S. 150, 152  
13 (1999); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004); *Public Util.*  
14 *Dist. No. 1 v. Federal Emergency Mgmt. Agency*, 371 F.3d 701, 706 (9th Cir. 2004). Pursuant to  
15 the APA, agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or  
16 otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71,  
17 77 (2002); *High Sierra, Hikers Ass'n*, 390 F.3d at 638; *Public Util. Dist. No. 1*,  
18 371 F.3d at 706;.1 The arbitrary and capricious standard is appropriate for resolutions of factual  
19 disputes implicating substantial agency expertise. See *Marsh v. Oregon Natural Res. Council*, 490  
20 U.S. 360, 376 (1989); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002), cert.  
21 denied, 538 U.S. 946 (2003); *Ninilchik Traditional Council v. United States*, 227  
22 F.3d 1186, 1194 (9th Cir. 2000).

23 2. Review under the standard is narrow and the reviewing court may not substitute its judgment for  
24 that of the agency. See *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh*, 490 U.S. at  
25 378; *Ocean Advocates v. U.S. Army Corps of Eng's*, 402 F.3d 846, 858 (9th Cir. 2005); *Public*  
26 *Util. Dist. No. 1*, 371 F.3d at 706.2 The agency, however, must articulate a rational connection be-  
27 tween the facts found and the conclusions made. See *Environmental Def. Ctr., Inc. v. EPA*, 344  
28

1 F.3d 832, 858 n.36 (9th Cir. 2003), cert. denied, 541 U.S. 1085 (2004); *Midwater Trawlers Co-op*  
2 *v. Department of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

3 3. The reviewing court must determine whether the decision was based on a consideration of the  
4 relevant factors and whether there has been a clear error of judgment. See *Marsh*, 490 U.S. at 378;  
5 *Ocean Advocates*, 402 F.3d at 859; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097  
6 (9th Cir. 2003); *Environmental Def. Ctr.*, 344 F.3d at 858 n.36.

7 4. The inquiry, though narrow, must be searching and careful. *Marsh*, 490 U.S. at 378; *Ocean Ad-*  
8 *vocates*, 402 F.3d at 858-59; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001); *Ninilchik Tra-*  
9 *ditional Council*, 227 F.3d at 1194.

10 5. This court may reverse under the arbitrary and capricious standard only if the agency has relied  
11 on factors that Congress has not intended it to consider, entirely failed to consider an important as-  
12 pect of the problem, offered an explanation for its decision that runs counter to the evidence before  
13 the agency, or is so implausible that it could not be ascribed to a difference in view or the product  
14 of agency expertise. See *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir.) (noting standard),  
15 amended by 352 F.3d 1187 (9th Cir. 2003), cert. denied, 542 u.s. 919 (2004); *Environmental Def.*  
16 *Ctr.*, 344 F.3d at 858 n.36; *Brower*, 257 F.3d at 1065.

17 6. Finally, an agency's decision can be upheld only on the basis of the reasoning in that decision.  
18 See *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997); *French Hosp. Med. Ctr.*  
19 *v. Shalala*, 89 F.3d 1411, 1416 (9th Cir. 1996). *Marbury v. Madison*, 1803.

20 The EPA conduct of the Iron Mountain Mine remediation invites the question of why it was neces-  
21 sary in the first place to invoke the emergency authority of CERCLA rather than the CWA to ad-  
22 dress an environmental situation that had been known for at least 80 years, an action that was  
23 brought specifically for violation of an NPDES permit issued pursuant to provisions of the CWA, a  
24 removal action that took 9 years to implement and that after 25 years still has no remedy as re-  
25 quired by CERCLA.

26 Petitioner submits that the logical conclusion to be reached is that the EPA sought to extend its au-  
27 thority beyond the congressionally intended authority under CERCLA to this site because of the  
28 retroactive provisions of costs recovery from the previous owner.

1 Petitioner submits that these remaining grantees civil rights were violated by EPA actions moti-  
2 vated by prejudice, accomplished by discrimination, and depended upon these grantees and the  
3 Courts being deceived and misled, that is a fraud upon the Court.

4 Petitioner further submits that the subsequent violation of the remaining grantees rights were only  
5 necessary to perpetuate the EPA's improper assertion of police and regulatory power resulting in  
6 manifest tyranny and usurpation by personal, corporate, and stigmatic injury.

7 This tyranny has resulted in a rogue agency in the person of the EPA, whose unbridled authority  
8 granted by judicial deference acted to the negligent endangerment of these grantees, to the public,  
9 and to the environment, and in defiance of the protests of the RP's & PRP's, is an abuse of discre-  
10 tion for ignoring the expressed intent of Congress imposed by the National Environmental Policy  
11 Act and the Resource Conservation and Recovery Act, and provisions thereto, including review of  
12 environmental impact statement and compliance with RCRA C and D.

13 The abuse of discretion for representing a 25 year removal action as an interim remedy with no  
14 final remedy, and abuse of discretion for implementing a removal action in multiple violations of  
15 the National Contingency Plan, with no disposal plan, and violation of California Codes, etc.

### 16 **Constitutional Review**

17 7. A court may refuse to defer to an agency's interpretation of a statute that raises serious constitu-  
18 tional concerns. See *Ma v. Reno*, 208 F.3d 815, 821 n.13 (9th Cir. 2000) (noting Chevron defer-  
19 ence is not owed where a substantial constitutional question is raised by an agency's interpretation  
20 of a statute it is authorized to construe), vacated on other grounds by *Zadvydas v. Davis*, 533 U.S.  
21 678 (2001); *Williams v. Babbitt*, 115 F.3d 657, 661-62 (9th Cir. 1997).

22 8. Whether an agency's procedures comport with due process requirements presents a question of  
23 law reviewed de novo. See *Ramirez- Alejandro v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (en  
24 banc) (noting no deference is owed to agency); *Chowdhury v. INS*, 249 F.3d 970, 972 (9th Cir.  
25 2001) (BIA); *Gilbert v. National Transp. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996) (FAA); cf.  
26 *Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86, 89 (9th Cir. 1996) (noting courts  
27 should usually defer to agency's fashioning of hearing procedures). The constitutionality of an  
28



1 agency's regulation is reviewed de novo. See *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d  
2 1016, 1018 (9th Cir. 1999).

3 In an opinion for *Olech v. Willowbrook* by Judge Richard Posner, the court explained that the  
4 plaintiffs stated a claim under the Equal Protection Clause because they alleged a "spiteful effort to  
5 'get' [them] for reasons wholly unrelated to any legitimate state objective."

6 The Supreme Court unanimously affirmed. In a per curiam opinion, the Court stated that it had  
7 granted review in the case to decide the issue of "whether the Equal Protection Clause gives rise to  
8 a cause of action on behalf of a 'class of one' where the plaintiff did not allege membership in a  
9 class or group."

10 The Court answered this question in the affirmative. It said that its prior rulings had "recognized  
11 successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she  
12 has been intentionally treated differently from others similarly situated and that there is no rational  
13 basis for the difference in treatment." The Court explained that "the purpose of the Equal Protec-  
14 tion Clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction  
15 against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or  
16 by its improper execution through duly constituted agents."

17 The Supreme Court has said "whether the complaint alleges a class of one or of five is of no con-  
18 sequence because we conclude that the number of individuals in a class is immaterial for equal pro-  
19 tection analysis."

20 Petitioner submits that prima facie evidence exists of constitutional violations of civil rights.

### 21 **Statutory and Regulatory Interpretations**

22 9. Courts generally defer to an agency's interpretation of its regulations. See *Public Util. Dist. No.*  
23 *1 v. Federal Emergency Mgmt. Agency*, 371 F.3d 701, 706 (9th Cir. 2004); *Forest Guardians v.*  
24 *U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (noting "substantial deference").

25 10. Deference is owed unless the interpretation is plainly erroneous or inconsistent with regulation.  
26 See *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). Note that in  
27 some instances, little or no deference is owed to an agency's interpretation of regulations. See e.g.,  
28 *United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001) (explaining continuum of deference

1 owed); *Pronsolino v. Nastri*, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of defer-  
2 ence).

3 11. Finally, note that interpretative regulations are entitled to less deference than legislative regula-  
4 tions. See *Community Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 791 (9th Cir.  
5 2003); *Lynch v. Dawson*, 820 F.2d 1014, 1020 (9th Cir. 1987) (noting “various degrees of defer-  
6 ence” owed to interpretative rules). Whether an agency regulation is interpretative or legislative is a  
7 question of law reviewed de novo. See *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004);  
8 *Hemp Indus. Ass’n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1086 (9th Cir. 2003); *Chief Pro-  
9 bation Officers v. Shalala*, 118 F.3d 1327, 1330 (9th Cir. 1997).

10 12. An agency’s interpretation or application of a statute is a question of law reviewed de novo. See  
11 *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006); *Vernazza v. SEC*, 327 F.3d 851, 858 (9th  
12 Cir.), amended by 335 F.3d 1096 (9th Cir. 2003). An agency’s interpretation of its statutory man-  
13 date is also de novo. See *Bear Lake Watch, Inc. v. FEC.*, 324 F.3d 1071, 1073 (9th Cir. 2003);  
14 *Friends of the Cowitz and CPR-Fish v. FEC.*, 253 F.3d 1161, 1166 (9th Cir. 2001), amended by  
15 282 F.3d 609 (9th Cir. 2002); *American Rivers v. FEC.*, 201 F.3d 1186, 1194 (9th Cir. 2000).

16 13. In reviewing an agency’s construction of a statute, the court must reject those constructions that  
17 are contrary to clear congressional intent or frustrate the policy that Congress sought to implement.  
18 See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (estab-  
19 lishing two-part test for reviewing an agency’s interpretation of a statute); *Schneider*, 450 F.3d at  
20 952; *Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (en  
21 banc) (explaining two-step test), amended by 360 F.3d 1374 (9th Cir. 2004); *California Dep’t of  
22 Soc. Servs. v. Thompson*, 321 F.3d 835, 847 (9th Cir. 2003) (applying *Chevron*). When a statute is  
23 silent or ambiguous on a particular point, the court may defer to the agency’s interpretation. See  
24 *Chevron*, 467 U.S. at 843; *Schneider*, 450 F.3d at 952; *Bear Lake Watch*, 324 F.3d at 1073; *Espejo  
25 v. INS*, 311 F.3d 976, 978 (9th Cir. 2002). Review is limited to whether the agency’s conclusion is  
26 based on a permissible construction of the statute.

27 See *Chevron*, 467 U.S. at 843; *Espejo*, 311 F.3d at 978; *McLean v. Crabtree*, 173 F.3d 1176, 1181  
28 (9th Cir. 1999).

1 14. Thus, a federal agency’s interpretation of a statutory provision it is charged with administering  
2 may be entitled to deference. See *Bear Lake Watch*, 324 F.3d at 1073 (noting “deference to an  
3 agency’s reasonable interpretation of a statutory provision where Congress has left open the ques-  
4 tion of the agency’s discretion”); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th  
5 Cir. 2002) (noting deference unless agency’s interpretation is contrary to clear congressional intent  
6 or frustrates the policy Congress sought to implement); *Royal Foods Co. v. RJR Holdings Inc.*, 252  
7 F.3d 1102, 1106 (9th Cir. 2000) (noting under the two-part Chevron  
8 analysis, deference is due the agency’s interpretation of a statute unless the plain language is un-  
9 ambiguous “with regard to the precise matter at issue”)

10 15. Note that no deference is owed to an agency when “Congress has directly spoken to the precise  
11 question at issue.” *Chevron*, 467 U.S. at 842; *Community Hosp. of Monterey Peninsula v. Thomp-*  
12 *son*, 323 F.3d 782, 789 (9th Cir. 2003). Courts are also not obligated to defer to an agency’s inter-  
13 pretations that are contrary to the plain and sensible meaning of the statute. See *Kankamalage v.*  
14 *INS*, 335 F.3d 858, 862 (9th Cir. 2003). No deference is given to an agency’s interpretation of a  
15 statute that it does not administer or is outside of its expertise. See *Garcia-Lopez v. Ashcroft*, 334  
16 F.3d 840, 843 (9th Cir. 2003) (interpreting state law).

17 16. Moreover, “[r]adically inconsistent interpretations of a statute by an agency, relied upon in  
18 good faith by the public, do not command the usual measure of deference to agency action.” *Pfaff*  
19 *v. United States Dep’t of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Thus, “[a]n  
20 agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation  
21 is ‘entitled to considerably less deference’ than a consistently held agency view.” *Young v. Reno*,  
22 114 F.3d 879, 883 (9th Cir. 1997)

23 17. Finally, “judicial deference is not necessarily warranted where courts have experience in the  
24 area and are fully competent to decide the issue.” *Monex Int’l, Ltd. v. Commodity Futures Trading*  
25 *Comm’n*, 83 F.3d 1130, 1133 (9th Cir. 1996). A state agency’s interpretation of a federal statute is  
26 not entitled to deference. See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997)  
27 (review is de novo).

1 Whatever regulations the EPA claims to have followed in the conduct of this superfund remedia-  
2 tion, the wholesale contravention of congressional intent as expressed in the preamble to RCRA  
3 and violation of the NCP and NEPA demands this Courts intervention:

4 6901 of the Solid Waste Act.

5 b) Environment and health The Congress finds with respect to the environment and health, that--  
6 (1) although land is too valuable a national resource to be needlessly polluted by discarded materi-  
7 als, most solid waste is disposed of on land in open dumps and sanitary landfills; (2) disposal of  
8 solid waste and hazardous waste in or on the land without careful planning and management can  
9 present a danger to human health and the environment; (3) as a result of the Clean Air Act [42  
10 U.S.C. 7401 et seq.], the Water Pollution Control Act [33 U.S.C. 1251 et seq.], and other Federal  
11 and State laws respecting public health and the environment, greater amounts of solid waste (in the  
12 form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and  
13 environmentally unsound practices for the disposal or use of solid waste have created greater  
14 amounts of air and water pollution and other problems for the environment and for health; (4) open  
15 dumping is particularly harmful to health, contaminates drinking water from underground and sur-  
16 face supplies, and pollutes the air and the land; (5) the placement of inadequate controls on hazard-  
17 ous waste management will result in substantial risks to human health and the environment; (6) if  
18 hazardous waste management is improperly performed in the first instance, corrective action is  
19 likely to be expensive, complex, and time consuming; (7) certain classes of land disposal facilities  
20 are not capable of assuring long-term containment of certain hazardous wastes, and to avoid sub-  
21 stantial risk to human health and the environment, reliance on land disposal should be minimized or  
22 eliminated, and land disposal, particularly landfill and surface impoundment, should be the least  
23 favored method for managing hazardous wastes; and (8) alternatives to existing methods of land  
24 disposal must be developed since many of the cities in the United States will be running out of suit-  
25 able solid waste disposal sites within five years unless immediate action is taken. (c) Materials  
26 The Congress finds with respect to materials, that-- (1) millions of tons of recoverable material  
27 which could be used are needlessly buried each year; (2) methods are available to separate usable  
28 materials from solid waste; and (3) the recovery and conservation of such materials can reduce the

1 dependence of the United States on foreign resources and reduce the deficit in its balance of pay-  
2 ments. (d) Energy The Congress finds with respect to energy, that-- (1) solid waste represents a  
3 potential source of solid fuel, oil, or gas that can be converted into energy; (2) the need exists to  
4 develop alternative energy sources for public and private consumption in order to reduce our de-  
5 pendence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation;  
6 and (3) technology exists to produce usable energy from solid waste.

7 **426.** Motion for Judgment on the Pleadings finding EPA in violation of RCRA and the NCP.  
8 Violations of NEPA, CWA, CERCLA, EPCRA, and the Constitution of the United States.

### 9 **Substantial Evidence**

10 18. Agency's factual findings are reviewed under the substantial evidence standard. See Dickinson  
11 v. Zurko, 527 U.S. 150, 153-61 (1999) (rejecting "clearly erroneous" review and reaffirming sub-  
12 stantial evidence); Alaska Dept. of Health and Soc. Servs. v. Centers for Medicare and Medicaid  
13 Servs., 424 F.3d 931, 938 (9th Cir. 2005); Lucas v. NLRB, 333 F.3d 927, 931  
14 (9th Cir. 2003). Substantial evidence means more than a mere scintilla but less than a preponder-  
15 ance; it means such relevant evidence as a reasonable mind might accept as adequate to support a  
16 conclusion. See NLRB v. International Bhd. of Elec. Workers, Local 48, 345 F.3d 1049, 1054 (9th  
17 Cir. 2003); De la Fuente II v. FDIC, 332 F.3d 1208, 1220 (9th Cir. 2003). The  
18 standard, however, is "extremely deferential" and a reviewing court must uphold the agency's find-  
19 ings "unless the evidence presented would compel a reasonable factfinder to reach a contrary re-  
20 sult." See Monjaraz-Munoz v. INS, 327 F.3d 892, 895 (9th Cir.), amended by 339 F.3d 1012 (9th  
21 Cir. 2003).<sup>7</sup> If the evidence is susceptible to more than one rational interpretation, the court may  
22 not substitute its judgment for that of the agency. See Bear Lake Watch, Inc. v. FEC., 324 F.3d  
23 1071, 1076 (9th Cir. 2003); McCartney v. Massanari, 298 F.3d 1072, 1075 (9th Cir. 2002).

24 19. The substantial evidence standard requires the appellate court to review the administrative re-  
25 cord as a whole, weighing both the evidence that supports the agency's determination as well as the  
26 evidence that detracts from it. See De la Fuente, 332 F.3d at 1220 (reviewing the record as a  
27 whole); Mayes v. Massanari, 276 F.3d 453, 458-59 (9th Cir. 2001); Smolen v. Chater, 80 F.3d  
28 1273, 1279 (9th Cir. 1996).

1 20. A district court's decision to exclude extra-record evidence when reviewing an agency's deci-  
2 sion is reviewed for an abuse of discretion. See *Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir.  
3 1998); *Southwest Ctr. For Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447  
4 (9th Cir. 1996); see also *Bear Lake Watch*, 324 F.3d at 1077 n.8 (declining to  
5 review extra-record evidence).

6 21. Note that when an agency and a hearings officer disagree, the court reviews the decision of the  
7 agency, not the hearings officer. See *Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990), amended  
8 by 932 F.2d 1352 (9th Cir. 1991); *NLRB v. International Bhd. of Elec. Workers, Local 77*, 895  
9 F.2d 1570, 1573 (9th Cir. 1990).<sup>8</sup> Thus, the standard of review is not modified when such a dis-  
10 agreement occurs. See *Maka*, 904 F.2d at 1355; *International Bhd.*, 895 F.2d at 1573. When the  
11 agency rejects the hearings officer's credibility findings, however, it must state its reasons and  
12 those reasons must be based on substantial evidence. See *Maka*, 904 F.2d at 1355;  
13 *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986).

14 22. This court defers to credibility determinations made by hearings officers. See *Manimbao v.*  
15 *Ashcroft*, 329 F.3d 655, 658 (9th Cir. 2003); *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1050 (9th  
16 Cir. 2002); *Underwriters Lab., Inc. v. NLRB*, 147 F.3d 1048, 1051 (9th Cir. 1998). Such credibility  
17 determinations must be upheld unless they are "inherently or patently unreasonable." *Retlaw*  
18 *Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995) (internal quotation omitted). Although  
19 deference is given, a hearings officer must give specific, cogent reasons for adverse credibility  
20 findings. See *Manimbao*, 329 F.3d at 658; *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002); *Red-*  
21 *dick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

22 **427.** The EPA selected remedy, to fill the mine with concrete, was abandoned almost before the  
23 ink was dry on the first ROD (record of decision). Nevertheless, EPA maintained its prerogative to  
24 carry on without any final remedy, pretended that its actions somehow constituted an interim rem-  
25 edy, and ignored the obvious remedy presented by these remaining grantees. The EPA misrepre-  
26 sented the very nature of the cause of the problem by persisting in its premise that the migration of  
27 elements from the property was the result of a chemical reaction that the EPA said it was trying to  
28 eliminate, (see administrative record 60595, June 28, 1993), when it was well known and under-

1 stood by them that the reactions were entirely dependant upon microorganisms living within the  
2 rock, that these bacteria had inhabited the rock for a geologic period of time prior to mining, that in  
3 all probability the acid mine drainage had been occurring prior to mining, and that there was no  
4 conceivable way to stop the acid mine drainage other than to finish the work of mining the ore first  
5 begun over 100 years before.

#### 6 **Environmental Protection Agency Review**

7 **428.** Final administrative actions of the EPA are reviewed under the standards established by the  
8 Administrative Procedures Act. See *Ober v. Whitman*, 243 F.3d 1190, 193 (9th Cir. 2001); *De-*  
9 *fenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.), amended by 197 F.3d 1035 (9<sup>th</sup> Cir.  
10 1999). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed de  
11 novo. See *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001).

12 The court may reverse the EPA's decision only if it is arbitrary, capricious, an abuse of discretion,  
13 or otherwise not in accordance with law. See *Defenders of Wildlife v. United States Env't Prot.*  
14 *Agency*, 420 F.3d 946, 958-59 (9th Cir. 2005) (discussing what is "arbitrary and capricious");  
15 *Ober*, 243 F.3d at 1193; *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Defer-  
16 ence is owed to the EPA's interpretation of its own regulations if those regulations are not unrea-  
17 sonable. See *Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996); see also  
18 *Pronsolino v. standard*); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d  
19 843, 848-49 (9th Cir. 2001) (noting court may reject a construction inconsistent with statutory  
20 mandates or that frustrate the statutory policies that Congress sought to implement). *Nastri*, 291  
21 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference owed to the EPA).

22 \_\_\_\_\_  
23 1 See *Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003), cert. denied,  
24 541 U.S. 1085 (2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003);  
25 *Arizona Cattle Growers' Ass'n*, 273 F.3d at 1236; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir.  
26 2001); *United States v. Snoring Relief Lab Inc.*, 210 F.3d 1081, 1085 (9th Cir. 2000).  
27 2 *Fry v. DEA*, 353 F.3d 1041, 1043 (9th Cir. 2003); *Environmental Def. Ctr.*, 344 F.3d at 858 n.36;  
28 *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1235 (9th Cir. 2001)



1 (noting “narrow scope” of review); Hells Canyon Alliance, 227 F.3d at 1177; Ninilchik Traditional  
2 Council, 227 F.3d at 1194; Snoring Relief Lab Inc., 210 F.3d at 1085.

3 3 See also Community Hosp. of Monterey Peninsula v. Thompson, 323 F.3d 782, 792 (9th Cir.  
4 2003) (“considerable less deference” is owed to agency’s interpretation that conflicts with prior  
5 interpretation); Santamaria-Ames v. INS, 104 F.3d 1127, 1132 n.7 (9th Cir. 1996) (no deference  
6 owed to interpretation that is contrary to plain and sensible meaning of regulation); United States v.  
7 Trident Seafoods, Inc., 60 F.3d 556, 559 (9th Cir. 1995) (no deference owed to interpretation of-  
8 fered by counsel where the agency has not established a position).

9 4 See also Defenders of Wildlife v. Browner, 191 F.3d 1159, 1162 (9th Cir.) (describing two-step  
10 Chevron review, and noting when Congress leaves a statutory gap for the agency to fill, any admin-  
11 istrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to  
12 the statute), amended by 197 F.3d 1035 (9th Cir. 1999).

13 5 See also American Fed. of Government Employees v. FLRA, 204 F.3d 1272, 1275 (2000) (not-  
14 ing agency’s interpretation of a statute outside of its administration is reviewed de novo).

15 6 See also Resources Invs., Inc. v. U.S. Army Corps of Eng’rs, 151 F.3d 1162, 1165 (9th Cir.  
16 1998) (deference does not extend to agency litigating positions that are wholly unsupported by  
17 regulations, rulings, or administrative practice).

18 7 See also Krull v. SEC, 248 F.3d 907, 911 (9th Cir. 2001) (noting court must “weigh pros and  
19 cons in the whole record with a deferential eye”); Alderman v. SEC, 104 F.3d 285, 288 (1997).

20 8 See also Northern Montana Health Care Ctr. v. NLRB, 178 F.3d 1089, 1093 (9th Cir. 1999) (“We  
21 employ the substantial evidence test even if the Boards decision differs materially from the  
22 ALJ’s.”); Perez v. INS, 96 F.3d 390, 392 (9th Cir. 1996) (where BIA conducts independent review  
23 of the IJ’s findings, court reviews BIA’s decision, not IJ’s).

24 9. The Supreme Court held, in Ex Parte Milligan 71 U.S. 2: No doctrine, involving more pernicious  
25 consequences, was ever invented by the wit of man than that any of its provisions can be suspended  
26 during any of the great exigencies of government."

27 Petitioner submits that he and his joint venture with the remaining grantees has been deprived of  
28 their right to resume mining, their right to protect and preserve their property, the right to feel se-

1 cure on ones own property and in ones own person, that such deprivations were the result a viola-  
2 tion of due process and equal protection and other constitutionally protected civil rights, by im-  
3 proper and unlawful actions by the EPA and the DOJ motivated by malice, fraud, oppression, and  
4 deceit, and with other ulterior government motives, resulting in manifest errors of impunity and  
5 miscarriage of justice, in contravention and breach of Letters Patents from the President of the  
6 United States including Freeholds for the service of soldiers to the Nation, and in breach and abro-  
7 gation of the General Mining Laws and the California Codes.

### 8 **BACKGROUND**

9 **429.** On June 5, 1991, the United States filed this action, under the Comprehensive Environmental  
10 Response, Compensation, and Liability Act, as amended (CERCLA), 42 U.S.C. §§ 9601-9675 ,  
11 against various grantees, including the present owner, T.W. Arman and Iron Mountain Mines, Inc  
12 (IMMI). On August 29, 1991, the California Department of Toxic Substances Control (DTSC) and  
13 the Central Valley Regional Water Quality Control Board (“DTSC” and “the Board” respectively;  
14 “State Agencies” collectively) filed a CERCLA action against these same parties and the matters  
15 were consolidated. This is an action that continues as a result of government claims against grant-  
16 ees for recovery of “unrecovered past costs” from the Iron Mountain Mine Superfund Site located  
17 outside of Redding California.

18 **430.** On May 4th, 2000, the Regional Judicial Officer Steven W. Anderson, issued a determination  
19 for probable cause in a CERCLA lien proceeding for a cost recovery action under Section 107(l) of  
20 CERCLA, 42 U.S.C. §9607(l), which lien "provides that all costs and damages for which a person  
21 is liable to the United States in a cost recovery action under CERCLA".

22 **431.** On December 8, 2000, the Eastern District Court approved a settlement between the Govern-  
23 ment and then co-defendant Aventis CropScience USA Inc. (formerly known as Stauffer Chemical  
24 Company, Rhône-Poulenc Basic Chemicals Company, and Rhône-Poulenc, Inc.) and entered a  
25 Consent Decree resolving the claims between the United States , the State Agencies, and those Set-  
26 tling Parties. Grantees Arman and IMMI did not object to the settlement but were not parties to it.

27 **432.** Subsequently, the remaining grantees discovered that they had been deceived and misled by  
28 being encouraged not to object to entry of the Consent Decree by counsel for government, who in-

1 formed grantees that said Consent Decree was to their benefit, and was the best possible outcome  
2 that the government could negotiate with the responsible parties.

3 **433.**Grantees subsequently learned that, in addition to dismissal with prejudice of their counter-  
4 claims against the settling grantees and damages claims of \$10 million, the Consent Decree also  
5 relieved the settling grantees of any guilt, responsibility or blame for injury or damages, relieved  
6 the settling grantees of recoupment of \$51 million in supposedly unrecovered past response costs,  
7 and relieved the settling grantees of all unquantified and unlimited future liability by transferring  
8 those liabilities to the non-settling and innocent landowner grantees

9 Subsequently, the United States and the State Agencies moved for partial summary judgment on  
10 the “potential liability” of the “PRP's”, Arman and IMMI.

11 **434.**On Dec. 24, 2008, Joint Venturer petitioned to reopen this case which has been listed as  
12 “closed” since 1993, to vindicate the Petitioner and the Grantees from the guilt and liability and  
13 establish a valid claim for just compensation along with bringing counterclaims and a citizen suit  
14 with notice of imminent and substantial endangerment to the United States Ninth Circuit Court of  
15 Appeals.

16 **435.**Cementation of copper began with the discovery of copper and the beginning of copper mining  
17 at Iron Mountain around 1896. By 1908 the State Geologist reported that the operation was so ex-  
18 tensive that a building was being constructed over and around it.

19 In 1919 copper prices crashed and the mine closed, in 1920 fish kills were reported.

20 In 1921 copper cementation resumed and was thereafter operated continuously until the EPA im-  
21 plemented their High Density Sludge water treatment.

22 After WWII Iron Mountain mines produced sulfur and iron for fertilizers until 1963.

23 Iron Mountain has 20,000,000 tonnes proven and 5,000,000 tonnes probable ore reserves.

24 The naturally occurring archaea living in the Richmond mine are reported to be capable of produc-  
25 ing the most acidic natural mine waters on the planet, pH -3.6.

26 Iron Mountain Mines, Inc. bioleaching naturally produces about 8 tons of metals per day.

27 One of the earliest records in the west of the practice of leaching is from the island of Cyprus.

28 Galen, a naturalist and physician reported in AD 166 the operation of in situ leaching of copper.

1 Surface water was allowed to percolate through the permeable rock, and was collected in ampho-  
2 rae. In the process of percolation through the rock, copper minerals dissolved so that the concentra-  
3 tion of copper sulphate in solution was high. The solution was allowed to evaporate until copper  
4 sulphate crystallized. Pliny (23-79 AD) reported that a similar practice for the extraction of copper  
5 in the form of copper sulphate was widely practiced in Spain.

6 **435.** Prior to the invention of electrolysis, the only practical method for the recovery of copper  
7 from copper sulphate was by cementation, a process that derives its name from the Spanish word  
8 cementacion, meaning precipitation. The cementation of copper was known in Pliny's time, but no  
9 written record of its commercial application seems to have survived. The cementation of copper  
10 was known to the Chinese, as documented by the Chinese king Lui-An (177-122 BC), and the Chi-  
11 nese implemented the commercial production of copper from copper sulphate using a cementation  
12 process in the tenth century. The Chiangshan cementation plant started operation in 1096 with an  
13 annual production of 190 tonnes per year of copper. In the Middle Ages, the alchemist Paracelsus  
14 (AD 1493-1541) described the cementation of copper as an example of the transmutation of Mars  
15 (iron) into Venus (copper).

## 16 **QUESTIONS OF LAW AND MATERIAL FACTS AT ISSUE**

### 17 **Claim 1**

18 **436.** Violations of RCRA, CERCLA, EPCRA, NCP, CWA, California Toxic Pits Act  
19 Violations of the California Health and Safety Code, the California Public Resource Code, the Cali-  
20 fornia Water Code, and the California Toxic Pits Recovery Act, the Resource Conservation and  
21 Recovery Act, and the National Environmental Policy Act.

22 **437.** Since 1992 the DTSC and the RWQCB have been "encouraging" the "further development  
23 and consideration of an alternative that could reduce or eliminate the need for treatment at the site,  
24 including capping, plugging, and resource recovery approaches".

25 **438.** The High Density Sludge produced by the EPA treatment plant is a class A mining waste un-  
26 der California Law. The EPA continues to claim that the sludge is a class B mining waste. Either  
27 way the waste is not being disposed of in accordance with the law.

1 22470 . SWRCB - Applicability. (C15: Section 570)

2 (a) General — This article applies to all discharges of mining wastes. No SWRCB-promulgated  
3 parts of this subdivision except those in this article, Article 1 of Chapter 1 (i.e., section 20080 et  
4 seq.), and such provisions of the other articles of this subdivision as specifically are referenced in  
5 this article shall apply to discharges of "mining wastes" as that term is defined in section 22480.  
6 Mining Units (including surface impoundments, waste piles, and tailings ponds) which receive  
7 WDRs after November 27, 1984, shall comply with the siting and construction standards in this  
8 article. Existing active and inactive Mining Units shall comply with the siting and construction re-  
9 quirements of this article as required by the RWQCB. Dischargers shall submit a report of waste  
10 discharge in compliance with Article 4, Subchapter 3, Chapter 4 of this subdivision (section 21710  
11 et seq.), and shall have WDRs which implement the appropriate provisions of this article unless  
12 requirements are waived by the RWQCB. Requirements for new and existing Mining Units are  
13 summarized on table 1.1 of this article. The RWQCB can impose more stringent requirements to  
14 accommodate regional and site specific conditions.

15 Table 1.1

16 Siting (1) Not on Holocene faults;

17 (2) Outside of areas of rapid geologic change;

18 From 54187 of the Administrative Record; Geologic Reconnaissance and Fracture Analysis, Iron  
19 Mountain Area... "Faults, joints, and other Fractures are a pervasive feature of the bedrock and as-  
20 sociated ore bodies." "they cut across the Brickyard ore body exposed in the open pit."

21 From 54224 of the Administrative Record; Geology of the Massive Sulfide Deposits at Iron Moun-  
22 tain ..... "The Brick Flat ore body is explored only by rather widely spaced drill holes. It is appar-  
23 ently bounded on the north and south edges by the two strands of the Camden fault, but different  
24 widths of ore in drill holes adjacent to each other suggest that other faults are probably present."

25 **439.** From 54423 of the Administrative Record; "In Brick Flat, two major fault zones are present:"  
26 "The mountain is falling in on itself," said John Spitzley, a civil engineer with the CH2M Hill en-  
27 gineering firm who oversaw much of the remediation work. "Some 30 to 40 acres at the top of the  
28 mountain is moving." <http://www.savethewildup.org/alerts/?id=438>

1 "Imagine yourself in downtown San Francisco , and you've got 20 office buildings between 10 and  
2 20 stories high. That's what they've carved out underground. After mining, they allowed the rocks  
3 to fall in. So you have a rubblized zone in the mountain that's 70 stories high and covers the foot-  
4 print of the office buildings. The water filters through this broken up pyrite deposit, just like a big  
5 Mr. Coffee, and forms a highly concentrated mine drainage," says Ray Sugarek, project manager  
6 for the clean-up effort at the mine. <http://www.1849.org/ggg/acid.html>

7 The EPA superfund water treatment plant for acid mine drainage at Iron Mountain Mines removes  
8 cadmium, a EPCRA 313 regulated chemical. The treatment plant processes about 3,600 lbs. of  
9 cadmium per year. The facility employs more than 10 full time employees. The EPA toxic pit  
10 sludge disposal facility upon the Brick Flat mine at Iron Mountain leaches at a ph of 2 and contains  
11 levels of cadmium in excess of 110 ppb, in violation 40 CFR Parts 148, 261, 266, 268, and 271,  
12 Land Disposal Restrictions Phase IV: Final Rule Promulgating Treatment Standards for Metal  
13 Wastes and Mineral Processing Wastes; Mineral Processing Secondary Materials and Bevill Exclu-  
14 sion Issues, and TCLP, TTLC, STLC, CalWET, EPCRA, CWA, CERCLA, NCP, RCRA, the Cali-  
15 fornia Health and Safety Code, the California Water Code, the California Public Resources Code,  
16 and the California Toxic Pits Recovery Act.

17 **440.** The EPA Superfund Iron Mountain Mine water treatment plant produces sludge in violation  
18 EPCRA 313 and has since the day the rule came into effect; May 26, 1998. The sludge is an  
19 "acutely hazardous waste" because it is derived from the similarly classified AMD of Iron Moun-  
20 tain Mines. The penalty for failing to report a EPCRA 313 violation is up to \$27,500 per day that  
21 the violation has continued.

22 **441.** Pursuant to the provisions of the California Public Resources Code, Petitioner submits that the  
23 EPA reported in its record of decisions that the Brick Flat disposal cell would require an environ-  
24 mental impact statement consistent with the requirements of the National Environmental Policy Act  
25 (NEPA). The EPA stated that the BLM would perform this EIS. The EPA has stated that all Cali-  
26 fornia Environmental laws are Applicable, Relevant, and Appropriate Requirements (ARAR) all of  
27 which are potentially subject to waivers, except for the Toxic Pits Recovery Act.

1 Petitioner submits that amongst other reasons justifying review, that under the provisions of 21166  
2 (c) of the code, “New information, which was not known and could not have been known at the  
3 time the environmental report was certified as complete, becomes available.

4 **442.** Petitioner submits that amongst other new information that would justify Review pursuant to  
5 21167 (b)(c)(d) or (e) of the code, that the “Derived From” rules of RCRA hazardous waste inform  
6 us that the sludge produced and disposed by the EPA at Iron Mountain Mines, Inc. is by definition  
7 an Acutely Toxic Hazardous Waste.

8 **443.** Petitioner alleges that plaintiffs intentional and negligent violations of the siting provisions of  
9 the code were motivated by malice, fraud, oppression, and deceit, since no rational basis exists for  
10 locating the toxic sludge disposal cell at the top of the mountain where it would be in absolute vio-  
11 lation of the siting provisions of RCRA and State environmental laws, a decision that was imple-  
12 mented at extraordinary additional expense, and for which the only plausible explanation for this  
13 decision is that the EPA intended to deprive the grantees and this petitioner of the opportunity to  
14 resume mining on the basis of interference with the EPA's actions.

15 **444.** Petitioner submits that due care was performed by Petitioner as joint venturer and miner by  
16 informed inquiry to Rick Sugarek , Project Manager for the EPA at the Iron Mountain Mines, Inc.  
17 Superfund Site, who stated that the Sludge produced and disposed at Iron Mountain Mines, Inc.  
18 Brick Flat Pit Disposal Cell upon the Brick Flat Pit Mine at Iron Mountain Mines, Inc. is not a haz-  
19 ardous waste, and who encouraged any solution to the sludge disposal problem.

20 Petitioner submits that due care was performed by Petitioner as joint venturer and miner by in-  
21 formed inquiry to Rudy Carver, Manager for AIG Consultants, Inc. Site Operator for the EPA at  
22 the Iron Mountain Mines, Inc. Superfund Site, who stated that the Sludge produced and disposed at  
23 Iron Mountain Mines, Inc. Brick Flat Pit Disposal Cell upon the Brick Flat Pit Mine at Iron Moun-  
24 tain Mines, Inc. is not hazardous waste, and who authorized sampling of the sludge.

25 Petitioner submits that due care was performed by Petitioner as joint venturer and miner by in-  
26 formed inquiry to Kathleen Salyer , Site Clean-up Branch Chief for the EPA Region IX, who has  
27 corresponded with Grantees and Petitioner to inform that the Sludge produced and disposed at Iron  
28



1 Mountain Mines, Inc. Brick Flat Pit Disposal Cell upon the Brick Flat Pit Mine at Iron Mountain  
2 Mines, Inc. is not a hazardous waste, but a waste subject to the RCRA Beville Act exclusions.

3 **445.** Since the joint venture was entered into in January of 2008, the Petitioner has been locked out  
4 of Iron Mountain Mine Property, and required to obtain permission for entry from Rick Sugarek  
5 and the EPA, required to submit a Work Plan for any activities, forbidden to perform any further  
6 sampling, forbidden from entering the mine, required to obtain permission for entry from Rudy  
7 Carver and AIG Consultants, Inc., the Site Operator, and been required to maintain constant CB  
8 radio contact concerning petitioners whereabouts at all times on the property. The EPA and the Site  
9 Operator have made allegations of the Petitioners and Grantees interference with the operations of  
10 the facilities.

11 **446.** Petitioner demands that the EPA cease and desist in the violation of Petitioner's and Defen-  
12 dant's Civil Rights.

13 **447.** Petitioner demands that the EPA comply with the General Mining Law and Landowners prop-  
14 erty rights in recognition of the Title by Patent Deeds, provisions of the National Contingency Plan  
15 (NCP) the Clean Water Act (CWA), the Solid Waste Act (RCRA), the Comprehensive Environ-  
16 mental Response, Compensation, and Liability Act (CERCLA, or SUPERFUND), the Emergency  
17 Planning and Community Right to Know Act (EPCRA), the California Water Code, the California  
18 Health and Safety Code. and the California Toxic Pits Act, the same provisions as were required of  
19 Iron Mountain Mines and as were used to justify the invasion and occupation of Iron Mountain  
20 Mine by the EPA, used to justify the inverse condemnation of Iron Mountain Mines by the EPA,  
21 used to justify the Taking without Just Compensation of Iron Mountain Mines, Inc. property by the  
22 EPA, used to justify the stigmatic injury and desecration of Iron Mountain Mines by the EPA, used  
23 to justify the negligently arbitrary and capricious conduct of the Iron Mountain Mines Superfund  
24 site by the EPA, used to justify the deprivations of the rights to Due Process and Equal Protection  
25 of T.W. Arman and Iron Mountain Mines, Inc. by the EPA, and used to justify the Personal Injury  
26 and Property Damage of T.W. Arman and Iron Mountain Mines, Inc. by the abuse of discretion of  
27 the Court as it was manipulated by the EPA.

1 T.W. Arman and IMMI operated a copper recovery (cementation) plant to remove the copper from  
2 the AMD, (the primary metal found to be toxic to fish), until the EPA made that process impossible  
3 by bypassing the cementation plant when they installed the HDS lime treatment plant in 1996. This  
4 process had been practiced continuously since mining began at Iron Mountain Mines (then Moun-  
5 tain Copper Co.), and was so extensive that the facility had to have a building constructed around it  
6 in 1907. The EPA's "scientists" have conjectured that the biological activities of these archaea liv-  
7 ing in the rock were a result of mining.

8 **448.** Petitioner submits that the scientific evidence now available is that the biological activity of  
9 the organisms contributing to the Acid Mine Drainage, which is reported to be 7-8 orders of magni-  
10 tude greater than the ordinary dissolution of metals in sulfate and water, was not a product of min-  
11 ing, but is a naturally occurring phenomena that was present in the ore before mining began, that  
12 the Acid Mine Drainage has been occurring for a period of geologic time prior to mining, that min-  
13 ing is the only means to control the cause of the pollution, and that this biological activity cannot  
14 be stopped, as the EPA has demonstrated by their utterly ineffectual remedial actions for the last 25  
15 years, and so therefore the only remedy to the pollution is to resume and to finish the job of mining,  
16 and there are no other alternatives that are not arbitrary and capricious.

17 **449.** T.W. Arman and IMMI proposed insitu solution mining (bio-mining, or bio-leaching) in 1985,  
18 had secured the services of the Davy McKee Corp. (the biggest and most experienced solution min-  
19 ing engineering and construction firm in the U.S. at that time, now part of Aker Kvaener Corp.),  
20 and had financial commitments to fund the project, but the EPA refused to allow it supposedly  
21 based on a "Confidential Enforcement Analysis" prepared by a third party private company, (ap-  
22 parently operated by a single individual calling his company the "Colorado School of Mines Re-  
23 search Institute", no affiliation to the Colorado School of Mines, the preeminent Mine Engineering  
24 School in the United States), that still found the IMMI proposal viable, and could only object to the  
25 proposal based on a theory that it would be difficult to attract investment capital.) The EPA thereaf-  
26 ter refused further consideration without Iron Mountain Mines, Inc. first providing \$15 million in  
27 "financial assurances" to the EPA.

1 **450.** The Petitioner believes that the EPA was determined to prosecute the previous owner ( a for-  
2 tune 500 company) for abandoning Iron Mountain Mine in the deplorable condition that it had de-  
3 teriorated to, and for which (after 9 years of litigation) they achieved a reported record \$950 mil-  
4 lion settlement in the Dec. 2000 by Consent Decree from the Eastern District Court.  
5 Having obtained the then record settlement from those settling defendants of an amount far in ex-  
6 cess of the cost to remedy the problem, the EPA had to continue the negligent endangerment result-  
7 ing from the AMD treatment to protect its franchise and its hegemony, swaddled in Judicial defer-  
8 ence, in complete disregard for protection of human health and the environment, without regard to  
9 the general welfare, the General Mining Law, California Property Law, EPA guidance, Executive  
10 Orders, or the protections of the United States Constitution.

11 **451.** Now the EPA must be made to acknowledge that the methods proposed by AMD&CSI and  
12 IMMI are sound and viable, that this remedy should have been implemented and still must be im-  
13 plemented as the best available technology and in fact the only available remedy.

14 **452.** The EPA refusal to consider this proposal means that the EPA has its own ulterior motives and  
15 its own agenda for the property and for the \$950 million in settlement funds, in violation of the  
16 General Mining Law, California Property Law, and in violation of the Constitution of the United  
17 States, and may thus be presumed to have perpetrated a blatant invasion and occupation of private  
18 property under false pretenses and with malice to defraud the property owner of inalienable rights,  
19 an abomination of property rights that is fundamentally unjust and contrary to the most cherished  
20 principles for the protection of private property rights by the government.

21 **453.** Since the EPA has failed to perform its proper function according to its purpose and legal  
22 mandate, Grantees and Petitioner have given notice to the DOJ and EPA of a citizen suit.  
23 Petitioner requests emergency protection from the Court to compensate for the deprivations suf-  
24 fered and immediate compensation of just and equitable wages and rents to the grantees.

## 25 **Claim 2**

26 **454.** Fraud upon the Court, fraudulent denial of the “Innocent Landowner” defense  
27  
28

1 The plaintiffs falsely alleged and therefore the Court wrongly concluded that “The United States  
2 and California claim that “IMMI and Arman are PRP's because they are either owner[s] [or] opera-  
3 tor[s] of a vessel or a facility.”

4 The actual language of the statute is:

5 “9607(a)(1) the owner and operator of a vessel or a facility,” It may be understood from judicial  
6 precedence that owner or operator typically refers to those PRP's who have already been found to  
7 be polluters. From the Memorandum of Points and Authorities in Support of The Joint Motion of  
8 the United States of America, the State of California, and Aventis Crop Sciences, USA Inc. for en-  
9 try of consent decree: “The United States' amended complaint also names Arman and IMMI as  
10 owner and operator at the time of disposal”. Petitioner submits that the determination was made by  
11 the Court prior to the settlement that the “disposal” occurred prior to the purchase by Iron Moun-  
12 tain Mines, Inc. Petitioner refers to the appeal of Carson Harbor Village LTD for this Circuits de-  
13 termination of a CERCLA “disposal, and for clarification on a determination of the “innocent land-  
14 owner” defenses. The following are relevant excerpts from the Opinion by Judge McKeown; Par-  
15 tial Concurrence and Partial Dissent by Judge B. Fletcher

16 The plain meaning of the terms used to define "disposal" compels the conclusion that there was no  
17 "disposal" during the Grantees' ownership, because the movement of the contamination, even if it  
18 occurred during their ownership, cannot be characterized as a "discharge, deposit, injection, dump-  
19 ing, spilling, leaking, or placing." 42 U.S.C. § 6903(3)

20 Parsing the meaning of the term "disposal" in § 9607(a)(2) lies at the heart of this question. We  
21 conclude that the migration of contaminants on the property does not fall within the statutory defi-  
22 nition of "disposal." A defendant may assert a variety of defenses to liability. Most relevant here  
23 are the so-called "third party" and innocent landowner" defenses, by which a PRP may show that  
24 the release of hazardous substances was caused solely by "an act or omission of a third party," 42  
25 U.S.C. § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before  
26 the PRP acquired the property. 42 U.S.C. § 9601(35)(A). In this way, the interpretation of "dis-  
27 posal" affects the application of these defenses. See *infra* section III.B.2.b.

1 Once liability is established, the defendant may avoid joint and several liability by establishing that  
2 it caused only a divisible portion of the harm--for example, it contributed only a specific part of the  
3 hazardous substances that spilled. Even if a defendant cannot do so, it may seek contribution from  
4 other PRPs under 42 U.S.C. § 9613(f)(1). See Pinal Creek Group, 118 F.3d at 1300 (noting that  
5 Congress's amendment of CERCLA to include § 9613(f)(1) "clarif[ies ] and confirm[s]" that con-  
6 tribution is available to PRPs). "A PRP's contribution liability will correspond to that party's equi-  
7 table share of the total liability and will not be joint and several. " Id. at 1301.

8 The contribution provision aims to avoid a variety of scenaios by which a comparatively innocent  
9 PRP might be on the hook for the entirety of a large cleanup bill. Although we have previously  
10 concluded that RCRA's definition of "disposal" is "clear," 3550 Stevens Creek Assocs., 915 F.2d at  
11 1362, whether the definition includes passive soil migration is an issue of first impression in this  
12 circuit.

13 [T]here is no genuine issue of triable fact as to whether the dismissed defendants spilled chemicals  
14 or otherwise contaminated the property; moreover, although hazardous chemicals may have gradu-  
15 ally spread underground while the dismissed defendants controlled the property (passive migra-  
16 tion), we conclude that prior owners are not liable under CERCLA for passive migration . .

17 We have not addressed whether "disposal" in § 9607(a) includes the passive movement of contami-  
18 nation. We have held, however, that the movement of contamination that does result from human  
19 conduct is a "disposal." See Kaiser Aluminum & Chem. Corp., 976 F.2d at 1342 (holding that "dis-  
20 posal" under § 9607(a)(2) includes a party's movement and spreading of contaminated soil to un-  
21 contaminated portions of property and that "Congress did not limit [ `disposal'] to the initial intro-  
22 duction of hazardous material onto property"). 4 In another context, we have held that "disposal"  
23 refers "only to an affirmative act of discarding a substance as waste, and not to the productive use  
24 of the substance." 3550 Stevens Creek

25 4 Similarly, under the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), the movement of soil in the  
26 context of an agricultural activity called "deep ripping" (i.e., deep plowing) can be a "discharge" of  
27 pollutants into wetlands. See Borden Ranch P'ship v. United States Army Corps of Eng'rs, No. 00-  
28 15700, \_\_\_\_\_ F.3d \_\_\_\_\_, 2001 WL 914217, at \*3 (9th Cir. Aug. 15, 2001). Although we ac-

1 knowledge that the CWA is a different statutory scheme from CERCLA, it is noteworthy that, un-  
2 der both environmental statutes, there is no question that the movement of soil that results from af-  
3 firmative conduct can subject responsible persons to liability. *Assocs.*, 915 F.2d at 1362 (concluding  
4 that there was no "disposal" of asbestos in a building when it was installed for use as insulation and  
5 fire retardant).

6 We have also held that the definition of "disposal" is the same under § 9607(a)(2) and § 9607(a)(3).  
7 See *id.* ("Because the [disposal] definition applicable to actions under § 107(a)(2) and (a)(3) is the  
8 same, and there is no meaningful difference for purposes of CERCLA between a party who sells or  
9 transports a product containing or composed of hazardous substances for a productive use, and a  
10 party who actually puts that product to its constructive use, we see no reason to adopt a different  
11 definition in this case.").

12 5 Although we would normally address the agency's interpretation of the statute, see *Chevron*  
13 *U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984), here there is no EPA  
14 determination as a point of reference or deference.

15 **455.** Therefore, whether by the interpretation expressed in the Opinion, or by the preponderance of  
16 the evidence, there was no "disposal" giving rise to CERCLA liability during the ownership of Iron  
17 Mountain Mines, Inc. It is interesting to speculate on what might have happened in this case if not  
18 for the settlement, as it seems clear from the Opinion that the liability of the previous owners in the  
19 light of Carson Harbor might be seriously cast into doubt. By a preponderance of the evidence, be-  
20 cause it is shown that T.W. Arman did make enquiries about environmental issues which might be  
21 relevant to the purchase of Iron Mountain Mines, even though there was no law in effect at the time  
22 of purchase requiring him to do so, and because the seller concealed such environmental informa-  
23 tion, and because at the time of purchase the hazardous substances in question were not hazardous  
24 substances under the law, so no "knowledge" of these hazardous substances would even be possi-  
25 ble, that the Grantees are entitled to a presumption of innocence in the innocent landowner defense.  
26 Furthermore, Grantees were third party purchasers of the property, the Court having found in rul-  
27 ings prior to the settlement that Mountain Copper Co. was the party responsible for the pollution, or  
28 the "disposal" of waste, having found that Stauffer Chemical Co., which purchased Mountain Cop-

1 per Co. and all of its assets including Iron Mountain Mines as well as major phosphorus deposits in  
2 Utah and Florida was the successor in interest to Mountain Copper. Having found that Grantees  
3 T.W. Arman and Iron Mountain Mines, Inc. had no contractual relationship with Mountain Copper  
4 Co., and that Stauffer Chemical Co. did no mining, therefore, Iron Mountain Mines, Inc. is entitled  
5 to the “Third Party” defense. (It is also interesting to note that AstraZeneca, (successor to the li-  
6 abilities of Stauffer Chemical Co. through the derivative liability company Stauffer Management  
7 Co.) reported to its Stockholders in 2001 that the Iron Mountain Mines settlement with the EPA,  
8 (reported as the largest settlement ever with a single polluter at a single site, also reported as the  
9 “billion dollar” settlement), was on balance with the value of the other companies merged or di-  
10 vested such as ICI Americas, Aktemix 37, Rhone Polenc, etc. (all responsible parties) and the value  
11 of the phosphorus deposits measured against the cost of settlement and litigation was still a profit-  
12 able transaction for Aventis Crop Sciences and AstraZeneca. No official disclosure of costs was  
13 made by the Responsible Party (Aventis Crop Sciences), though they did claim to have spent over  
14 \$150 million on clean-up plus the \$162 million paid to fund the insurance policies attached to the  
15 consent decree and statement of work. The successor in interest to Aventis Crop Sciences is Bayer  
16 Crop Sciences, they are indemnified by AstraZeneca against future losses or claims from Iron  
17 Mountain Mines. The great fortunes made from Mountain Copper Co. were parlayed into major  
18 institutional ownership positions of these multi-national conglomerates, estimates of the value of  
19 the ore extracted by Mountain Copper Co. exceed \$3 billion in today's dollars.) The EPA thought  
20 that it was too risky to rely upon the permanent and unlimited liability and obligation of two of the  
21 worlds largest multi-national pharmaceutical conglomerates to pay for the remediation at Iron  
22 Mountain Mines, and settled instead for an Insurance policy with AIG Consultants through  
23 AISLIC, wholly owned subsidiaries of AIG, that will only pay for operations and maintenance for  
24 20 more years.

25 **456.** From the joint statement: The Proposed Consent Decree secures the current remedial action  
26 over the long term through a structured settlement that combines performance of Site O&M for  
27 thirty years, strong financial guarantees, and a large balloon payment to the government in 2030.  
28 Under the settlement, the first thirty years of Site activities are to be performed by the site operator,



1 an affiliate of the IT Corporation (“IT”), which is a signatory to the Consent Decree. The site op-  
2 erator's work is funded through an agreement between IT and a AAA-rated insurer, American Spe-  
3 cialty Lines Insurance Company (“AISLIC”), also a Consent Decree signatory, which is to receive  
4 a lump-sum payment of approximately \$76.7 million for that purpose from Aventis after entry of  
5 the consent decree, AISLIC's payment for the work performed by IT is (page 11) provided for by  
6 an insurance document (the “Policy”), made an exhibit to the Consent Decree (Appendix J thereto).

7 **457.** Under the IT/AISLIC agreement, IT receives payment for work performed under the govern-  
8 ing Statement of Work (“SOW”) for the thirty-year performance period, together with an additional  
9 \$100 million of coverage to cover certain unanticipated costs. The Policy also provides \$35 million  
10 of liability insurance, which covers claims against IT (and related entities), EPA, DTSC, and the  
11 CVRWQCB. Site activities from the thirty-first year forward are to be funded through the Terminal  
12 Payment, a lump-sum payment from AISLIC to the government parties of approximately \$514 mil-  
13 lion to be made in 2030. The Terminal Payment will be placed in a Superfund Special Account or  
14 equivalent. Aventis will pay approximately \$62.5 million following entry of the Decree to fund the  
15 Terminal Payment.

16 **458.** Instead of reimbursing itself for its unnecessary costs, the EPA invested in an insurance policy  
17 and made itself the beneficiary of \$514 million from the Trust II account in 2030. The EPA main-  
18 tained its lien against the properties owned by Iron Mountain Mines, Inc. for supposed recoupment  
19 of \$51 million in unnecessary costs. Now the government owns AIG, how very convenient. T.W.  
20 Arman has owned Iron Mountain Mines, Inc. since 1976.

### 21 **ULTERIOR GOVERNMENT MOTIVES**

22 **459.** Petitioner submits that ulterior government motives are implicit in the actions and transactions  
23 involving the Iron Mountain Mine EPA Superfund site, that such actions are improper since there  
24 was no actual human health threat, and no potential endangerment to fish since there were not any  
25 fish living there anymore, the fish having vanished long ago by reason of habitat destruction in-  
26 cluding water diversions and dams by the United States government, farming and ranching, off  
27 road vehicle recreation, and local active and abandoned mining operations, etc.

1 **460.** The touchstone for determining the necessity of response costs is whether there is an actual  
2 threat to human health or the environment; that necessity is not obviated when a party also has an  
3 ulterior government motive for the cleanup.

4 **461.** Petitioner submits that it is the duty of the Court to proceed with Judicial Review because of  
5 the implication of ulterior government motives in a Fraud Upon the Court, Because the district  
6 court erred in failing to recognized the ulterior government motives for the removal action and be-  
7 cause there are genuine issues of material fact regarding whether Iron Mountain Mines “share” of  
8 response costs were, in fact, "necessary," the Court cannot uphold even a partial summary judg-  
9 ment on this ground.

10 **462.** If the Court assumes that those costs were unnecessary by reason of the facts presented herein,  
11 or by a determination under judicial review, then no reimbursement for unrecovered past response  
12 costs is required and the \$51 million lien has been unjustly levied.

13 **463.** The Court still must decide whether grantees T.W. Arman and Iron Mountain Mines, Inc.(the  
14 " Grantees") are PRPs; if not, the summary judgment was improper and must be reversed and re-  
15 manded or dismissed.

16 **464.** Additional evidence that the selected remedy does not comply with EPA guidance.

17 EPA 530-R-94-031

18 NTIS PB94-200979

19 TECHNICAL RESOURCE DOCUMENT

20 EXTRACTION AND BENEFICIATION OF

21 ORES AND MINERALS

22 VOLUME 4

23 COPPER

24 August 1994

25 U.S. Environmental Protection Agency

26 Office of Solid Waste

27 Special Waste Branch

28 401 M Street, SW

1 Washington , DC 20460

2 In Situ Leaching

3 Another leaching method, involving the leaching of low-grade copper ore without its removal from  
4 the ground, is known as in situ leaching. In situ leaching generally refers to the leaching of either  
5 disturbed or undisturbed ore. In either case, in situ leaching allows only limited control of the solu-  
6 tion compared to a lined heap leach type operation. There are 18 in situ copper operations in the  
7 United States that leach disturbed ore in existing underground mines. In situ leaching has certain  
8 advantages over conventional mining and milling, including lower capital investment, lower oper-  
9 ating costs, and faster startup times. In situ leaching of undisturbed ores is best suited for mining  
10 relatively deep-lying oxidized copper deposits.

11 Insitu leaching of disturbed (rubblized) ore is used for extracting copper from any porous or per-  
12 meable deposits. In situ leaching of undisturbed ore, where the rock has not been moved from its  
13 pre-mining position, involves very different mining technologies from deposits that have been  
14 fragmented by mining operations (such as backfilled stope, and previous block-caving mining op-  
15 erations) or hydrofracted areas (U.S. EPA 1989e; Biswas and Davenport 1976, Graybeal and Lar-  
16 son, 1989).

17 Figure 11-1. In Situ Leaching Operations

18 (Source: Biswas and Davenport 1976)

19 Mining Industry Profile: Copper

20 1-55

21 , extracts copper from subsurface ore deposits without excavation. Typically, the interstitial poros-  
22 ity and permeability of the rock are important factors in the circulation system. The solutions are  
23 injected in wells and recovered by a nearby pump/production-well system. In some cases (where  
24 the ore body's interstitial porosity is low), the ore may be prepared for leaching (i.e., broken up) by  
25 blasting or hydraulic fracturing.

26 The chemistry of in situ leaching is similar to that of heap and dump leaching operations. The ore is  
27 oxidized by lixiviant solutions such as mine water, sulfuric acids, or alkalines that are injected from  
28

1 wells into an ore body to leach and remove the valuable minerals. Production wells capture and  
2 pump pregnant

3 The economics of current mining and recovery methods often prevent the mining of ore that either  
4 contains insufficient metal values or requires extensive site preparation or operating expense. For  
5 this reason, the in situ leach method is gaining favor as a means of recovering additional copper  
6 from old mine workings (i.e., block-caved areas and backfilled stopes) from which the primary sul-  
7 fide deposit has been mined. These types of operations tend to leave behind considerable fractured,  
8 copper-bearing rock that is expensive to mine and recover by conventional means (U.S. EPA  
9 1989e).

10 Most abandoned underground mining operations leave halos or zones of low-grade ore surrounding  
11 tunnels, stopes, rises, and pillars. The underground mine development (i.e., the shafts and drifts)  
12 required in such mines normally provides the basic circulation needed for a leaching operation.  
13 Usually, lixiviant solutions are introduced into the surrounding low-grade ore zones from above by  
14 injection through a series of drillholes. The main shaft is almost always used as a main drainage  
15 reservoir. Because drifts are designed to run upgrade, water or leach solutions flow naturally by  
16 gravity to the main shaft for recovery. Fluids flowing from the extraction drifts and haulage drifts  
17 are usually collected behind a dam placed across the main shaft and pumped to the surface. At  
18 block-caved operations, the caving method causes the area above the stope mine to be highly frac-  
19 tured and broken. This expands its volume, which increases the porosity of the low-grade ore.  
20 Thus, an ideal circulation system for stope leaching operations is created (U.S. EPA 1989e).

21 **465.** Additional evidence that the selected remedy does not comply with other agency guidance.

22 USER'S MANUAL FOR THE U.S. BUREAU OF MINES IN SITU

23 COPPER OXIDE MINING COST MODEL

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28 ABSTRACT

1 The U.S. Bureau of Mines has produced a generic in situ copper mine design manual,  
2 which contains a computerized cost model for in situ copper oxide mining. The model  
3 specifies (1) site-specific parameters, which must be quantified for mine design, (2) a  
4 method for minesite design based on those parameters, and (3) a procedure for assessing  
5 economic viability for the mine design. The menu-driven computer program performs  
6 calculations for developing commercial mine design specifications, as well as capital and  
7 operating costs. The default values are based on 1986 dollars, and indices for updating  
8 costs are included. The program also provides discounted-cash-flow rate of return  
9 (DCFROR) and allows for sensitivity analyses for an in situ mining operation at any  
10 specific undisturbed copper oxide deposit.

11 This report is to be used with the 1990 version of the computer program, which has been  
12 made user friendly. It describes the files, tutorial, input phase, help function, and monitor  
13 display of all calculated values and of the DCFROR table. The monitor-displayed  
14 discounted initial value of investment and annual operating costs are defined. The dual  
15 rate-of-return situation and sensitivity analyses are also briefly discussed. Information is  
16 provided on obtaining the computer program on diskette.

## 17 INTRODUCTION

18 The U.S. Bureau of Mines believes that the competitive position of the Nation's copper  
19 industry can be significantly improved with the application of in situ leach mining  
20 techniques. A long-term objective of the Bureau is to increase the probability of the  
21 domestic production of copper by the private sector, using in situ leach mining methods.  
22 As part of the effort to meet this objective, the Bureau is conducting research to provide  
23 the mining industry with the means to design the most economically successful in situ  
24 copper operation for any specific deposit.

25 In 1986, the Bureau initiated a research program emphasizing in situ mining of shallow to  
26 moderately deep (500 to 2,000 ft) copper oxide ores. At that time, the Bureau contracted  
27 with Science Applications International Corp. (SAIC), McLean, VA, to provide a generic  
28 in situ copper mine design manual for developing economically successful mining

1 operations in copper oxide deposits. ....

2 **Evidence in Support of the Innocent Landowner Defense**

3 **466.** It may be observed that only a very few cases that could address this issue had come to the  
4 court by the time of the passage of SARA in 1986, in which congress sought to clarify much of the  
5 more vague aspects of the legislation. It may also be seen from the administrative record that the  
6 events and circumstances relevant to this matter commenced prior to the amendments of SARA.

7 **467.** Nevertheless, despite numerous amendments to the statute in the intervening years since its  
8 adoption, congress has preserved the terms in their original form.

9 **468.** Petitioner submits and contend that it is exactly because of the potential for a case to arise  
10 such as the present case that the distinction was made, and that logically one may conclude that this  
11 distinction was provided to afford the opportunity for the courts to reach a just and equitable deci-  
12 sion based on the facts of the case that would allow for a truly innocent landowner to avoid liabil-  
13 ity. Grantees further submit that it was Congress intent to provide clarity to this intention with the  
14 subsequent amendments and their clarifications of the innocent landowner defense, which is why  
15 the precise wording of the statute has remained intact.

16 **469.** Extensive consideration of the importance of the term “Operator” is given in such cases as  
17 U.S. v. Best Foods, (cited by plaintiffs in their pleadings for partial summary judgment);  
18 “Under the plain language of the statute, any person who operates a polluting facility is directly  
19 liable for the costs of cleaning up the pollution. See 42 U.S.C. § 9607 (a)(2). This is so regardless  
20 of whether that person is the facility's owner, the owner's parent corporation or business partner, or  
21 even a saboteur who sneaks into the facility at night to discharge its poisons out of malice. If any  
22 such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the  
23 existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the  
24 issue of direct liability. See *Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931  
25 F.2d 327, 330 (CA5) (“CERCLA prevents individuals from hiding behind the corporate shield  
26 when, as ‘operators,’ they themselves actually participate in the wrongful conduct prohibited by the  
27 Act”), cert. denied, 502 U.S. 1004 (1991); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26  
28 (CA1 1990) (“a person who is an operator of a facility is not protected from liability by the legal

1 structure of ownership”) ”“ This much is easy to say; the difficulty comes in defining actions suffi-  
2 cient to constitute direct parental “operation.” Here of course we may again rue the uselessness of  
3 CERCLA's definition of a facility's “operator” as “any person ... operating” the facility, 42 U.S.C.  
4 § 9601 (20)(A)(ii), which leaves us to do the best we can to give the term its “ordinary or natural  
5 meaning.” *Bailey v. United States* , 516 U.S. 137 , 145 (1995) (internal quotation marks omitted).  
6 In a mechanical sense, to “operate” ordinarily means “[t]o control the functioning of; run: operate a  
7 sewing machine .” *American Heritage Dictionary* 1268 (3d ed. 1992); see also *Webster's New In-*  
8 *ternational Dictionary* 1707 (2d ed. 1958) (“to work; as, to operate a machine”). And in the organ-  
9 izational sense more obviously intended by CERCLA, the word ordinarily means “[t]o conduct the  
10 affairs of; manage: operate a business .” *American Heritage Dictionary*, *supra*, at 1268; see also  
11 *Webster's New International Dictionary*, *supra*, at 1707 (“to manage”). So, under CERCLA, an op-  
12 erator is simply someone who directs the workings of, manages, or conducts the affairs of a facil-  
13 ity. To sharpen the definition for purposes of CERCLA's concern with environmental contamina-  
14 tion, an operator must manage, direct, or conduct operations specifically related to pollution, that  
15 is, operations having to do with the leakage or disposal of hazardous waste, or decisions about  
16 compliance with environmental regulations.

17 **470.** The strained wording of CERCLA is acknowledged with “ Here of course we may again rue  
18 the uselessness of CERCLA's definition of a facility's “operator” as “any person ... operating” the  
19 facility, 42 U.S.C. § 9601 (20)(A)(ii), which leaves us to do the best we can to give the term its  
20 “ordinary or natural meaning.” *Bailey v. United States* , 516 U.S. 137 , 145 (1995) (internal quota-  
21 tion marks omitted).”

22 **471.** The significant clarification offered by Best Foods is that “ an operator must manage, direct,  
23 or conduct operations specifically related to pollution”.

24 Congress saw fit to remedy the inherent lack of clarification in CERCLA with the Superfund  
25 Amendment and Reauthorization Act (SARA) of 1986, wherein it created and elaborated on the  
26 “Innocent Landowner Defense”.

27 Grantees refer to the 1 st ROD, (Record of Decision) of 10/03/1986, which states (page 4):

28 “OVERVIEW OF THE PROBLEM



1 MINERALIZED ZONES THAT HAVE EXTENSIVE UNDERGROUND WORKINGS FROM  
2 PAST MINING ACTIVITIES ARE THE PRIMARY SOURCE OF CONTAMINATION.”

3 And a few pages later (page 7),

4 “THE IRON MOUNTAIN PROPERTY WAS PURCHASED FROM MOUNTAIN COPPER  
5 COMPANY BY STAUFFER CHEMICAL COMPANY IN 1967. THE PROPERTY WAS  
6 SUBSEQUENTLY SOLD TO IRON MOUNTAIN MINES, INC., IN 1976.

7 THERE HAS BEEN SOME CORE SAMPLING, BUT THERE IS NO EVIDENCE THAT  
8 MINING HAS OCCURRED UNDER THE CURRENT OWNERSHIP.”

9 Grantees therefore submit that as Iron Mountain Mine is an “abandoned mine” according to the  
10 EPA, (since mining ceased in 1963), and since Iron Mountain Mine is zoned for mining, which is  
11 the only legitimate use for which a permit may be issued by the County, and that no mining permit  
12 was ever obtained by the grantees, and since the EPA acknowledged in ROD 1 that “mining activi-  
13 ties are the primary source of contamination”, and that “there is no evidence that mining has oc-  
14 curred under the current ownership”.

15 It is therefore apparent that for the purposes of CERCLA and this litigation in a determination of  
16 liability that the grantees are not the “operators” as they did not “manage, direct, or conduct opera-  
17 tions specifically related to pollution.”

### 18 **Claim 3**

19 472. The Government falsely alleged and therefore the Court wrongly concluded that “as a “current  
20 owner” of the facility in question, it is not necessary to establish IMMI’s liability as an “operator”  
21 of the same facility.”

22 473. Petitioner submits that it is this very question which is the most central issue in this matter.

23 Petitioner reiterate that it is apparent that for the purposes of CERCLA liability that the grantees  
24 are not the “operators” as they did not “manage, direct, or conduct operations specifically related to  
25 pollution.”

### 26 **Claim 4**

1 474. The EPA falsely alleged and therefore the Court wrongly concluded that “to establish liability  
2 for CERCLA clean-up costs, a plaintiff must show that the defendant is a potentially responsible  
3 party (“PRP”).”

4 475. Petitioner submits that this statement is an example of an unconstitutional interpretation of  
5 CERCLA and that it is contrary to the language of the statutes, the intent of the Congress, and the  
6 interpretations and precedents of the Courts, as such a showing would only establish “potential”  
7 liability, it does not establish liability.

### 8 **Claim 5**

9 476. The government falsely alleged and therefore the Court wrongly concluded that “Arman is an  
10 operator under CERCLA because he is someone who currently “manage[s], directs[s], or con-  
11 duct[s]...operations having to do with the leakage or disposal of hazardous waste, or decisions  
12 about compliance with environmental regulations.” The very decision the government cite as the  
13 definitive ruling relevant to this case, (U.S. v. Best Foods, see claim 2) elaborates in great detail on  
14 the important distinctions and clarifications that must be taken into account in such a determina-  
15 tion, specifically that “an operator must manage, direct, or conduct operations specifically related  
16 to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or de-  
17 cisions about compliance with environmental regulations.

18 477. Petitioner submits that the Courts have conclusively determined the parameters for pollution  
19 resulting from “leakage” or “disposal”, and that neither event has ever occurred under the owner-  
20 ship by Iron Mountain Mines, Inc..

21 478. Petitioner submits that when no “leakage” or “disposal” is taking place, there are then no deci-  
22 sions to be made about compliance with relevant environmental regulations.

### 23 **Claim 6**

24 479. The government falsely alleged and therefore the Court wrongly concluded that “Because  
25 IMMI purchased the property with knowledge of – indeed, at least in part, because of – the pres-  
26 ence of hazardous materials, the innocent landowner defense is not available to IMMI.

27 Petitioner submits that the “hazardous substances” referred to by government are copper, cad-  
28 mium, and zinc. Grantees further submit that at the time of purchase of the property, October 21st,

1 1976, (coincidentally the very day of the enactment of the Resource Conservation and Recovery  
2 Act, also known as “RCRA” and the Federal Land Policy and Management Act of 1976, 43 U.S.C.  
3 1701 et seq.), copper, cadmium, and zinc were not “listed” as “hazardous substances” for the pur-  
4 poses of the Clean Water Act (CWA) and its regulation of storm water runoff, such provisions hav-  
5 ing occurred during deliberations of the transportation subcommittee of Congress the following  
6 July, and were not enacted by amendment to the legislation until the following December.

7 480. Grantees agree that the purchase of the property was because of the presence of the valuable  
8 minerals on the property, (since it is after all a mine), particularly the metals copper and zinc, and  
9 further submit that they were explicitly so informed by the sellers, (though they were not informed  
10 of the potential environmental risks and liabilities and the prospect of pending legislation that the  
11 sellers presumably knew about), and were not deterred but rather encouraged into purchasing the  
12 property because of the information regarding the presence of these valuable minerals, however, it  
13 was not possible for the grantees to have “purchased the property with knowledge of or because of  
14 the presence of hazardous materials“ if they were not hazardous materials at the time of purchase.

15 481. Grantees further submit that they “did not know and had no reason to know that any hazardous  
16 substance which is the subject of the release or threatened release is disposed of on, in, or at the  
17 facility.” (9601 (35) (A) (i), as no “disposal” was known or disclosed.

18 482. Grantees further submit that the Courts records show that T.W. Arman made enquiries about  
19 the environmental conditions at Iron Mountain Mine prior to purchase, because the responsible of-  
20 ficer of Stauffer Chemical found it necessary to correspond with his subordinate regarding disclo-  
21 sure of information concerning the mines to T.W. Arman, and specifically informed them to with-  
22 hold information about any environmental problems.

23 483. Petitioner submits that by a preponderance of the evidence therefore, that T.W. Arman did use  
24 “due care” regarding hazardous substances at the time of purchase.

25 484. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the  
26 “innocent landowner defense”.

27 **Claim 7**  
28

1 485. The government falsely alleged and therefore the Court wrongly concluded that “IMMI has  
2 not established the necessary elements of the defense.”

3 486. Petitioner submits that by a preponderance of the evidence they are not “a person otherwise  
4 liable”, in accordance with claims 1 thru 6.

5 487. Petitioner submits that, for the sake of argument, (even though they are not otherwise liable):

6 488. AMD should be recognized as an “Act of God” because it is a “natural phenomenon of an ex-  
7 ceptional, inevitable, and irresistible character, the effects of which could not have been prevented  
8 or avoided by the exercise of due care or foresight.”

9 489. AMD should be recognized as an “Act of God” because the presence of any “hazardous sub-  
10 stance” that is of a naturally occurring substance in its unaltered form, or altered solely through  
11 naturally occurring processes or phenomena, from a location where it is naturally found must nec-  
12 essarily be acknowledged as an “Act of God” for such an expression to have any meaning.

13 490. AMD should be recognized as an “Act of God” because no person is responsible for it having  
14 been “deposited, stored, disposed of, or placed”.

15 491. Third party defense: No contractual relationship ever existed between grantees and Mountain  
16 Copper Co. (the responsible party for the “disposal” according to government.)

17 492. Petitioner submits that they (a) [he] exercised due care with respect to the hazardous sub-  
18 stances concerned, taking into consideration the characteristics of such hazardous substance, in  
19 light of all relevant facts and circumstances, and (b) [he] took precautions against foreseeable acts  
20 or omissions of any such third party and the consequences that could foreseeably result from such  
21 acts or omissions; or (4) any combination of the foregoing paragraphs.

22 493. Petitioner submits that therefore, (even though they are not otherwise liable for the costs of the  
23 clean-up), the Grantees would still be entitled to a defense to liability pursuant to some combina-  
24 tion or all of the defenses enumerated in 9607 (b) (1) and/or (3).

25 494. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the  
26 “innocent landowner defense” the “Third Party defense” and the “Act of GOD defense”.

27 **Claim 8**  
28

1 495. The government falsely alleged and therefore the Court wrongly concluded that “It may be  
2 doubted whether or not the third party defense is available to landowners who do not qualify for  
3 the innocent landowner defense.”

4 496. Petitioner submits that in as much as this defense should not be an issue in this case in accor-  
5 dance with claims 1 thru 7, that nevertheless the absurdity of government conjecture may be  
6 plainly understood by inverting the statement: “It may be doubted whether or not a third party de-  
7 fense would be necessary for a landowner who does qualify for the innocent landowner defense.”

8 See appeal of Carson Harbor Village, Ltd. V. Unocal Corp.

9 497. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the  
10 “Act of GOD defense” the “innocent landowner defense” and the “Third Party defense”.

11 **Claim 9**

12 498. The government falsely alleged and therefore the Court wrongly concluded that “the innocent  
13 landowner defense is not available to Arman because he is not the “owner” of the facility in need of  
14 clean-up.”

15 499. Petitioner submits that by any and every measure it is commonly understood that the corporate  
16 ownership of Iron Mountain Mine is only a formality, that there are no employees, no commerce or  
17 revenue to the corporation, even T.W. Arman is unemployed, and the EPA project manager of the  
18 Superfund site has recently been publicly quoted when asked about the proposed statue to be built  
19 at Iron Mountain Mines in the Redding Searchlight as stating “build it -- it is his property.”

20 500. Petitioner submits that the infamy of the crime of the pollution from Iron Mountain Mine, and  
21 the public stigma and ridicule resulting from the governments propaganda and unsubstantiated al-  
22 legations, which for some segments of the population has elevated the perceived conduct of the  
23 perpetrator of the pollution at Iron Mountain Mine to every bit the equivalent of a crime of treason,  
24 entitles grantees to constitutional protections of due process and equal protection for crime of in-  
25 famy and other fundamental and common law rights retained by the people.

26 Petitioner submits that the infamy of the crime of the natural resource damages, and particularly  
27 the characterizations by the government implicating the polluters in the extermination and possible  
28

1 extinction of the beloved salmon and trout, entitles grantees to constitutional protections of due  
2 process and equal protection and other common law rights retained by the people.

3 Petitioner submits that the infamy of the crime of the habitat destruction and the public perception  
4 of the perpetrators selfish plundering of mineral resources with indifference to the threat to the  
5 health and welfare of the people, and the alleged “imminent and substantial endangerment” to the  
6 public health and the environment, without recourse to equal protection, due process, and protec-  
7 tion under the First, Fifth, Eighth, and Fourteenth Amendments, and the prohibition against Bills of  
8 Attainder and Ex Post Facto laws, and such other common law rights as are retained by the people,  
9 is a violation of grantees civil rights.

10 501. Petitioner submits that the infamy of the crimes of pollution, natural resource damage, and  
11 habitat destruction, in consideration of the fact that all the other parties to the litigation have settled  
12 their liability without an admission of guilt, wrongdoing, or responsibility, and that therefore only  
13 the remaining grantees are subject to the stigma, blame, public ridicule, derision, and the burden of  
14 shame now symbolically associated with Iron Mountain Mines, and in spite of the fact that they are  
15 innocent of these crimes, and entitled to an innocent landowner defense, and entitled to other de-  
16 fenses to liability, but nevertheless, and despite the governments settlement with the polluters that  
17 resulted in a reported \$950 million settlement providing the “Complete Relief” as required in 42  
18 U.S.C. 9613(f)(2), that the government wrongfully continues to prosecute the grantees under  
19 CERCLA, to levy a statutory lien against grantees property of \$51 million, and to hold grantees  
20 responsible for unquantified unlimited future liabilities, and the Court dismissing with prejudice  
21 counterclaims for \$10 million in damages and claims for contribution against the settling grantees.

22 502. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the  
23 “Act of GOD defense”, the “innocent landowner defense” and the “Third Party defense” and are  
24 entitled to protection of their civil rights and under the equal protection clause.

25 **Claim 10**

26 503. The government falsely alleged in the joint status report that the terms of the settlement did  
27 not provide for reimbursement for past costs.

1 504. Paragraph 13(B)(3) of the Consent Judgment states: “Third, and only to the extent that the  
2 costs of Items (1) and (2), are able to be fully funded, payment of unrecovered past response costs  
3 incurred by the Oversight and Support Agencies.”

4 505. Therefore, Petitioner submits that the express provisions of the consent decree provide for “re-  
5 imbursement of unrecovered past response costs”, and the stipulated arrangements made according  
6 to the consent decree for the long term investment in insurance vehicles to provide for payment of  
7 costs associated with the clean-up were entered into freely by the government, and with full knowl-  
8 edge and understanding including the express terms of paragraph 86.

9 506. Grantees further submit that the action of the government in stipulating to the purchase of a  
10 private insurance vehicle to manage public trust funds without proper safeguards or guarantees and  
11 the conflict of interest implicit in such an arrangement when the trustee is also the fiduciary and the  
12 contractor is contrary to public law.

13 507. Grantees further submit that in consideration of the financial failure of the original site opera-  
14 tors, followed by the failure of the replacement site operators parent corporation, requiring the un-  
15 precedented bailout by the federal government of a private insurance company resulting in the Fed-  
16 eral Government owning 79.9% of said corporation, which has effectively resulted in the trustee  
17 being the fiduciary being the contractor being the oversight agency, and so therefore the conflict of  
18 interest is a breach of duty and a violation of trust.

19 508. Grantees further submit that as the government now effectively possesses the trust funds in  
20 constructive trust, it must release the lien on defendant’s property.

21 **Claim 11**

22 509. The government falsely alleged in the joint status report that grantees were given ample op-  
23 portunity to oppose the consent decree.

24 510. Petitioner submits that grantees did oppose the terms of the consent decree, but were in-  
25 formed by the Court that the fact that they were not a party to the settlement, and because the set-  
26 tlement was a consent judgment and a final settlement for all costs, and because prior to entering  
27 the settlement the Court dismissed all Claims, Cross-claims, and Counter-claims against the set-  
28 tling parties and these grantees with prejudice, so these grantees were informed and understood that  
the settling defendants could not sue these grantees for contribution, and were informed by counsel  
for the government that the Consent Decree provided benefits to these grantees, and that the settle-



1 ment was the best that the government negotiators could achieve, and so therefore the Court en-  
2 couraged the grantees to cooperate with the Court in concluding the matter with a just and equitable  
3 decision in the proceedings.

4 511. Petitioner submits that the government delay in resurrecting this claim until the time for filing  
5 an appeal to the consent decree had passed is a fraud upon the Court and the grantees.

6 512. Motion to dismiss under *res judicata* plaintiff's claims for liability for pollution or natural re-  
7 source damage against the remaining grantees.

8 **Claim 12**

9 **513.** The EPA negligently violated the express terms of 9604 (3)(A) and (4) which states:

10 (3) Limitations on Response.--The President shall not provide for a removal or remedial action un-  
11 der this section in response to a release or threat of release-- (A) of a naturally occurring substance  
12 in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a  
13 location where it is naturally found; (4) Exception to Limitations.--Notwithstanding paragraph (3)  
14 of this subsection, to the extent authorized by this section, the President may respond to any release  
15 or threat of release if in the President's discretion, it constitutes a public health or environmental  
16 emergency and no other person with the authority and capability to respond to the emergency will  
17 do so in a timely manner. Petitioner submits and the Administrative Record shows that previous  
18 grantees were willing and had the authority and capability to respond to the emergency in a timely  
19 manner, that said grantees did so respond to the emergency, that these remaining grantees did sub-  
20 mit plans for the remedy that was supported by those co-grantees, but were prevented from exercis-  
21 ing this duty and implementing the remedy by the EPA. Petitioner submits that nowhere in this sec-  
22 tion is the agency afforded discretion based upon a determination of the adequacy of financial as-  
23 surances as grounds for interfering with the owners right to implement a remedy or relief from the  
24 obligation imposed by 9604 (3)(A) and (4) and other provisions of CERCLA, CWA, CAA, NCP,  
25 EPCRA, and State Laws.

26 The grantees allege that government violated defendant's civil rights in failing to perform in accor-  
27 dance with 9604 (3)(A) and (4).

1 **514.** For the reasons heretofore established in claims 1 through 12, grantees move to reverse, vacate  
2 and remand the Partial Summary Judgment of 10-04-2005 denying property owner an innocent  
3 land owner defense under 101(35) as void, and because it is no longer equitable that the judgment  
4 should have prospective application; and any other reason justifying relief from the operation of the  
5 judgment, or because it was the result of fraud upon the Court.

6 **Claim 13**

7 **515.** Abuse of Discretion for Entering of Consent Decree prior to adoption of a Final Natural Re-  
8 sources Damages Plan as unfair and unreasonable. See U.S. v. Montrose. (Coincidentally the same  
9 settling defendants, (Aventis Crop Sciences, Stauffer Chemical, Aktemix 37, Rhone Polenc.as in  
10 this case.)) See also: Ross v. Marshall , 426 F.3d 745, 763 (5th Cir. 2005). Or “A trial court abuses  
11 its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous as-  
12 sessment of the evidence.” Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581, 584 (5th Cir. 2003)

13 **516.** Abuse of Discretion for adoption of Final Restoration Plan for Natural Resource Injuries that  
14 is not consistent with the Department of Interior Natural Resource Damage Assessment (NRDA)  
15 and for failure to provide monetary damages for the public benefit consistent with the stated dam-  
16 ages in the Administrative Record, and conveyance to the public trust of damaged mine lands with-  
17 out provisions for adequate remediation of mine-scarred lands or potential for habitat restoration or  
18 recreational or other beneficial uses.

19 **517.** Failure to implement a Natural Resource Damage Assessment according to:

20 (1) Part II only (Fish-Kill Counting Guidelines) of "Monetary Values of Freshwater Fish and Fish-  
21 Kill Guidelines," American Fisheries Society Special Publication Number 13, 1982; available for  
22 purchase from the American Fisheries Society, 5410 Grosvenor Lane , Bethesda , MD 20814 , ph:  
23 (301) 897-8616. Reference is made to this publication in 11.62(f)(4)(i)(B) and 11.71(l)(5)(iii)(A) of  
24 this part.

25 (2) Appendix 1 (Travel Cost Method), Appendix 2 (Contingent Valuation (Survey) Methods), and  
26 Appendix 3 (Unit Day Value Method) only of Section VIII of "National Economic Development  
27 (NED) Benefit Evaluation Procedures" (Procedures), which is Chapter II of Economic and Envi-  
28 ronmental Principles and Guidelines for Water and Related Land Resources Implementation Stud-

1 ies, U.S. Department of the Interior, Water Resources Council, Washington, DC, 1984,  
2 DOI/WRC/-84/01; available for purchase from the National Technical Information Service (NTIS),  
3 5285 Port Royal Road, Springfield, VA 22161; PB No. 84-199-405; ph: (703) 487-4650. Reference  
4 is made to this publication in 11.83(a)(3) of this part.

5 (3) "Uniform Appraisal Standards for Federal Land Acquisition" (Uniform Appraisal Standards),  
6 Interagency Land Acquisition Conference, Washington, DC, 1973; available for purchase from the  
7 Superintendent of Documents, U.S. Government Printing Office, Washington, DC, 20402; Stock  
8 Number 052-059-00002-0; ph: (202) 783-3238. Reference is made to this publication in  
9 11.83(c)(2)(i) of this part.

10 Grantees seeks review of the Administrative Record and the Court's Records to revisit the innocent  
11 landowner defense provisions of and 101(35) for a final determination and due process regarding  
12 the remaining grantees that is just and equitable and consistent with the law.

13 See: Atlantic research v United States EPA “Many prior opinions have called these “potentially  
14 responsible parties”(abbreviated “PRP”). We decline to use this term. The PRP term has been de-  
15 veloped by the courts. It is not found in CERCLA. The term refers to “a party who may be covered  
16 by the statute at the time the party is sued under the statute.” *Pneumo Abex*  
17 *Corp. v. High Point, Thomasville & Denton R. R. Co.*, 142 F.3d 769, 773 n.2 (4th Cir.  
18 1998). After *Aviall*, the term has been weakened and “may be read to confer on a  
19 party that has not been held liable a legal status that it should not bear.” *Consolidated*  
20 *Edison Co. c. UGI Utils., Inc.*, 423 F.3d 90, 98 n.8 (2d Cir. 2005).”

21 **518.** The Court cites *Carson Harbor v. Unocal*. As the Ninth Circuits definitive ruling relevant to  
22 this case, but fails to observe that at the time of the purchase of the property, (October 21st 1976),  
23 copper, zinc, and cadmium were not regulated as hazardous substances or as hazardous wastes in  
24 storm water discharge, (that is, non-industrial sources) and that their regulation did not come into  
25 effect until the following July, (when Congress' Transportation Subcommittee developed standards  
26 that included these elements pursuant to the CWA), and did not become law until the following  
27 December, (at which time the Regional Water Board immediately instituted measures resulting in  
28 NPDES permit requirements).

1 **519.** It is therefore clear that while CERCLA liability for polluters is retroactive, applying retroac-  
2 tivity to knowledge a priori of a naturally occurring mineral in its place of origin being a hazardous  
3 substance when there was no disposal and so therefore there could be no “hazardous waste” as a  
4 condition of establishing innocence is neither the intent of the law nor a literal reading of the stat-  
5 ute, is contrary to principles of equal protection and due process, and the Courts reliance and defer-  
6 ence to the EPA in this matter amounts to a fraud upon the Court..

7 Indeed, the copper leaching from the facility was considered a valuable mineral and an asset at that  
8 time, having been collected by the copper cementation process there for at least 75 years. To the  
9 extent the property owner had any activity in relation to this drainage, it was in the operation of the  
10 cementation plant, which was preventing or minimizing the “hazardous substance” from draining  
11 into the river, albeit purely (and unprofitably) as a business proposition.

12 **520.** Grantees aver, and it will be seen from the Court and Administrative record, such as the  
13 Memorandum of Understanding in Support of the Consent Decree entered by the Government in  
14 October of 2000, that such a claim for denying liability was not proposed until 2002, almost 11  
15 years after this litigation commenced, the government instead having intended to deprive the De-  
16 fendant of the innocent landowner defense all along on a theory of interference simply because the  
17 Grantees had sought to defend their property rights and for having protested the very actions which  
18 are now the focus of this proposed Judicial Review.

19 **521.** Grantees declare that at no time did they engage in any action to interfere with the actions of  
20 the EPA or the site operators.

21 **522.** ("Fraud upon the court" has been defined by the 7th Circuit Court of Appeals to "embrace  
22 that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by  
23 officers of the court so that the judicial machinery can not perform in the usual manner its impartial  
24 task of adjudging cases that are presented for adjudication." Kenner v. C.I.R., 387 F.3d 689 (1968);  
25 7 Moore 's Federal Practice, 2d ed., p. 512, ¶ 60.23. The 7th Circuit further stated "a decision pro-  
26 duced by fraud upon the court is not in essence a decision at all, and never becomes final.")

27 False Claims to obtain a DETERMINATION OF PROBABLE CAUSE

28 False Claims under Section 107(1) of CERCLA, 42 U.S.C. §9607 (1) CERCLA lien provisions.

1 False Claims under CERCLA Due Process Requirements.  
2 False Claims and Declarations of agents and agencies with malice and oppression under color of  
3 law.  
4 False Claims of J. WINSTON PORTER, ASSISTANT ADMINISTRATOR OFFICE OF SOLID  
5 WASTE AND EMERGENCY RESPONSE.  
6 False Claims of Keith Takata, USEPA  
7 False Claims of Kathleen Salyer, USEPA  
8 False Claims of Michael Hingerty, USEPA  
9 False Claims of Felicia Marcus, USEPA  
10 False Claims of Jeffrey Zelikson, Hazardous Waste Management Division, USEPA  
11 False Claims of David B. Jones, USEPA  
12 False Claims of Rick Sugarek, project manager of the EPA treatment  
13 False Claims of John Sitzley, CH2MHill  
14 False Claims of Jim Mavis, CH2MHill  
15 False Claims of James C. Pedri, Engineer-in-Charge of the Redding Office of the California Re-  
16 gional Water Quality Control Board, Central Valley Region.  
17 False Claims of John Turner, Environmental Service Division, California Dept. of Fish and Game  
18 False Claims of Gary Stacey, Environmental Service Division, California Dept. of Fish and Game  
19 False Claims of Anthony J. Landis, P.E., Chief, California Department of Toxic Substance Control  
20 False Claims of Don Dievert, California Department of Toxic Substance Control  
21 False Claims of Ramon Perez, California Department of Toxic Substances Control  
22 False Claims of William C. Allan, Regional Environmental Assistant  
23 False Claims of Denise Klimas, National Oceanic and Atmospheric Administration  
24 False Claims of Steven W. Anderson, Regional Judicial Officer for EPA.(May 4, 2000)  
25 "In order to establish that it had no reason to know of the disposal of hazardous substances at the  
26 facility, a defendant must have undertaken, at the time of acquisition, all appropriate inquiry into  
27 the previous ownership and uses of the property consistent with good commercial or customary  
28 practice in an effort to minimize liability. . . . The court shall take into account commonly known or

1 reasonably ascertainable information about the property, the obviousness of the presence or likely  
2 presence of contamination at the property, and the ability to detect such contamination by appropri-  
3 ate inspection.

4 IMMI has failed to show by a preponderance of the evidence that it meets this condition."  
5 CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B). (2002 Amendment here represented to  
6 supposedly regulate "Due Care" in purchasing of real property in 1976 and as grounds for denial of  
7 third party and innocent landowner defenses and requiring knowledge *a priori*;. *ipso facto*; *ex post*  
8 *facto*, and also suggesting EPA actions somehow constitute a benefit to the True and Rightful  
9 Owners deserving of EPA recoupment by a "Windfall lien".)

10 **FALSE CLAIMS AND FRAUD UPON THE COURT by counsel for government**

11 Thomas A. Bloomfield, Assistant Regional Counsel, USEPA

12 John Lyons, Assistant Regional Counsel, USEPA

13 Tom J. Boer, Trial Attorney

14 David B. Glazer,USDOJ

15 Lois J. Schiffer, Assistant Attorney General , USDOJ

16 Paul L Seave, United States Attorney, Eastern District of California

17 Yoshinori H. T. Himel, Assistant United States Attorney

18 Sara J. Russel, Deputy Attorney General, California

19 Margarita Padilla, Deputy Attorney General, California

20 Lisa Trankley-Sato California Department of Justice

21 These blatant lies raise the despotism and tyranny to a crime of infamy and assault on fundamental  
22 liberties and private property rights with fraud, malice, oppression, deceit, libel and slander.

23 "The guilty may fear, but no vengeance he aims At the honest man's life or Estate His wrath is en-  
24 tirely confined to wide frames And to those that old prices abate "; (General Ludd's Triumph, song  
25 of the Luddites)

26 **Claim 14**

27 **523.** Judicial Review under U.S.C. §§ 9658 for property damage and personal injury and for Fail-  
28 ure to implement a Remedial Action Plan and for Failure to Perform in accordance with the Na-

1 tional Contingency Plan, and for selection of remedies that are arbitrary or capricious, negligent, or  
2 are otherwise inconsistent with the National Contingency Plan. See *Frey v. EPA*.

3 **Claim 15**

4 **524.** Judicial Review as Lead agency did not develop or ignored a limited number of remedial al-  
5 ternatives that attain site-specific remediation levels within different restoration time periods utiliz-  
6 ing one or more different technologies, in violation of the National Contingency Plan.

7 **Claim 16**

8 **525.** Judicial Review as Lead agency did not develop or ignored one or more innovative treatment  
9 technologies for further consideration if those technologies offer the potential for comparable or  
10 superior performance or implementability; fewer or lesser adverse impacts than other available ap-  
11 proaches; or lower costs for similar levels of performance than demonstrated treatment technolo-  
12 gies, in violation of the National Contingency Plan.

13 **Claim 17**

14 **526.** Judicial Review as Lead agency failed to assure that alternatives shall be assessed for the  
15 long-term effectiveness and permanence they afford, along with the degree of certainty that the al-  
16 ternative will prove successful, in violation of the National Contingency Plan.

17 **Claim 18**

18 **527.** Judicial Review as Removal Actions by lead agency failed to comply with the Statement of  
19 Work.

20 (Government have failed to maintain the “copper cementation plant” as provided in the statement  
21 of work, and further have failed to provide appropriate plumbing therefore, there being no return  
22 drain for the processed AMD to be returned to the system for treatment, thereby preventing the  
23 implementation of the grantees first proposed application of resource conservation and recovery  
24 technologies documented in the Administrative Record, which was the conversion of the copper  
25 cementation plant to modern electro-winning technology.)

26 **Claim 19**

27 **528.** Judicial Review as Removal Actions by lead agency failed to comply with Federal Environ-  
28 mental Laws, and are therefore are in violation of the National Contingency Plan.



1 RCRA, 42 U.S.C. § 6972(a)(1)(A);(B);(2), provides that citizens may commence a citizen suit  
2 against any person “(1)(A) against any person (including (a) the United States, and (b) any other  
3 governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the  
4 Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, re-  
5 quirement, prohibition, or order which has become effective pursuant to this chapter; or(B) against  
6 any person, including the United States and any other governmental instrumentality or agency, to  
7 the extent permitted by the eleventh amendment to the Constitution, and including any past or pre-  
8 sent generator, past or present transporter, or past or present owner or operator of a treatment, stor-  
9 age, or disposal facility, who has contributed or who is contributing to the past or present handling,  
10 storage, treatment, transportation, or disposal of any solid or hazardous waste which may present  
11 an imminent and substantial endangerment to health or the environment; or(2) against the Adminis-  
12 trator where there is alleged a failure of the Administrator to perform any act or duty under this  
13 chapter which is not discretionary with the Administrator.

14 **529.** Claimant declares that the “interim” authority of the EPA to manufacture and generate acutely  
15 toxic hazardous waste sludge and to dispose this acutely toxic hazardous waste sludge within the  
16 hazardous waste toxic pit upon the Brick Flat Mine at Iron Mountain has long ago expired, and that  
17 the imminent and substantial danger to the defendant and the defendant's property, and the immi-  
18 nent and substantial danger to the public health and the environment for the disposal of hazardous  
19 wastes in a disposal cell located in an active geological zone with known Holocene faults, and the  
20 lack of an actual remedial action plan or an offsite disposal facility, with the resulting status quo  
21 that the EPA will manufacture and generate this hazardous waste toxic sludge for several thousand  
22 years without any access to a permanent disposal site or provisions for funding such an extraordi-  
23 nary waste, in violation of RCRA, CERCLA, CWA, and otherwise contrary to public law. See  
24 *Covington v. Jefferson County* , 358 F.3d 626 (9th Cir. 2003) Claimant further attests that these  
25 hazardous wastes invoke the provisions of Subchapter III, and that no notice is therefore required.

### 26 **Claim 20**

27 530. Judicial Review as Removal Actions by lead agency failed to comply with State Environ-  
28 mental Laws, and in violation of the National Contingency Plan.

1 RCRA, 42 U.S.C. § 6972(a)(1)(B), provides that citizens may commence a citizen suit against any  
2 person “who has contributed or who is contributing to the past or present handling, storage, treat-  
3 ment, transportation, or disposal of any solid or hazardous waste which may present an imminent  
4 and substantial endangerment to health or the environment.”. Claimant attests that the acutely toxic  
5 hazardous waste pit sludge is producing its own Acid Mine Drainage, (AMD) as was anticipated by  
6 both advocates and critics of the lime treatment plan as documented in the Administrative Record,  
7 and that this leachate that is discharging from the acutely toxic hazardous waste sludge contained  
8 within the toxic pit upon the Brick Flat Mine at Iron Mountain Mines is leaching at a pH of 2 in  
9 violation of RCRA, TCLP, STLC, CalWET, and the California Toxic Pits Act, and, and that this  
10 leachate contains levels of cadmium in excess of the allowable limits of the California Toxic Pits  
11 Act, RCRA, CWA, and in violation of TCLP, TTLC, STLC, and CalWET standards, and in viola-  
12 tion of the California Health and Safety and the California Water Code. Claimant further attests  
13 that these hazardous wastes invoke the provisions of Subchapter III, and that no notice is therefore  
14 required.

15 **Claim 21**

16 531. Judicial Review as Removal Actions by lead agency failed to consider or ignored the degree  
17 to which alternatives employ recycling or treatment that reduces toxicity, mobility, or volume, in  
18 violation of the National Contingency Plan.

19 **Claim 22**

20 532. Judicial Review as Removal Actions by lead agency failed to consider or ignored total storage  
21 and disposal capacity, in violation of the National Contingency Plan.

22 **Claim 23**

23 533. Judicial Review as Removal Actions by lead agency failed to provide a final Remedial Action  
24 Plan, in violation of the National Contingency Plan.

25 **Claim 24**

26 534. Abuse of Civil Authority for waste of public funds incurred due to removal actions undertaken  
27 in an arbitrary, capricious, or by policies otherwise inconsistent with the National Contingency  
28 Plan. EPA commissioned an “independent” study of the IMMI remedial action proposal in 1985. It

1 is referred to as “Confidential Enforcement Analysis” in ROD 1. The EPA decision not to accept  
2 the IMMI proposal was supposedly based substantially on this study. The study made the following  
3 conclusions:

4 535. “Technical feasibility;

5 The recovery technologies described by Davy McKee in their October 1985 report are reliable and  
6 could be used for removal of copper, copper sulfate, zinc sulfate, jarosite, alum, and gypsum for  
7 acid mine drainage (AMD) solution. However, there is insufficient mineralogical, trace metal  
8 analyses, and test work to verify that saleable products of jarosite, alum, or gypsum can be eco-  
9 nomically produced.

10 Recovery of concentrated leach solutions from reinjection are the key to success of the project and  
11 little or no design data is available on this aspect of the proposal.

12 Insufficient hydrological studies have been conducted on the site to insure solution containment.

13 Additional Information Needed to More Fully Determine Technical Feasibility

14 Delineation of reserves and grades of materials to be recovered (ore reserves analysis, grade verifi-  
15 cation, product purity).

16 Assessment of excursions of concentrated leach solutions away from the collection site due to the  
17 two major faults and the numerous fractures, caved, and subsidence areas of the site.

18 Investigate leach kinetics to determine how quickly the leach solution can be built up to the 4 to 6  
19 gpl level.

20 Conduct in situ tests to evaluate the ore body’s response to reinjection.

21 Determine the extent to which IMMI estimates the orebody requires further fracturing to ensure  
22 economic life and recovery.

23 Economic Viability

24 Based on the capital and operating costs projected by IMMI (with and without reclamation costs),  
25 the project currently has a low probability of producing a positive net present value at risk levels  
26 which would attract financing or venture capital.

27 The cost of a limited preproduction test program for the property is 2 to 5 million dollars.

28 Depending on reserves, the project life is estimated at between 3 and 9 years.

1 Meeting all facets of the Clean Water Act could cost \$40 to \$250 million.  
2 Technical and Environmental Concerns”

3 Therefore, it may be seen from the Administrative Record that as far back as 1985, the EPA had  
4 reason to know and did know that the Defendant’s proposed remedy was reliable, and that the pro-  
5 posed remedy might substantially eliminate the source of the contamination in as little as 3 to 9  
6 years, and furthermore that it was even possible for it to be profitable.

7 536. Motion for the Court to Intervene under Judicial Review to implement the grantees proposed  
8 remedies for the cause of the pollution at the Iron Mountain Mine Superfund Site.

9 **Claim 25**

10 537. Judicial Review of statutory lien on defendant’s property filed by support agencies for unre-  
11 covered past response costs incurred due to removal actions undertaken in an arbitrary, capricious,  
12 unnecessary, or by policies otherwise inconsistent with the National Contingency Plan.

13 **Claim 26**

14 538. Judicial Review for Remedial Actions that were Negligently Arbitrary or Capricious.

15 **Claim 27**

16 539. Judicial Review as Removal Actions were not consistent with the National Contingency Plan

17 **Claim 28**

18 540. Judicial Review as Removal Actions are the cause of imminent and substantial endangerment  
19 to the public health and the environment, in violation of CERCLA, RCRA, CWA, NEPA, and the  
20 California Toxic Pits Act..

21 **Claim 29**

22 541. Judicial Review as Lead agency failed to utilize permanent solutions and alternative treatment  
23 technologies or resource recovery technologies to the maximum extent practicable, in violation of  
24 the National Contingency Plan.

25 **Claim 30**

26 542. Judicial Review as Lead agency failed to perform a non-discretionary act or duty under RCRA.  
27 42 U.S.C. § 6972(a)(2).”

28 **Claim 31**

1 543. Judicial Review for determination of inverse condemnation for preventing the recovery of  
2 mineral resources from mine lands in violation of State and Federal law, for unlawful interference  
3 with the entry of the Petitioner or Defendant(s) to the property, for imposing unreasonable  
4 restrictions on the Petitioner or Defendant(s) quiet enjoyment of the property, for interference with  
5 Petitioner and Defendant(s) civil liberties, and for destruction of private property and property  
6 resources.

7 544. Petition to sever and certify case to the Court of Federal Claims to adjudicate the Taking of  
8 Private Property for the Public Benefit without Just Compensation.

9 **Claim 32**

10 545. Judicial Review for Fraud upon the Court, for fraudulent representation as a windfall lien, and  
11 for Malice, Fraud, and Deceit, for violations of due process and other civil rights, and for Violation  
12 of Consent Decree by maintaining a Statutory lien on owners property for unrecovered past re-  
13 sponse costs, in disregard for the stipulated provisions of paragraph 13(B)(3) of the Consent Judg-  
14 ment, which states: “Third, and only to the extent that the costs of Items (1) and (2), are able to be  
15 fully funded, payment of unrecovered past response costs incurred by the Oversight and Support  
16 Agencies.”, and paragraph 86 of the Consent Decree, which states that “The “matters addressed” in  
17 this settlement are all response actions taken or to be taken, all response costs incurred or to be in-  
18 curred, and all Natural Resource Damages incurred or to be incurred, by the United States, the  
19 State agencies, or any other person with respect to the Site, and specifically include without limita-  
20 tion the Work to be performed by the Site Operator, all claims, counterclaims, and cross-claims  
21 filed by and against the parties in the above captioned cases, and those matters governed by the  
22 covenants contained in Sections XXI and XXII of this Consent Decree.”

23 **Claim 33**

24 546. Judicial Review for willful and negligent violation with malice and oppression of the Califor-  
25 nia Health and Safety Code and the California Toxic Pits Recovery Act.

26 547. Since 1992 the DTSC and the RWQCB have been “encouraging” the “further development  
27 and consideration of an alternative that could reduce or eliminate the need for treatment at the site,  
28 including capping, plugging, and resource recovery approaches”.

1 548. The High Density Sludge produced by the EPA treatment plant is a class A mining waste un-  
2 der California Law.

3 Table 1.1

4 Siting (1) Not on Holocene faults;

5 (2) Outside of areas of rapid geologic change;

6 From 54187 of the Administrative Record; Geologic Reconnaissance and Fracture Analysis, Iron  
7 Mountain Area..."Faults, joints, and other Fractures are a pervasive feature of the bedrock and as-  
8 sociated ore bodies." "they cut across the Brickyard ore body exposed in the open pit."

9 From 54224 of the Administrative Record; Geology of the Massive Sulfide Deposits at Iron Moun-  
10 tain ..... "The Brick Flat ore body is explored only by rather widely spaced drill holes. It is appar-  
11 ently bounded on the north and south edges by the two strands of the Camden fault, but different  
12 widths of ore in drill holes adjacent to each other suggest that other faults are probably present."

13 549. From 54423 of the Administrative Record; "In Brick Flat, two major fault zones are present:"

14 550. "The mountain is falling in on itself," said John Spitzley, a civil engineer with the CH2M Hill  
15 engineering firm who oversaw much of the remediation work. "Some 30 to 40 acres at the top of  
16 the mountain is moving." <http://www.savethewildup.org/alerts/?id=438>

17 551. The EPA superfund water treatment plant for acid mine drainage at Iron Mountain Mines re-  
18 moves cadmium, a EPCRA 313 regulated chemical. The treatment plant processes about 3,600 lbs.  
19 of cadmium per year. The facility employs more than 10 full time employees. The EPA toxic pit  
20 sludge disposal facility upon the Brick Flat mine at Iron Mountain leaches at a ph of 2 and contains  
21 levels of cadmium in excess of 110 ppb, in violation 40 CFR Parts 148, 261, 266, 268, and 271,  
22 Land Disposal Restrictions Phase IV: Final Rule Promulgating Treatment Standards for Metal  
23 Wastes and Mineral Processing Wastes; Mineral Processing Secondary Materials and Bevill Exclu-  
24 sion Issues, and TCLP, STLC, CalWET, EPCRA, CWA, CERCLA, NCP, RCRA, the California  
25 Health and Safety Code, the California Water Code, and the California Toxic Pits Cleanup Act.

26 552. The EPA Superfund Iron Mountain Mine water treatment plant produces sludge in violation  
27 EPCRA 313 and has since the day the rule came into effect; May 26, 1998. The sludge is an  
28

1 “acutely hazardous waste” because it is derived from the similarly classified AMD of Iron Moun-  
2 tain Mines.

3 553. The recent case of *Frey v. EPA* offers some useful insight into the parameters of Judicial Re-  
4 view under CERCLA:

5 554. “But what if EPA decides to study the contamination for an indeterminate period of time  
6 without taking any remedial action? Counsel had no response when asked whether the statute pre-  
7 cludes review if EPA claims that it will take action, after further study, at some point before the sun  
8 becomes a red giant and melts the earth. We then asked counsel whether a reviewing court could  
9 invoke the Administrative Procedures Act (APA), 5 U.S.C. §§ 706(1), to compel agency action  
10 unlawfully withheld or unreasonably delayed, if EPA dragged its feet for decades. Counsel in-  
11 formed us that a court could not act under these circumstances because CERCLA's rules governing  
12 judicial review override the APA. See 5 U.S.C. §§ 702 (stating that Administrative Procedures Act  
13 review is not available when “any other statute that grants consent to suit expressly or impliedly  
14 forbids the relief which is sought”); *Schalk*, 900 F.2d at 1097. We can only conclude from this ex-  
15 change that EPA considers itself protected from review under CERCLA §§ 113(h) as long as it has  
16 any notion that it might, some day, take further unspecified action with respect to a particular site.

17 555. There is no support in the statute for such an open-ended prohibition on a citizen suit. *Frey I*  
18 spoke of “active steps designed to clean up a site” and held that “the time limits in §§ 113(h) are  
19 geared to concrete, existing, remedial measures; not measures that might be devised at some future  
20 date.” 270 F.3d at 1134. For EPA to delay *Frey's* suit, it must point to some objective referent that  
21 commits it and other responsible parties to an action or plan. No such objective evidence exists in  
22 this record. There is no timetable or other objective criterion by which to assess when EPA's amor-  
23 phous study and investigation phase may end. The special master's report, adopted in 1999 by the  
24 district court, instructed EPA and Viacom to negotiate permanent water treatment solutions for the  
25 sites “approximately one year following the completion of source control activities at each site.”  
26 Source control activities were completed in 1999 and 2000, yet EPA concedes in its brief on appeal  
27 that no permanent water or soil treatment remedies have been adopted to date. At argument, EPA's  
28



1 counsel alluded to the possibility of further measures in 2005 or 2006. We are unimpressed with  
2 this vague reference, unsupported by any timetable in the record.

3 556. In its ROD Amendments, EPA referred to future "operable units" that will be implemented to  
4 address the contaminated groundwater and sedimentation once excavation has been completed. See  
5 40 C.F.R. §§ 300.430(a)(1)(ii)(A) (discussing use of "operable units" in remediating contaminated  
6 sites). We recognize that environmental regulations may call for a phased approach in expediting  
7 total site cleanup. *Id.* And it is quite clear that EPA is entitled to gather data and assess alternatives  
8 before selecting an appropriate response. But the data collection and analysis must proceed with  
9 some level of transparency. EPA cannot preclude review by simply pointing to ongoing testing and  
10 investigation, with no clear end in sight.

11 557. Frey offers one solution to this problem. She asks us to read the text of §§ 113(h) narrowly to  
12 preclude review only when EPA has selected a remedy through its Record of Decision process.

13 Frey concedes that if EPA had selected a final remedy for all three operable phases (excavation,  
14 water treatment, sediment treatment) through a ROD, she could not bring suit until all three reme-  
15 dies had been fully implemented. But it did not do so. In this case, she contends, plans for ground-  
16 water and sediment remediation cannot reasonably be characterized as later stages of the excava-  
17 tion remedy that EPA has already selected.

18 558. Frey is correct insofar as there is no evidence of any kind that EPA will be doing anything  
19 specific in the future with this site. We do not go so far as to hold that EPA must have issued either  
20 a ROD or a ROD Amendment before it obtains the breathing room afforded by §§ 113(h). We con-  
21 clude only that there must be some objective indicator that allows for an external evaluation, with  
22 reasonable target completion dates, of the required work for a site. (Although we are sure that EPA  
23 would not try to avoid the statute by submitting a 100-year plan, we note that such a target date  
24 would obviously be unreasonable.) Neither the consent decree nor the special master's report serves  
25 as an objective measure here. Instead, we see only a desultory testing and investigation process of  
26 indefinite duration.”

27 559. “We recognize that Congress intended for remedial action to be complete before permitting  
28 judicial review. *Frey I*, 270 F.3d at 1133; *Schalk*, 900 F.2d at 1095. Congress did not, however, in-

1 tend to extinguish judicial review altogether. *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1245  
2 (7th Cir.1991).”

3 560. After a very long wait, grantees assert that they are finally entitled to their day in court.

4 **MEMORANDUM IN SUPPORT OF A FINDING THAT A CONSTITUTIONAL**  
5 **TAKING OF PRIVATE PROPERTY FOR THE PUBLIC BENEFIT CLAIM**  
6 **REQUIRING JUST COMPENSATION EXISTS IN THE PRESENT CASE, THAT THE**  
7 **GRANTEES WERE DENIED EQUAL PROTECTION AND DUE PROCESS, AND THAT**  
8 **THE CONSENT DECREE OF DEC. 2000 WAS BY FRAUD UPON THE COURT AN**  
9 **ERROR OF IMPUNITY AND MISCARRIAGE OF JUSTICE.**

10 561. The maxim, much cited by Macchiavelli, appears in the original Latin as "divide et impera." It  
11 may be translated as "divide and rule."

12 562. Excerpt from the conclusion of the appeal of *United States v. Cannons*.

13 563. In politics and sociology, divide and rule (derived from Latin divide et impera) (also known as  
14 divide and conquer) is a combination of political, military and economic strategy of gaining and  
15 maintaining power by breaking up larger concentrations of power into chunks that individually  
16 have less power than the one implementing the strategy. In reality, it often refers to a strategy  
17 where small power groups are prevented from linking up and becoming more powerful, since it is  
18 difficult to break up existing power structures.

19 564. Maxims "Divide et impera" or "Divide ut regnes" are traditionally identified with the princi-  
20 ple of government of the Roman Senate. This attribution is not entirely reliable, insofar as the Ro-  
21 man policy mainly aimed to unite the conquered nations both politically and culturally, under Ro-  
22 man rule. It is, however, borne out by the example of Gabinius parting the Jewish nation into five  
23 conventions, reported by Flavius Josephus in Book I, 169-170 of *The Wars of the Jews* (*De bello*  
24 *Judaico*) [1]. Likewise, Strabo reports in *Geography*, 8.7.3 [2], that the Achaean League was gradu-  
25 ally dissolved under the Roman possession of the whole of Greece, owing to them not dealing with  
26 the several states in the same way, but wishing to preserve some and to destroy others.

27 565. In modern times, Traiano Boccalini cites "Divide et impera" in *La bilancia politica*, 1,136 and  
28 2,225 as a common principle in politics. The use of this technique is meant to empower the sover-

1 eign to control subjects, populations, or factions of different interests, who collectively might be  
2 able to oppose his rule. Machiavelli identifies a similar application to military strategy, advising in  
3 Book VI of The Art of War [3] (Dell'arte della guerra [4]), that a Captain should endeavor with  
4 every art to divide the forces of the enemy, either by making him suspicious of his men in whom he  
5 trusted, or by giving him cause that he has to separate his forces, and, because of this, become  
6 weaker.

7 566. The strategy of division and rule has been attributed to sovereigns ranging from Louis XI to  
8 the Habsburgs. Its historical reception has been mixed. Thus Edward Coke denounces it in Chapter  
9 I of the Fourth Part of the Institutes, reporting that when it was demanded by the Lords and  
10 Commons what might be a principal motive for them to have good success in Parliament, it was  
11 answered: "Eritis insuperabiles, si fueritis inseparabiles. Explosum est illud diverbium: Divide, &  
12 impera, cum radix & vertex imperii in obedientium consensus rata sunt." [You would be insuper-  
13 able if you were inseparable. This proverb, Divide and rule, has been rejected, since the root and  
14 the summit of authority are confirmed by the consent of the subjects.] On the other hand, in a minor  
15 variation, Sir Francis Bacon touts the cunning maxim of "separa et impera" in a letter to James I of  
16 15 February 1615. Likewise James Madison recommends in a letter to Thomas Jefferson of 24 Oc-  
17 tober 1787 [5], summarizing the thesis of The Federalist #10 [6]: "Divide et impera, the reprobated  
18 axiom of tyranny, is under certain qualifications, the only policy, by which a republic can be ad-  
19 ministered on just principles."

20 567. Typical elements of this technique are said to involve creating or encouraging divisions  
21 among the subjects in order to forestall alliances that could challenge the sovereign.  
22 aiding and promoting those who are willing to cooperate with the sovereign.  
23 fostering distrust and enmity between local rulers.  
24 encouraging frivolous expenditures that leave little money for political and military ends.

25 568. The use of this strategy was imputed to administrators of vast empires, including the Roman  
26 and British, who were charged with playing one tribe against another to maintain control of their  
27 territories with a minimal number of imperial forces. The concept of "Divide and Rule" gained  
28 prominence when India was a part of the British Empire, but was also used to account for the strat-

1 egypt used by the Romans to take Britain, and for the Anglo-Normans to take Ireland. It is said that  
2 the British used the strategy to gain control of the large territory of India by keeping its people di-  
3 vided along lines of religion, language, or caste, taking control of petty princely states in India  
4 piecemeal.

5 569. Also mentioned as a strategy for market action in economics, it can be applied to get the most  
6 out of the players in a competitive market. *Wikipedia*

7 570. On Page 10, Line 20 of the Memorandum of Points and Authorities in Support of The Joint  
8 Motion of the United States of America, the State of California, and Aventis Crop Sciences, USA  
9 Inc. for entry of consent decree: “The United States’ amended complaint also names Arman and  
10 IMMI as owner and operator at the time of disposal”. Page 13, Line 13: In addition, DTSC and  
11 CVRWQCB have waived claims for other past costs in the approximate amounts of \$1.5 million  
12 and \$300,000 respectively, DFG did not file a claim for response costs in the litigation. Page 14,  
13 Line 17. Applicable Legal Standard. Page 19, Line 9: As a practical matter, due to the apparent  
14 financial condition of Arman and IMMI, it is unlikely that those parties would really face the pros-  
15 pect of having to pay for the entire remainder of Site costs left after the settlement with Aventis.  
16 Page 19, Line 17: Because the settlement was arrived at through a procedurally fair means, through  
17 arm’s length negotiations between sophisticated and well represented parties, and because no party  
18 has objected to it, the Court may presume that it is substantively fair, as well. The settlement with  
19 Aventis does reduce overall costs at the Site by a very substantial share and is therefore of signifi-  
20 cant benefit to Arman and IMMI. With a strong and guaranteed return on investment not available  
21 on funds invested in the Treasury. The settlement is guaranteed by AISLIC which, as noted, is a  
22 AAA-rated insurance company. Accordingly, the financial security of the settlement is on much  
23 firmer footing than it would be in the absence of the settlement, which would require the govern-  
24 ment to look to Aventis to perform the remedy over the long term. In all, the settlement provides  
25 for great benefits to the environment and to the public at large. In the view of the United States and  
26 the State agencies, which are charged with protecting the public interest and which have been inti-  
27 mately involved in the litigation for the past nine years, the settlement represents a very favorable  
28

1 resolution of this case and is fully consistent with the environmental clean-up and restoration goals  
2 of CERCLA.

3 The standard in this Circuit governing the Court's approval of a CERCLA consent decree is  
4 whether the settlement embodied in the decree is "reasonable, fair, and consistent with the purposes  
5 that CERCLA is intended to serve."

6 571. The constitutional arguments sponsored by Grantees measures up to the *Cannons* test of scru-  
7 tiny. Counterclaimants submit that there is a constitutional right under federal law to the protec-  
8 tions of the innocent landowner defense, see *Babbitt New Mexico, LLC v. United States, Texas*  
9 *Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641-42, 101 S.Ct. 2061, 2067-68, 68 L.Ed.2d  
10 500 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 90-91, 101 S.Ct.  
11 1571, 1580, 67 L.Ed.2d 750 (1981), and hence, the Counterclaimants were deprived of a constitu-  
12 tionally protected interest

13 572. The claims include violation of equal protections and due processes

14 573. .Therefore

15 A class of persons who have not yet resolved their liability to the United States or a State in a judi-  
16 cially approved settlement of the innocent landowner defense may not be held liable for claims for  
17 contribution regarding matters addressed in a settlement with polluters. Such settlement with inno-  
18 cent landowners must provide for equitable distribution of liability from the sovereign's and socie-  
19 ties benefits from the pollution, and for the responsibility of permanent guardianship of the republic  
20 and society's environmental defense obligation from the pollution, and include provisions for the  
21 protection of a national treasure.

22 See 42 U.S.C. Sec. 9613(f)(2) (1987).

23 574. Counterclaimants invoke the "too big to fail" doctrine of the Executive Branch in the envi-  
24 ronmental defense of Superfund sites.

25 575. On this issue, we believe it is appropriate to consider the adequacy of the process. To the ex-  
26 tent that the process was fair and full of "adversarial vigor," *Exxon*, 697 F.Supp. at 693, the results  
27 come before the court with no assurance of substantive fairness. See, e.g., *Rohm & Haas*, 721  
28 F.Supp. at 694 , to the contrary, the record shows that the remaining grantees have essentially been

1 deprived of informed counsel since 1993. (examining extensive discovery leading to settlement  
2 terms); *Cannons*, 720 F.Supp. at 1045; *Acushnet*, 712 F.Supp. at 1031; *Oyster Bay*, 696 F.Supp. at  
3 844; see generally De Long, *New Wine for a New Bottle: Judicial Review in the Regulatory State*,  
4 72 Va.L.Rev. 399, 417-18 (1986) (suggesting that courts could consider their review obligations  
5 fulfilled if they merely assured themselves that agency processes functioned adequately to inform  
6 and control discretion)

7 576. *Iron Mountain Mines, Inc. and T.W. Arman* were deprived of adequately informed counsel  
8 from the day Baker & McKenzie withdrew from the case in 1993. T.W. Arman never claimed to be  
9 sophisticated in legal matters. T.W. Arman was prosecuted to attrition without regard to causation  
10 or comparative fault.

11 577. It is clear that because of willful misrepresentations, lack of due process and equal protection,  
12 and with allegations of oppression, fraud, malice, and deceit, that the double swaddling enjoyed by  
13 the EPA must be examined under the light of judicial review.

14 578. We must go further. Because Counterclaimants did suffer adverse effects from the consum-  
15 mation of the settlement embodied in the decree, and those effects stem from a systemic unfairness  
16 and from the combination of Congress' plan and government' own conduct (including their negoti-  
17 ating strategy).

18 579. Counterclaimants allege that a case of systemic unfairness exists.

19 580. Remove the EPA's double swaddling, and what do you find?

20 581. Evidence of bad faith and collusion on the part of the settling parties, and violation of trust

21 582. The second layer of swaddling derives from the nature of appellate review. Because approval  
22 of a consent decree is committed to the trial court's informed discretion, see *id.* 896 F.2d at 603-04;  
23 *United States v. Hooker Chemical & Plastics Corp.*, 776 F.2d 410, 411 (2d Cir.1985); In re  
24 *AWECO, Inc.*, 725 F.2d 293, 297 (5th Cir.), cert. denied, 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed.2d  
25 182 (1984), the court of appeals should not be reluctant to disturb a unreasoned exercise of that dis-  
26 cretion. In this context, and with allegations of fraud upon the court, the test for abuse of discretion  
27 is itself not a deferential one.

1 583. Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material  
2 factor deserving significant weight is ignored, when an improper factor is relied upon, or when all  
3 proper and no improper factors are assessed, but the court makes a serious mistake in weighing  
4 them.

5 584. Harmful errors of law: see claims, 2 miners & 8000 acres of land v. United States; **1.** The  
6 government falsely alleged and therefore the Court wrongly concluded that “The United States and  
7 California claim that “IMMI and Arman are PRP’s because they are either owner[s] [or] operator[s]  
8 of a vessel or a facility.” **2.** The EPA falsely alleged and therefore the Court wrongly concluded  
9 that “as a “current owner” of the facility in question, it is not necessary to establish IMMI’s liability  
10 as an “operator” of the same facility.” **3.** The government falsely alleged and therefore the Court  
11 wrongly concluded that “Arman is an operator under CERCLA because he is someone who cur-  
12 rently “manage[s], directs[s], or conduct[s]...operations having to do with the leakage or disposal  
13 of hazardous waste, or decisions about compliance with environmental regulations.” **4.** The gov-  
14 ernment falsely alleged and therefore the Court wrongly concluded that “IMMI has not established  
15 the necessary elements of the defense.” **5.** The government falsely alleged and therefore the Court  
16 wrongly concluded that “It may be doubted whether or not the third party defense is available to  
17 landowners who do not qualify for the innocent landowner defense.” **6.** The government falsely  
18 alleged and therefore the Court wrongly concluded that “the innocent landowner defense is not  
19 available to Arman because he is not the “owner” of the facility in need of clean-up.” **7.** The gov-  
20 ernment falsely alleged in the joint status report that this action is to” recover response costs in-  
21 curred and to be incurred”. **8.** The government falsely alleged in the joint status report that the  
22 terms of the settlement did not provide for reimbursement for past costs. **9.** The government falsely  
23 alleged in the joint status report that grantees were given ample opportunity to oppose the consent  
24 decree. **10.** The EPA negligently violated the express terms of 9604 (3)(A) and (4) which states:  
25 (3) Limitations on Response.--The President shall not provide for a removal or remedial action un-  
26 der this section in response to a release or threat of release--

27 (A) of a naturally occurring substance in its unaltered form, or altered solely through naturally  
28 occurring processes or phenomena, from a location where it is naturally found;



1 **11.** Abuse of Discretion and Failure to Perform. **12.** Violation of constitutionally protected rights  
2 and interests, denial of equal protection and due process by misrepresentation and deceit to defraud  
3 the grantees of property and livelihood by conspiracy under color of law.

4 585. A. Procedural Fairness?

5 586. We agree with the district court that fairness in the CERCLA settlement context has both pro-  
6 cedural and substantive components. *Cannons*, 720 F.Supp. at 1039-40. To measure procedural  
7 fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor,  
8 openness, and bargaining balance. See, e.g., *id.* at 1040; *United States v. Rohm & Haas Co.*, 721  
9 F.Supp. 666, 680-81 (D.N.J.1989); *Kelley v. Thomas Solvent Co.*, 717 F.Supp. 507, 517-18  
10 (W.D.Mich.1989); *In re Acushnet River & New Bedford Harbor*, 712 F.Supp. 1019, 1031  
11 (D.Mass.1989); *Exxon*, 697 F.Supp. at 693; *State of New York v. Town of Oyster Bay*, 696  
12 F.Supp. 841, 844-45 (E.D.N.Y.1988); *United States v. Hooker Chemicals & Plastics Corp.*, 540  
13 F.Supp. 1067, 1080 (W.D.N.Y.1982).

14 587. In this instance, the district court wrongfully found the proposed decree to possess the requi-  
15 site procedural integrity, *Cannons*, 720 F.Supp. at 1040-41, and Counterclaimants hereby offer per-  
16 suasive reason to alter the findings. It is clear the district court believed that the government con-  
17 ducted negotiations forthrightly and in good faith, because it deferred to the agencies repeated rep-  
18 resentations to that effect, but the record is replete with indications to the contrary effect, particu-  
19 larly to the effect of the lack of informed counsel damaging grantees.

20 588. Counterclaimants claim that they are entirely innocent, and entitled by every measure to the  
21 innocent landowner defense, and were thus intentionally excluded from the major party settlement.  
22 Congress intended to give the EPA broad discretion to structure classes of PRPs for settlement pur-  
23 poses. The failure to provide grantees the innocent landowner defense by fraud upon the court, with  
24 malice and oppression, and without due process or equal protection, is a violation of grantees civil  
25 rights. The government acted beyond the scope of its discretion in depriving the grantees of these  
26 rights, and for the taking of private property for public benefit without just compensation.

27 589. We say that Counterclaimants were entitled to more civil rights protections from the EPA's  
28 negotiating strategy than they received. At the time the RP was initially invited to participate in the

1 administrative settlement, the EPA, did not by letter, inform Counterclaimants that they were eligi-  
2 ble for the settlement in this case.

3 590. *Cannons*, 720 F.Supp. at 1033. Counterclaimants knew, early on, that they were within the  
4 EPA's determination of a potentially responsible party, a "PRP". Although Counterclaimants did  
5 assume that they could ride on the coattails of the major party and join whatever decree emerged--  
6 the government had not, on other occasions, allowed for an innocent landowner defense—and the  
7 agency was asked for, but it did it not give, any reasonable consideration of the innocent landowner  
8 defense in this instance, and did wrongfully deprive grantees of the benefit of the innocent land-  
9 owner defense. As a matter of law, we do not believe that Congress meant to permit the violation of  
10 persons civil rights in CERCLA cases, even when an EPA determination of an environmental  
11 emergency exists. This may constitute violations of equal protection and due process, and the tak-  
12 ing of private property for the public benefit requiring just compensation. The liability and respon-  
13 sibility for compliance with the National Contingency plan is principally on the EPA. That the EPA  
14 did violate grantees rights and allow polluters to resolve their liability, which settlements they  
15 might prefer to join, and falsely accused and wrongfully and maliciously prosecuted innocent land-  
16 owners, wrongfully dismissed counterclaims with prejudice against settling grantees of \$10 mil-  
17 lion, and conveyed to innocent landowners liabilities for unrecovered past response costs of some  
18 \$51 million plus interest, and unquantified unlimited future liabilities from the polluters in absentia,  
19 and without informed counsel, that as a matter of equity and tort, and since grantees were deceived  
20 and misled, that the Court must inspect the swaddling of EPA under CERCLA.

21 591. *Iron Mountain Mines, Inc. and T.W. Arman* are not the polluters

22 592. The district court accepted the recommendations of the settling parties in the memorandum of  
23 understanding in support of entry of the consent decree, and therefore found the consent decrees to  
24 have been the product of fair play. Given that the decree was negotiated without the named grant-  
25 ees participation, and the grantees counsel was soon to be disbarred and who had no experience in  
26 Federal Court or with pollution cases and the Department of Justice, and grantees were not sophis-  
27 ticated, and Counterclaimants did not have an opportunity to participate in the negotiations or to  
28

1 join the settlement, and that the agency did not operate in good faith, that the finding of procedural  
2 fairness is eminently unsupportable, and must be vacated for fraud upon the court..

3 593. B. Substantive Fairness?

4 594. Counterclaimants aver that if there is no substantive fairness, there can be no comparative  
5 fairness.

6 595. Substantive fairness introduces into the equation concepts of corrective justice and account-  
7 ability: where an innocent party should not bear the cost of the harm for which it is not legally re-  
8 sponsible. See generally Developments in the Law--Toxic Waste Litigation, 99 Harv.L.Rev. 1458,  
9 1477 (1986). The logic behind these concepts dictates that settlement terms must be based upon,  
10 and roughly correlated with, some acceptable measure of comparative fault, apportioning liability  
11 among the settling parties according to rational (if necessarily imprecise) estimates of how much  
12 harm each PRP has done. Cf. Rohm & Haas, 721 F.Supp. at 685 (the most important aspect of ju-  
13 dicial review is relationship of settlement figure to proportion of settlor's waste); Cannons, 720  
14 F.Supp. at 1043 (charging more than proportionate liability must be justified in some way, as by  
15 unexpected costs or unknown conditions); Kelley, 717 F.Supp. at 517 (approving settlement be-  
16 cause it was unlikely that settlor's comparative fault was less than percentage of cleanup costs it  
17 agreed to pay); United States v. Conservation Chemical Co., 628 F.Supp. 391, 401 (W.D.Mo.1985)  
18 (liability apportionment should be made on basis of comparative fault). Counterclaimants submit  
19 that they did no mining, (the human activity found to have contributed to the release of "hazardous  
20 substances"). Counterclaimants submit that they did not profit from the pollution. Counterclaimants  
21 submit that their activities at the site served to lessen the severity of the pollution, (albeit inadver-  
22 tently). Counterclaimants submit that they did offer a plan which actually was a remedy of the pol-  
23 lution, but that the EPA instead decided to embark on a removal (treatment) program that will take  
24 over 3000 years.

25 596. When contesting substantive fairness, the issue as to how comparative fault is to be measured  
26 must be resolved. There is in this case a correct approach. When the measure of comparative fault  
27 at a particular Superfund site under particular factual circumstances is left to the EPA's expertise  
28 and the EPA willfully and with malice, fraud, oppression, and deceit deprives the grantees of the

1 constitutional right to equal protection and due process of the innocent landowner defense, the EPA  
2 in tort and equity violated the grantees' civil rights. Whatever formula or scheme the EPA later ad-  
3 vances for measuring comparative fault and allocating liability should be disregarded since the  
4 agency did not supply an honest explanation for it, or weld some reasonable linkage between the  
5 factors it includes in its formula or scheme and the proportionate shares of the settling RP. See  
6 United States v. Akzo Coatings, 719 F.Supp. 571, 586-87 (E.D.Mich.1989); Acushnet, 712 F.Supp.  
7 at 1031: cf. Gardner & Greenberger, Judicial Review of Administrative Action and Responsible  
8 Government, 63 Geo.L.J. 7, 33 (1974) (courts must know why an agency has taken an action if  
9 they are to perform their review function adequately). Put in slightly different terms, the chosen  
10 measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a  
11 rational basis.<sup>4</sup> See 42 U.S.C. Sec. 9613(j) (1987); Rohm & Haas, 721 F.Supp. at 681.  
12 597. Even though the EPA must be given leeway to construct the barometer of comparative fault,  
13 and the agency must also be accorded flexibility to diverge from an apportionment formula in order  
14 to address special factors not conducive to regimented treatment, the agency must also give a fair  
15 consideration of the innocent landowner, third party, and Act of GOD defenses. While the list of  
16 possible variables is virtually limitless, two frequently encountered reasons warranting departure  
17 from strict formulaic comparability are the uncertainty of future events and the timing of particular  
18 settlement decisions. Common sense suggests that a PRP's assumption of open-ended risks may  
19 merit a discount on comparative fault, while obtaining a complete release from uncertain future li-  
20 ability may call for a premium. See, e.g., Cannons, 720 F.Supp. at 1043; Superfund Settlements  
21 with De Minimis Waste Contributors: An Analysis of Key Issues by the Superfund Settlements  
22 Project, May 8, 1987, Vol. XIV Chem. Waste Lit. Rptr. 34, 46 (June 1987) [hereinafter Superfund  
23 Settlements ] (premium should be paid by PRP for benefit of being permitted to cash out). By the  
24 same token, the need to encourage (and suitably reward) early, cost-effective settlements, see, e.g.,  
25 Acushnet, 712 F.Supp. at 1032 (quick settlement deserves recognition in terms of lowered settle-  
26 ment figure); United States v. Seymour Recycling Corp., 554 F.Supp. 1334, 1339 (S.D.Ind.1982)  
27 (similar), and to account inter alia for anticipated savings in transaction costs inuring from celeri-  
28 tous settlement, cf., e.g., Mathewson Corp. v. Allied Marine Indus., Inc., 827 F.2d 850, 855-56 (1st

1 Cir.1987) (discussing range of considerations influencing private settlements), can affect the con-  
2 struct. Even though Congress intended EPA to have considerable flexibility in negotiating and  
3 structuring settlements, we think reviewing courts should not permit the agency to depart from  
4 rigid adherence to equal protection and due process wherever the agency proffers a justification for  
5 denial of the innocent landowner defense.

6 598. We believe that a district court should not in this case give the EPA's expertise the benefit of  
7 the doubt when weighing substantive fairness--particularly when the agency has deceived and mis-  
8 led the court, which has been confronted by ambiguous, incomplete, or inscrutable information,  
9 and the preponderance of the evidence indicating that the court was deceived and misled, and be-  
10 cause of the implication of fraud in the present case. In these settlement negotiations, precise data  
11 relevant to determining the total extent of harm caused and the role of each PRP was available in  
12 this case. See Superfund Settlements, supra p. 16, at 43. It would disserve a principal component of  
13 the statute—the provisions for an innocent landowner defense--to leave matters in limbo until more  
14 information was amassed. When the EPA uses the data to violate defendant's rights along the broad  
15 spectrum of plausible approximations and equitable defenses, judicial intrusion is warranted. See  
16 Rohm & Haas, 721 F.Supp. at 685-86 (reasonable relationship to some plausible estimate or range  
17 of estimates is standard of fairness).

18 599. In this instance, the deprivations of equitable defenses are a violation of equal protection and  
19 due process and a deprivation of substantive fairness. They also do not adhere generally to princi-  
20 ples of comparative fault according to a volumetric standard, determining the liability of each PRP  
21 according to volumetric contribution. And, to the extent they deviate from this formulaic approach,  
22 they do not do so on the basis of adequate justification. In particular, no consideration is given to  
23 the comparative fault between a polluter and a non-polluter.

24 Counterclaimants' next asseveration--that the decrees favor the major party RP over their non-  
25 culpable counterparts- On this record, the district court did misuse its discretion by failing to rule  
26 upon the parties' comparative fault.

27 600. While the decree offers a substantial settlement, the bad-faith justification absolving the pol-  
28 luters of responsibility, and granting absolute finality, makes the injustice readily apparent. In re-

1 turn for the premium paid, RP can cash out, thus obtaining four important benefits: reduced trans-  
2 action costs and receiving absolute finality with respect to the monetization of their overall liabil-  
3 ity. Cf. Superfund Settlements, supra p. 16, at 42-43, and, the responsible party does not retain an  
4 open-ended risk anent their liability at the Site, nor are they making any admission of guilt or ad-  
5 mission of comparative fault or harm. see Cannons, 720 F.Supp. at 1042, making the comparison of  
6 proportionate contributions a vital proposition. At the very least, relief from the \$10 million coun-  
7 terclaim, and relief from \$51 million in unrecovered past response costs, and relief from unquanti-  
8 fiable unlimited future liability absent any recourse, and the transfer of such \$51 million liability  
9 and transfer of unquantifiable unlimited future liability to an innocent landowner, and the transfer  
10 to an innocent landowner of the infamy and stigmatic shame and comparative fault and harm for  
11 pollution and natural resource damage, such as the extermination of salmon and trout, a tradeoff  
12 crafted by the government's negotiators without grantees participation, seems unreasonable. Indeed,  
13 the acceptance of the settlement is itself an indication of substantive unfairness toward the class to  
14 which Counterclaimants belong. See Seymour, 554 F.Supp. at 1339. On this record, the district  
15 court did misuse its discretion in ruling that the decrees sufficiently tracked the parties' comparative  
16 fault.

17 601. The last point which merits discussion under this rubric involves the fact that the agency  
18 upped the ante as the game continued, that is, the premium assessed as part of the administrative  
19 settlement was increased substantially. The district court must see unfairness in this EPA approach.

20 602. Counterclaimants berate the settlement as discriminating against a non-polluter, and the gov-  
21 ernment's use of such a technique is unfair and serves to promote the violations of grantees civil  
22 rights. See 42 U.S.C. Sec. 9622(a) (1987); see also Cannons, 720 F.Supp. at 1037 (emphasizing  
23 congressional interest in expedited cleanups); see generally, Note, Superfund Settlements: The  
24 Failed Promise of the 1986 Amendments, 74 Va.L.Rev. 123, 126 (1988) (chief congressional pur-  
25 pose of CERCLA was to provide immediate response to threat of uncontrolled hazardous waste).  
26 indeed, if the government cannot offer such routine incentives, there will be little inducement on  
27 the part of any PRP to enter an administrative settlement. Of course, the extent of the differential  
28 must be reasonable and the graduation neither unconscionable nor unduly coercive, but these are

1 familiar subjects for judicial review in a wide variety of analogous settings. Cf., e.g., United States  
2 v. Ven-Fuel, Inc., 758 F.2d 741, 763-64 (1st Cir.1985) (discussing standard of review anent im-  
3 position of civil penalty for oil import violation). We believe that the EPA was unreasonable in deny-  
4 ing grantees the benefit of the innocent landowner defense, and unreasonable by failing to make a  
5 settlement proposal in this CERCLA case that was substantively fair.

6 603. C. Reasonableness?

7 604. In this unusual environmental litigation, the evaluation of a consent decree's reasonableness  
8 will be a straightforward exercise. Is the consent decree fair? The answer is no. And does the con-  
9 sent decree fulfill the requirements of the NCP? Again the answer is no. We comment briefly upon  
10 three such facets. The first is obvious: the decree's likely efficaciousness as a vehicle for cleansing  
11 the environment is of cardinal importance. See *Cannons*, 720 F.Supp. at 1038; *Conservation*  
12 *Chemical*, 628 F.Supp. at 402; *Seymour*, 554 F.Supp. at 1339. Except in cases which involve only  
13 recoupment of cleanup costs already spent, the reasonableness of the consent decree, for this pur-  
14 pose, will be basically a question of technical adequacy, primarily concerned with the probable ef-  
15 fectiveness of proposed remedial responses. As this is only a case for recoupment, the additional  
16 scope of judicial review is applied

17 605. The efficaciousness of the remedial actions has not been fully protective of human health and  
18 the environment, and may be reasonably observed to have been arbitrary and capricious, and oth-  
19 erwise not in accordance with public law. In fact the treatment facility which reported that it was  
20 treating on average 372 lbs. of copper per day when the plant began operations in 1995, reported in  
21 2003 that the plant was now treating approximately 650 lbs. per day, or almost twice the amount of  
22 “hazardous substance”. It is therefore apparent that no remedy yet exists for the AMD, and that the  
23 problem is now much more severe. Furthermore, no provision for the minimum of 20 acres of off-  
24 site storage for the hazardous waste treatment sludge is provided by the State as required by law.  
25 No provision is made or suggested for where the 50 million tons of hazardous waste sludge will be  
26 disposed. No financial assurances are provided for this disposal.

27 606. A second important facet of reasonableness will depend upon whether the settlement satisfac-  
28 torily compensates the public for the actual (and anticipated) costs of remedial and response meas-



1 ures. Like the question of technical adequacy, this aspect of the problem can be enormously com-  
2 plex. The actual past response costs of remedial measures were known at the time this consent de-  
3 cree was proposed. Since the settlement's bottom line is definite, the proportion of settlement dol-  
4 lars to total needed dollars is not debatable. The agency must be held to a standard of mathematical  
5 precision. If the figures relied upon do not derive in a sensible way from a plausible interpretation  
6 of the record, the court should not defer to the agency's expertise. The agency effectively waived  
7 collection of \$51 million in unrecovered past response costs from the responsible party, transferred  
8 this obligation to Counterclaimants with a statutory lien, and transferred unquantified and unlimited  
9 future liability to the innocent landowners.

10 607. A third integer in the reasonableness equation relates to the relative strength of the parties'  
11 litigating positions. If the government's case is strong and solid, it should typically be expected to  
12 drive a harder bargain. On the other hand, if the case is less than robust, or the outcome problem-  
13 atic, a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of  
14 a proposed settlement must take into account foreseeable risks of loss. See Rohm & Haas, 721  
15 F.Supp. at 680; Kelley, 717 F.Supp. at 517; Acushnet, 712 F.Supp. at 1028; Exxon, 697 F.Supp. at  
16 692; Hooker, 540 F.Supp. at 1072. The same variable, we suggest, has a further dimension: when  
17 the government's case is fundamentally defective because of the innocent landowner defense, and it  
18 then by definition is a takings for the public benefit claim, and it will take time and money to pay  
19 damages and pay to implement private remedial measures through the litigatory failure. So it is bet-  
20 ter for the government to deny the named defendant in the suit the status of innocent landowner so  
21 as to delay justice while swaddled in judicial deference to the EPA. To the extent that time is not of  
22 the essence or that the perpetual transaction costs loom large, a settlement which nets less than full  
23 recovery of cleanup costs is not necessarily reasonable. See Rohm & Haas, 721 F.Supp. at 680 (in-  
24 terpreting "reasonableness" in light of congressional goal of expediting effective remedial action  
25 and minimizing litigation); United States v. McGraw-Edison Co., 718 F.Supp. 154, 159  
26 (W.D.N.Y.1989) (settlement reasonable in light of prospect of protracted litigation as contrasted to  
27 expeditious reimbursement and remedy); Acushnet, 712 F.Supp. at 1030 (emphasizing that trial  
28 would likely be "complex, lengthy, expensive and uncertain"); Exxon, 697 F.Supp. at 693 (noting

1 benefit of immediate payment to environmental cleanup effort); Seymour, 554 F.Supp. at 1340 (ur-  
2 gency of abating danger to public must be considered). The reality is that, all too often, litigation is  
3 a cost-ineffective alternative which can squander valuable resources, public as well as private.

4 Nevertheless, with these allegations of conflict of interest, and the allegation of compromise and  
5 collusion of the parties to the trust funds secured by the consent decree, the settlement must be sub-  
6 ject to judicial review.

7 608. In this case, the district court wrongfully found the consent decrees to be reasonable. Cannons,  
8 720 F.Supp. at 1038-39. Counterclaimants have also seriously questioned the technological effi-  
9 cacy of the cleanup measures to be implemented at the Site. They also contend that the settlement  
10 was not designed to assure adequate compensation to the public for harms caused. Given the total-  
11 ity of the record-reflected circumstances, and the probability of fraud upon the court, the lower  
12 court's finding of reasonableness should be vacated and remanded.

13 609. D. Fidelity to the Statute?

14 610. Of necessity, consideration of the extent to which consent decrees are consistent with Con-  
15 gress' discerned intent involves matters implicating fairness and reasonableness. The three broad  
16 approval criteria were not meant to be mutually exclusive and cannot be viewed in majestic isola-  
17 tion. Recognizing the inevitable imbrication, we turn to the final criterion.

18 611. We describe the two major policy concerns underlying CERCLA:

19 612. First, Congress intended that the federal government be immediately given the tools necessary  
20 for a prompt and effective response to the problems of national magnitude resulting from hazardous  
21 waste disposal. Second, Congress intended that those responsible for problems caused by the dis-  
22 posal of chemical poisons bear the costs and responsibility for remedying the harmful conditions  
23 they created.

24 613. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir.1986)  
25 (quoting United States v. Reilly Tar & Chemical Corp., 546 F.Supp. 1100, 1112 (D.Minn.1982)).  
26 The district court thought that these concerns were addressed, and assuaged, by the proposed set-  
27 tlement. Counterclaimants do not.

1 614. It is crystal clear that the broad settlement authority conferred upon the EPA must be exer-  
2 cised with deference to the statute's overarching principles: accountability, the desirability of an  
3 unsullied environment, and promptness of response activities.

4 615. The bases do not appear to have been touched in this instance. The questions of accountabil-  
5 ity invite a proper investigation; in this case virtually none of the damaged environment is being  
6 restored to any beneficial use or to a condition where it can safely be returned to nature; and the  
7 promptness of the response activities and the intention of the response are still open to question.

8 616. Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material  
9 factor deserving significant weight is ignored, when an improper factor is relied upon, or when all  
10 proper and no improper factors are assessed, but the court makes a serious mistake in weighing  
11 them.

12 617. *Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864  
13 F.2d 927, 929 (1st Cir.1988).

14 618. The objectors can demonstrate that the trier made a harmful error of law or has lapsed into "a  
15 meaningful error in judgment," *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir.1988), a re-  
16 viewing tribunal must not stay its hand. While the doubly required deference--district court to  
17 agency and appellate court to district court--places a heavy burden on those who purpose to upset a  
18 trial judge's approval of a consent decree, an unfair and unjust verdict as a result of fraud upon the  
19 court must be overturned.

20 619. Even accepting substantive fairness as linked to comparative fault, an important issue still re-  
21 mains as to how comparative fault is to be measured. There is no universally correct approach. It  
22 appears very clear that what constitutes the best measure of comparative fault at a particular Super-  
23 fund site under particular factual circumstances is usually left to the EPA's discretion. Whatever  
24 formula or scheme EPA advances for measuring comparative fault and allocating liability is upheld  
25 so long as the agency supplies a plausible explanation for it, welding some reasonable linkage be-  
26 tween the factors it includes in its formula or scheme and the proportionate shares of the settling  
27 PRPs. See *United States v. Akzo Coatings*, 719 F.Supp. 571, 586-87 (E.D.Mich.1989); *Acushnet*,  
28 712 F.Supp. at 1031: cf. Gardner & Greenberger, *Judicial Review of Administrative Action and*

1 Responsible Government, 63 Geo.L.J. 7, 33 (1974) (courts must know why an agency has taken an  
2 action if they are to perform their review function adequately). Put in slightly different terms, the  
3 chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid  
4 of a rational basis.<sup>4</sup> See 42 U.S.C. Sec. 9613(j) (1987); Rohm & Haas, 721 F.Supp. at 681. No such  
5 formula exists in the present case. While no measure of comparative fault exists in the Consent De-  
6 cree, the Memorandum in support of entry of the Consent Decree from the agencies and Aventis  
7 discusses allocation based upon years of ownership. This formula of allocation, besides for pur-  
8 poses of preliminary assessment, has been found invalid by the Courts. Counsel for government  
9 acknowledge that the innocent landowner defense is the only defense available, and suggest that  
10 allegation of a lack of “due care” would deny grantees the benefit of the innocent landowner de-  
11 fense. The Courts have found this premise lacking in previous CERCLA cases.

12 620. Counterclaimants submit that by a preponderance of the evidence, the EPA selected remedies  
13 were arbitrary, capricious, and devoid of a rational basis. Counterclaimants further submit that by a  
14 preponderance of the evidence, that deprivations of due process and equal protection were facili-  
15 tated by a conspiracy of officers of the court to systematically and under color of law deprive the  
16 grantees of their civil and constitutional rights.

17 621. 4. Notice. The Counterclaimants also contend that the government's negotiating strategy must  
18 be fair. Congress did send the EPA into the toxic waste ring with the obligation to protect the civil  
19 rights of those it governs. The EPA may not mislead any of the parties, discriminate unfairly, or  
20 engage in deceptive practices.

21 622. Counterclaimants allege that by a preponderance of the evidence, the government have de-  
22 ceived and misled and discriminated against the remaining Grantees in this case.

23 623. In this CERCLA context, the government is under an obligation to determine liability in its  
24 settlement offers, and innocent landowners must be eligible to join ensuing major party settlements  
25 or otherwise resolve their liability for pollution that they did not cause or create. Therefore, and be-  
26 cause of the unreasonable extent of the differential, and the graduation of comparative fault uncon-  
27 scionably and unduly coercive in the present case, that grantees were discriminated against, misled,  
28 and deceived.

1 624. Exclusions from Settlements. Under the SARA Amendments, the right to the protections of  
2 the innocent landowner defense, and settlement to suit, is a fundamental right. The tyranny of "di-  
3 vide and conquer" as was applied in the present case, and in the contravention and defiance of a  
4 congressional directive, requires denial to the EPA the use of so reprobated an axiom of tyranny.  
5 So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it  
6 chooses. In the present case however, the EPA did not operate in good faith, and the consent decree  
7 must be vacated, the trust funds commutated, and a decree of dismissal or acquittal and resolution  
8 of liability for the innocent landowner must be entered in this case.

9 **EVIDENCE IN SUPPORT OF A FINDING OF FRAUD, MALICE, OPPRESSION AND**  
10 **DECEIT WITH BREACH OF GENERAL MINING LAW AND VIOLATION OF RCRA**  
11 **(THE RESOURCE CONSERVATION AND RECOVERY ACT).**

12 REFERENCES

13 56137, 56163, 56180, 56184, 56186, 56187, 57223, 57266, 56763, 57814, 57850, 60586, 60595,  
14 61784, 61791, 61817, 62740, 63581, 63779, 62047, 62810, 62470, 63569, 63631, of the Superfund  
15 administrative record of Iron Mountain Mines.

16 INTRODUCTION

17 **625.** This supporting memorandum investigates the consideration of resource recovery approaches  
18 conducted by the EPA during the period from Dec. of 1993 to Feb. 1997. In particular it will exam-  
19 ine the evaluation to ascertain if a reasonable scientific consideration of alternatives was given, and  
20 to what extent a lack of reasonable scientific consideration may have resulted in unlawful interfer-  
21 ence with legitimate mining purposes or violation of environmental law.

22 **626.** On the matter of the HONOR OF ALL MINING MEN, dignity shall be the remedy and relief  
23 from unspeakable errors of impunity and miscarriage of injustice, so grievous is the writ.

24 William Camden called her the Lost Confidence mine, Col. Charles Magee called her the Lost  
25 California mine, and later James Sallee came in and just called her Iron Mountain. After the gossan  
26 Gold ran out, Sallee found Silver. After 30 years of mining she was found to have a massive sulfide  
27 ore, and the call went out. Men in New York found men in London who would take the Lost Con-  
28

1 fidence mine into a new era. For a while she became the 6th largest copper and sulfur mine in the  
2 world.

3 **627.** It was in 1896 that men of London chartered the great Mountain Copper Co., and thereafter  
4 created scholarly and wise institutions of corporate power with the wealth thus acquired.

5 **628.** It was free mining men who opened Iron Mountain to reveal and profit of her gifts and treas-  
6 ure.

7 As is by right, in the year of 1976, the “Iron Mountain” mines were sold to T.W. Arman.

8 By right, T.W. Arman has made her Iron Mountain Mines, Inc. “Mountain Copper lives!”

9 **629.** Yet the plaintiff parties would sue and by deceits revoke the Freeholds and Letters Patents to  
10 pretend to the Charter and gain by the usurpation of the Franchise.

11 Yet the impunity most poisonous is for the infamy and stigma and shame that wrongfully lay upon  
12 these grantees, and upon all miners, without their participation or counsel in consent, or even  
13 knowledge by which to recognize that they had all been poisoned for so long.

14 **630.** Thus the honor of all mining men has been cast into the gutter, to be trodden by the crowds.

15 Therefore, that the honor of all mining men shall be restored, so name & honor: T.W. Arman.

16 We beseech thee to rectify the unspeakable errors of impunity and miscarriage of justice.

17 We petition concerning the rights and liberties of all the citizens of this Realm for their repose and  
18 quiet, and to prevent and punish abuses in procuring of process of Supersedeas by Right.

19 **631.** Also, to avoid vexatious delay in cause, by removing of action and suit out of inferior Court,  
20 wherein the former abuse was vexatious and grievous, and chargeable to the subject.

21 For the above general causes, viz. Peace and Plenty, long may they happily by the goodness of  
22 GOD continue without abuse within this Realm.

23 **632.** "It has been justly thought a matter of importance to determine from what source the United  
24 States derives its authority... The question here proposed is whether our bond of union is a compact  
25 entered into by the states, or whether the Constitution is an organic law established by the People.  
26 To this we answer: 'We the People... ordain and establish this Constitution'...The government of the  
27 state had only delegated power (from the People) and even if they had an inclination, they had no  
28 authority to transfer the authority of the Sovereign People. The people in their capacity as Sover-

1 eigns made and adopted the Constitution; and it binds the state governments without the state's  
2 consent. The United States, as a whole, therefore, emanates from the People and not from the  
3 states, and the Constitution and the laws of the states, whether made before or since the adoption of  
4 that Constitution of the United States, are subordinate to the United States Constitution and the  
5 laws made in pursuance of it." - [Bouvier's 14th Edition Law Dictionary (citing 4 Wheat, 402)]

6 **633.** Differing court interpretations of a statute "is evidence that the statute is ambiguous and un-  
7 clear." U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

8 **634.** (The court refused to extend the recoupment doctrine to action under the Comprehensive En-  
9 vironmental Response, Compensation and Liability Act for purposes of establishing a waiver of  
10 sovereign immunity for mine owners' counter-claim.). United States v. Iron Mountain Mines , 881  
11 F. Supp. 1432, 1445 (E.D. Cal. 1995) (citing opinions in which courts held that the United States  
12 did not waive immunity for purposes of regulatory acts under CERCLA, and rejecting those opin-  
13 ions). Claims that the United States was contributorily negligent, caused harm at the site, or as-  
14 sumed the risk of harm at the site have been stricken as, in reality, alleging third party defenses that  
15 are not within the terms of §107(b). United States v. Kramer, but see United States v. Iron Moun-  
16 tain Mines, Inc., 881 F.Supp. 1432 (ED Cal 1995) (declining to follow cases holding that EPA has  
17 immunity for regulatory or remedial acts under CERCLA and suggesting defendant has good claim  
18 in contribution if government fits within the four categories of liable parties.)

19 **635.** The court of appeals agreed with a district court decision that arranger liability should not ap-  
20 ply to "a party who never owned or possessed, and never had any authority to control or duty to  
21 dispose of, the hazardous materials at issue." Id. at 22a (quoting United States v. Iron Mountain  
22 Mines, Inc., 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

23 **636.** The Acushnet River burden of proof allocation was ignored by the District Court for the East-  
24 ern District of California in United States v. Iron Mountain Mines, Inc., even though the court cited  
25 Acushnet River as positive authority. In Iron Mountain Mines, permits existed for some but not all  
26 of the metal mining waste. The court held that evidence of 'the mere existence' of non-permitted  
27 releases 'is sufficient to suggest that non- permitted releases contributed to the harm.



1 **637.** Clearly, these decisions establish two divergent bases for proving liability. According to  
2 Acushnet River, and to some extent Bunker Hill, a plaintiff must prove not only the existence of  
3 the non-permitted releases, but also that the releases contributed to the harm. According to Iron  
4 Mountain Mines, on the other hand, a plaintiff need only show the 'mere existence' of the non-  
5 permitted releases; that alone is sufficient to suggest contribution. Notably, none of these decisions  
6 explains the difference, suggested by the Acushnet River court, between contribution to harm and  
7 causation of harm.

8 **638.** The extraordinary remedy of mandamus traditionally lies within the court's discretion. Oregon  
9 Natural Resources Council v. Harrell, 52 F.3d 1499, 1508 (9th Cir. 1995)(listing elements of man-  
10 damus test); Garcia v. Taylor, 40 F.3d 299, 301 (9th Cir. 1994), superseded by statute on other  
11 grounds as stated in, Campos v. I.N.S., 62 F.3d 311, 314 (9th Cir. 1995); Fallini v. Hodel, 783 F.2d  
12 1343, 1345 (9th Cir. 1986). Whether the elements of the mandamus test are satisfied is a question  
13 of law reviewed de novo. Oregon Natural Resources Council, 52 F.3d at 1508; Garcia, 40 F.3d at  
14 301. The trial court retains discretion in ordering mandamus relief, however, even if all elements  
15 are satisfied. Oregon Natural Resources Council, 52 F.3d at 1508. A trial court abuses its discretion  
16 when its decision is based on clearly erroneous factual findings or an incorrect legal standard. Gar-  
17 cia, 40 F.3d at 301; Fallini, 783 F.2d at 1345.

18 **639.** The United States Supreme Court has established two per se tests under which a regulation  
19 can effect a taking absent a physical encroachment onto the land. First, a regulation constitutes a  
20 per se taking when it "does not substantially advance legitimate state interests." Lucas v. South  
21 Carolina Coastal Council, 505 U.S. 1003, 1016, 120 L. Ed. 2d 798, 112 S. Ct. 2886  
22 Second, a per se taking occurs when a regulation "denies an owner economically viable use of his  
23 land." "The United States Supreme Court has noted that whether or not a taking has occurred "de-  
24 pends largely 'upon the particular circumstances in the case'." Penn Cent., 438 U.S. at 124. In Penn  
25 Central, the Court listed the economic impact of the regulation, the regulation's interference with  
26 investment-backed expectations, and the character of the governmental action as three such factors  
27 . In the most recent of these cases, Lucas, 505 U.S. 1003, the Court found that the regulation de-  
28 prived the landowner of reasonable economic value. The Court did imply, however, that in situa-

1 tions in which a reasonable value remains, a second inquiry is appropriate: “An owner [for whom  
2 economic value remains] might not be able to claim the benefit of our categorical formulation, but,  
3 as we have acknowledged time and again, 'the economic impact of the regulation on the claimant  
4 and ... the extent to which the regulation has interfered with distinct investment-backed expecta-  
5 tions' are keenly relevant to takings analysis generally.” Lucas, 505 U.S. at 1019. [Id. @ 65.]  
6 “The most recent pertinent U.S. Supreme Court decision resolves any doubt that there is a  
7 two-tiered inquiry in regulatory takings cases. If a landowner fails to meet its burden of proving a  
8 per se taking, he can still prove a taking under a fact-specific inquiry. [See Palazzolo, 2001, 150 L.  
9 Ed. 2d 592, 121 S. Ct. 2448.]

10 **640.** “Where a regulation places limitations on land that fall short of eliminating all economically  
11 beneficial use, a taking nonetheless may have occurred, depending on a complex of factors  
12 including the regulation's economic effect on the landowner, the extent to which the regulation  
13 interferes with reasonable investment-backed expectations, and the character of the government  
14 action. Id. at 2457 [\*\*17] (citing Penn Cent., 438 U.S. at 124).

15 **641.** The Court found that an examination of one distinct right in the property, as the mineral  
16 rights, was inappropriate. It noted that the U.S. Supreme Court “has consistently held that in  
17 regulatory takings cases, a court must determine the regulation's effect on the full rights in the  
18 land.” . Consequently, the Colorado Supreme held that in this case, “.the trial court and court of  
19 appeals were correct in holding that the appropriate focus of a takings inquiry is the property  
20 rights as an aggregate rather than merely the mineral rights.” [Id. @ 68.]

21 **642.** They would neither love nor trust one another, but on the contrary would be a prey to discord,  
22 jealousy, and mutual injuries; in short, that they would place us exactly in the situations in which  
23 some nations doubtless wish to see us, viz., FORMIDABLE ONLY TO EACH OTHER.

### 24 **I. Letters Patents under the General Mining Law**

25 **643.** In the history of the United States, no Land Patent has ever lost an appellate review in the  
26 courts. In *Summa Corp. v. California ex rel. State Lands Comm'n* 466 US 198, the United States  
27 Supreme Court ruled that the Land Patent would always win over any other form of title. In that  
28 case, the land in question was tidewater land and California's claim was based on California's con-

stitutional right to all tidewater lands. The patent stood supreme even against California's Constitution, to wit:

[The patent] “[P]assing whatever interest the United States has in the premises and thereby settling any question of sovereign ownership....” *Pueblo of Santa Ana v. Baca* (CA10 NM) 844 F2d 708; *Whaley v. Wotring* (Fla App D1) 225 So 2d 177; *Dugas v. Powell*, 228 La 748, 84 So 2d 177. [quote at 28 Am. Jur. 2D, F. 2 § 49].

644. With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. *Moore v. Robbins*, 96 U.S. 530, 533, 24 L. Ed. 848.

## II. MVA/APA

645. The MVA provides district courts with mandamus power "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. S 1361. Similarly, the APA allows a court to compel "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. S 706(1). Courts may grant mandamus relief ordering an agency to act under the MVA only if the three elements of the general mandamus test are satisfied. On the other hand, courts generally apply the so-called TRAC factors in deciding whether to order relief in claims of agency delay brought under the APA. See *TRAC*, 750 F.2d at 79-80.

Although the exact interplay between these two statutory schemes has not been thoroughly examined by the courts, the Supreme Court has construed a claim seeking mandamus under the MVA, "in essence," as one for relief under S 706 of the APA. See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 , 230 n.4., 106 S. Ct. 2860, 2866 n.4, 92 L. Ed. 2d 166

## III. The Administrative Procedure Act

646. The APA provides that a court may compel "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. S 706(1).

## IV. Serious Economic Harm and the Public Welfare

647. Relief under the APA. These factors provide that: delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; [and] . . . the court should also take into account the nature and extent of the interests prejudiced by delay

## V. Intentional Delay and Bad Faith

1 **648.** The District of Columbia Circuit has suggested that "[i]f the court determines that the agency  
2 [has] delay[ed] in bad faith, it should conclude that the delay is unreasonable." IMC, 885 F. Supp.  
3 at 1367 (changes in original) (quoting Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987)). The District  
4 of Columbia Circuit later explained that "[w]here [an] agency has manifested bad faith, as by sin-  
5 gling someone out for bad treatment or asserting utter indifference to a congressional deadline, the  
6 agency will have a hard time claiming legitimacy for its priorities." In re Barr Labs., Inc., 930 F.2d  
7 72, 76 (D.C. Cir.) (citing In re Monroe Communications Corp., 840 F.2d 942, 946-47 (D.C. Cir.  
8 1988)), cert. denied, 502 U.S. 906, 112 S. Ct. 297, 116 L. Ed. 2d 241 (1991).

#### 9 **VI. Post Hoc Rationalization**

10 **649.** The rule barring consideration of post hoc agency rationalizations operates where an agency  
11 has provided a particular justification for a determination at the time the determination is made, but  
12 provides a different justification for that same determination when it is later reviewed by another  
13 body. See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 631 n. 31,  
14 100 S. Ct. 2844, 2858, 65 L. Ed. 2d 1010 (1980); Securities and Exchange Comm'n v. Chenery  
15 Corp., 318 U.S. 80, 95, 63 S. Ct. 454, 462, 87 L. Ed. 626 (1943). However, this rule has been de-  
16 veloped in the context of a court's duty to set aside a "final agency decision" if based on a post hoc  
17 rationalization. Such a "final agency decision," generally required for judicial review of agency ac-  
18 tions, provides the court with a date certain by which it can analyze the agency's justifications. It  
19 also identifies the particular decision being challenged and the justifications proffered at that time.  
20 Judicial review of an agency's actions under S 706(1) for alleged delay has been deemed an excep-  
21 tion to the "final agency decision" requirement. See, e.g., Public Citizen v. Bowen, 833 F.2d 364,  
22 367 (D.C. Cir. 1987); Public Citizen Health Research Group v. Comm, FDA, 740 F.2d 21,  
23 30-32 (D.C. Cir. 1984). Under this exception, the court is examining an agency's actions prior to a  
24 final agency decision for purposes of measuring agency delay. Accordingly, there is no date certain  
25 by which to evaluate an agency's justifications for its actions.

26 **650.** While quo warranto is regarded as the exclusive remedy to try title to public office, under cer-  
27 tain circumstances a court will consider title to an office in a mandamus proceeding under section  
28 1085 of the Code of Civil Procedure when title is "incidental" to the primary issue to be resolved

1 by the action. Generally, this occurs when a de facto officer brings an action such as mandamus to  
2 recover some incident of office, such as salary, and a determination as to whether the petitioner is  
3 entitled to recover the incident of office must necessarily be preceded by a ruling as to whether the  
4 petitioner is entitled to the office. (See *Klose v. Superior Court* (1950) 96 Cal.App.2d 913 and  
5 cases cited therein.) The court must decide whether title may be decided in the action "incidentally"  
6 to the ostensible primary issue. (*Stout v. Democratic County Central Comm.*, supra, 40 Cal.2d at  
7 94. See also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727.)

8 **651.** The relief sought requires judicial review of the EPA and DOJ actions. Iron Mountain Mines,  
9 Inc. is being wrongfully denied their rights in federal detention, and is seeking relief for the uncon-  
10 stitutional, abusive or neglectful conditions of her incarceration notwithstanding that a district court  
11 has granted custody to her captors.

## 12 I. INTRODUCTION

13 **652.** Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.  
14 § 6973, provides the U.S. Environmental Protection Agency (EPA) with broad and effective  
15 enforcement tools that can be used to abate conditions that may present an imminent and  
16 substantial endangerment to health or the environment. Section 7003 allows EPA to address  
17 situations where the handling, storage, treatment, transportation, or disposal of any solid or  
18 hazardous waste may present such an endangerment. In these situations, EPA can initiate judicial  
19 action or issue an administrative order to any person who has contributed or is contributing to such  
20 handling, storage, treatment, transportation, or disposal to require the person to refrain from those  
21 activities or to take any necessary action.

22 **653.** Among its many benefits, Section 7003 provides EPA with a strong and effective means of  
23 furthering risk-based enforcement and implementing its strategy for addressing the worst RCRA  
24 sites first, a strategy which EPA developed in response to its 1990 RCRA Implementation Study.<sup>1</sup>  
25 Under this strategy, EPA is addressing the universe of waste management facilities on the basis of  
26 environmental priorities. Furthermore, at any given site, EPA is attempting to use whatever legal  
27 authority is best suited to achieving environmental success. Section 7003 provides an invaluable  
28 means for achieving environmental success at many of these sites.

1 **654.** In consultation with EPA regional offices and other headquarters offices, the Office of Site  
2 Remediation Enforcement and the Office of Regulatory Enforcement have developed this  
3 guidance document to assist the regional offices in exercising the Agency’s authorities under  
4 RCRA § 7003. In addition to providing practical advice on the use of Section 7003, this  
5 document summarizes significant legal decisions that have addressed Section 7003.2 This  
6 document supersedes (1) the “Final Revised Guidance Memorandum on the Use and Issuance of  
7 Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act  
8 (RCRA)” which was issued on September 26, 1984 (“1984 Guidance”), and (2) the fact sheet  
9 entitled “The Imminent and Substantial Endangerment Provision of Section 7003,” which was  
10 issued by the Office of Site Remediation Enforcement in May 1996.

11 **655.** EPA references RCRA § 7003 in various policy and guidance documents. In light of the  
12 issuance of this guidance, the Region should consult with headquarters regarding the applicability  
13 of any of those documents to particular actions described in this guidance. Before taking any par-  
14 ticular action, the Region should examine Attachment 1 regarding delegations, consultations, and  
15 concurrence.

16 **656.** Section 7003 when there is an ongoing criminal investigation or prosecution against the same  
17 person concerning the same or a related matter, the Regions should consult the June 22, 1994  
18 memorandum from Steven A. Herman entitled “Parallel Proceedings Policy” and the applicable  
19 DOJ parallel proceedings policy.

20 **657.** RCRA § 7003(a) is also similar in some respects to the citizen suit provision set forth in  
21 RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B). That provision allows any person, including  
22 any state, to initiate a civil action against any person who has contributed or is contributing to cer-  
23 tain activities which may present an imminent and substantial endangerment to health or the envi-  
24 ronment. Because Section 7002(a)(1)(B) contains an endangerment standard and many terms that  
25 are identical to those used in Section 7003(a), some court decisions addressing Section  
26 7002(a)(1)(B) may assist the Regions in interpreting Section 7003.

27 **658.** It is EPA’s position, and at least one court agrees, that EPA may take action under  
28

1 Section 7003 even if the government is simultaneously taking action against the defendant under  
2 CERCLA. The Regions may therefore use Section 7003 either independently or as a  
3 supplement to actions taken under CERCLA or other statutes.

4 **659.** In practice, the Regions may find that they sometimes need to choose between using  
5 Section 7003 over CERCLA § 106(a) or RCRA § 3008(h). The following discussion describes  
6 when to consider using RCRA § 7003 instead of those two authorities.

7 1. Comparison of RCRA § 7003 and CERCLA § 106(a)

8 **660.** Under CERCLA § 106(a), EPA may initiate a judicial action or issue an administrative  
9 order when there may be an imminent and substantial endangerment because of an actual or  
10 threatened release of a “hazardous substance.”

11 a. Advantages of RCRA § 7003

12 **661.** The Regions may consider using RCRA § 7003 instead of CERCLA § 106(a) in order to:

13 C Address potential endangerments caused by materials that meet RCRA’s statutory  
14 definition of “solid waste” but are not “hazardous substances” under CERCLA -- The  
15 definition of “hazardous substance” in Section 101(14) of CERCLA, 42 U.S.C.

16 § 9601(14), does not include all materials that qualify as “solid waste” under RCRA

17 § 1004(27), 42 U.S.C. § 6903(27). Note, however, that the CERCLA definition of

18 “hazardous substances” does encompass some materials, such as radionuclides, which are  
19 not “solid waste” under RCRA.

20 **662.** Address potential endangerments caused by “hazardous waste” that meets the broad  
21 definition of that term under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), but which is  
22 not a CERCLA “hazardous substance” because it fails to meet the more narrow definitions  
23 of “hazardous waste” promulgated in 40 C.F.R. Part 261 pursuant to RCRA § 3001 --

24 CERCLA’s definition of “hazardous substance” includes “hazardous waste” having  
25 characteristics identified under or listed pursuant to Section 3001 of RCRA, 42 U.S.C. §  
26 6921. It does not include all materials that qualify as “hazardous waste” as defined in  
27 RCRA § 1004(5).



1 **663.** On July 9, 2008, the U.S. Court of Appeals for the First Circuit held that a state could inter-  
2 vene, through a consent decree, in a trifurcated CERCLA action four years after first invited and  
3 after the trial court had made initial findings of liability. *City of Bangor v. Citizens Commc'ns*  
4 *Co.*, 532 F.3d 70 (1st Cir. 2008). The City of Bangor (“Bangor”) had purchased land in 1978 from  
5 Citizens Communications (“Citizens”), whose predecessor owned and operated a manufactured gas  
6 plant onsite. Bangor, after incurring over \$1 million in costs investigating contamination on the  
7 property, brought CERCLA and RCRA actions against Citizens. After counterclaims and third and  
8 fourth party complaints, the parties agreed to trifurcate the trial: first resolving the liability as be-  
9 tween Bangor and Citizens, selecting a remedy in the second phase, and resolving the liability as  
10 between Citizens and other party defendants in the third phase. Before the first phase began in  
11 2003, several parties (and the court) requested that the State of Maine intervene, but the state re-  
12 fused. In 2006, the court made findings of fact and conclusions of law as to Citizens’ and Bangor’s  
13 liability. The two parties then negotiated a settlement agreement and a state consent decree that  
14 gave them contribution protection. In 2007, Maine sought to intervene in the lawsuit and file the  
15 consent decree. The trial court allowed the intervention, approved the consent decree, and found  
16 the initial findings no longer binding. The third and fourth parties appealed the district court’s de-  
17 cision to allow Maine’s intervention and the approval of the consent decree.

18 **663.** On appeal, the First Circuit upheld the district court’s decision to approve the consent decree.  
19 The First Circuit held that a state CERCLA consent decree will be upheld absent an abuse of dis-  
20 cretion, although a state agency would not receive the same deference under CERCLA as U.S. EPA  
21 would. The appellate court found that the consent decree was procedurally and substantively fair  
22 and complied with CERCLA § 122 settlement requirements. The appellate court also upheld the  
23 trial court’s decision to require that Citizens and other parties litigate their contribution claims in a  
24 separate, newly filed action.

25 **664.** On December 20, 2007, the U.S. District Court for the District of New Hampshire held that a  
26 non-settling PRP may intervene in a consent decree proceeding. *United States v. Exxonmobile*  
27 *Corp.*, 2007 U.S. Dist. LEXIS 95463 (D.N.H. Dec. 20, 2007). In *Exxonmobile*, a non-settling PRP  
28 sought to intervene in consent decree approval proceedings for 96 de minimis “contributors” at the

1 Beede Waste Oil Superfund Site in New Hampshire. Id. at \*2-\*3. The consent decree had been an-  
2 nounced in the Federal Register, but no motion had been filed in the court to approve the decree at  
3 the time the intervenor, Brodie, filed to intervene. Id. at \*5. In examining whether or not Brodie  
4 met the “interest” criterion for intervening in the suit, the court found persuasive the Eighth Circuit  
5 decision in *United States v. Union Elec. Co.*, 64 F.3d 1152 (8th Cir. 1995), which held that non-  
6 settling PRPs have sufficient interest to support intervention. Id. at \*12-\*14. The court rejected the  
7 argument, accepted by district courts in Michigan, Ohio and Arizona, that CERCLA is intended to  
8 encourage settlement, and thus preventing non-settling PRPs from intervening provides an incen-  
9 tive for non-settling PRPs to settle. Id. at \*10-\*12. As a result, the court allowed Brodie to inter-  
10 vene in the consent decree approval proceedings. On October 1, 2007, the United States Supreme  
11 Court refused to grant a writ of certiorari requested by the losing defendant in *Maine People’s Alli-  
12 ance v. Mallinckrodt*, 471 F.3d 277 (1st Cir. 2006). As a result, the U.S. Court of Appeals for the  
13 First Circuit’s judgment will stand, upholding a broad application of the citizen suit provisions un-  
14 der the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972(a)(1)(B).

15 **664.** In *Mallinckrodt*, several environmental groups had sued *Mallinckrodt* for its alleged historic  
16 mercury contamination of the Penobscot River. Although *Mallinckrodt* had been working with  
17 EPA for years regarding this mercury contamination, the environmental groups brought their own  
18 lawsuit under RCRA’s “citizen suit” provision, alleging that the mercury contamination “may pre-  
19 sent an imminent and substantial endangerment to health or the environment.” Plaintiffs demanded  
20 that *Mallinckrodt* conduct a comprehensive study of the nature and extent of the endangerment.  
21 When *Mallinckrodt*’s attempts to dismiss the case based on EPA’s prior involvement failed, the  
22 case went to trial. At trial, plaintiffs’ lead expert testified that he did not know either the extent or  
23 severity of the mercury problem, but thought that there might be a serious endangerment and that it  
24 was “highly likely” that remediation would be required. The trial court held that plaintiffs had  
25 demonstrated RCRA citizen suit liability.

26 **664.** On appeal to the First Circuit, *Mallinckrodt* attacked both the environmental groups’ standing  
27 to bring the RCRA claims and the trial court’s broad interpretation of RCRA citizen suit liability.  
28 *Mallinckrodt*’s principal argument against standing was that, due to uncertainty about the contami-

1 nation's scope and effect, plaintiffs could not show a substantial probability that harm will occur.  
2 However, the appellate court rejected Mallinckrodt's position, finding that plaintiffs had suffi-  
3 ciently shown that the mercury created a substantial probability of increased harm to the environ-  
4 ment, which reasonably caused injury to members of the environmental groups.

5 **664.** The appellate court also rejected Mallinckrodt's opposition to the trial court's broad interpre-  
6 tation of RCRA's citizen suit liability. After considering and rejecting Mallinckrodt's attempt to  
7 limit the statute's reach through an analysis of both statutory language and legislative history, the  
8 appellate court concluded that, for purposes of both standing and liability, Congress had intended to  
9 allow citizens to ask the courts to grant relief for "any risks posed by toxic waste," even if EPA re-  
10 fuses to address the risk. 471 F.3d at 294-96. Thus, as long as "the threat is near-term and involves  
11 potentially serious harm," a federal court can act. *Id.* at 296.

12 **664.** By rejecting Mallinckrodt's request, the First Circuit's opinion on the broad expanse of RCRA  
13 citizen suit liability, as well as similar decisions in the Second, Third, Fifth, Tenth, and Eleventh  
14 Circuits, remains the law.

#### 15 Tenth Circuit Imposes Broad Application of RCRA Citizen Suits

16 **665.** On September 24, 2007, just a week before the Supreme Court's denial of certiorari in Mal-  
17 linckrodt, the U.S. Court of Appeals for the Tenth Circuit joined other federal appellate and trial  
18 courts in broadly applying the reach of potential liability under RCRA's citizen suit provision for  
19 "imminent and substantial endangerment," RCRA § 7002(a)(1)(B). *Burlington Northern and Santa*  
20 *Fe R.R. Co. v. Grant*, 2007 U.S. App. LEXIS 22680 (10th Cir. Sept. 24, 2007) ("BNSF"). In  
21 BNSF, a railroad (BNSF) sued its neighbor whose property allegedly was the source of a tar-like  
22 material that BNSF claimed had migrated and would continue to migrate onto BNSF's property.  
23 The tar had been generated by historic refinery operations occurring years before either party had  
24 purchased their parcels. BNSF sued its neighbor under the RCRA citizen provision and several  
25 state law theories, including nuisance and unjust enrichment. As for the RCRA claim, the neighbor  
26 argued that BNSF could not prove that the tar "may present an imminent and substantial endan-  
27 germent" because BNSF had known about the tar problem for years and had allegedly done noth-  
28 ing; no person had been injured and no "immediate" harm could be proved; and no government

1 agent had ever acted to address the tar. BNSF lost its RCRA and several other state law claims in  
2 pre-trial summary judgment rulings. It lost its remaining state law claims at the close of its case-in-  
3 chief at trial.

4 **665.** On appeal, however, the Tenth Circuit reinstated almost all of BNSF's claims. The Tenth Cir-  
5 cuit held that, as a matter of law, the RCRA citizen suit provision could not be interpreted as nar-  
6 rowly as the trial court had. The appellate court found that BNSF's alleged knowledge of and de-  
7 lay in response to environmental conditions was irrelevant to a determination of whether endan-  
8 germent was currently occurring. The court found that to accomplish RCRA's broad goal of elimi-  
9 nating "any risk posed by toxic wastes," Grant 2007 U.S. Dist. LEXIS at \*9, the trial court had to  
10 allow BNSF to prove merely a potential harm, not an actual harm. Moreover, there is no require-  
11 ment that BNSF prove that the actual harm will occur immediately, just that the threat of harm be  
12 immediate. In addition, a government agency's failure to act does not prevent an RCRA claim.  
13 Thus, the trial court erred when it dismissed BNSF's RCRA claim before trial.

14 **665.** The appellate court then addressed the state law claims that BNSF had lost in the court below.  
15 On appeal, the court found that the trial court's rulings against BNSF had been largely erroneous.  
16 Thus, the decisions below were reversed and the case was returned to the trial court so that BNSF  
17 could have the opportunity to prove its RCRA and state law claims under the appellate court's  
18 broader interpretation of the law.

19 **666.** Fifth Circuit Applies RCRA Citizen Suit Standing a Rights Beyond Plaintiff's Ownership In-  
20 terests

21 On August 28, 2007, the U.S. Court of Appeals for the Fifth Circuit became another court broadly  
22 applying RCRA citizen liability, declaring that Congress intended to allow citizens to "speed com-  
23 pliance with environmental laws," "put pressure on a government unwilling or unable to enforce  
24 such laws," and "close loopholes in environmental protection." *Consol. Cos. v. Union Pacific R.R.*,  
25 2007 U.S. App. LEXIS 20619, at \*11 (5th Cir. Aug. 28, 2007) (internal citations omitted). In *Con-*  
26 *sol. Cos.*, plaintiff Conco owned a piece of a former railyard. Other parties, unrelated to Conco,  
27 owned the remainder. Thirty years after Conco purchased its property, it found contamination  
28 which the parties stipulated came from the former rail operations. Conco then brought a lawsuit

1 against Union Pacific Railroad (“UPRR”), the railyard’s successor, under the RCRA citizen suit  
2 provision, §7002(a)(1)(B), as well as state statutory and common law theories. In its RCRA claim,  
3 Conco sought to require UPRR to address contamination, not only on Conco’s property, but  
4 throughout the site of the entire former railyard, including property not owned by either party to the  
5 lawsuit. The trial court held an evidentiary hearing on UPRR’s challenge to Conco’s standing and  
6 its ability to call the entire former railyard a single RCRA “facility.” When UPRR lost on both is-  
7 sues in the trial court, it appealed.

8 **666.** The Fifth Circuit upheld the trial court’s decision on all issues. It found that Conco had stand-  
9 ing to address more than the contamination on its property because the contamination on the other  
10 parcels demonstrated Conco’s “injury in fact.” Specifically, Conco showed that contamination on  
11 other parcels threatened harm to its property and its employees. This threat of harm was sufficient  
12 injury to confer standing to bring a claim. The appellate court also found that the term “facility”  
13 under RCRA’s citizen suit provision, although not defined in the statute, should be interpreted to  
14 include contiguous or adjacent property, just as that term does under RCRA’s underground tank  
15 provisions and under CERCLA’s broad definition of “facility.” The court stressed that the expan-  
16 sive interpretation of the term “facility” in the RCRA citizen suit provision was necessary given  
17 Congress’s intent to facilitate citizens’ ability to act as private attorneys general in addressing envi-  
18 ronmental conditions. According to the court, because nothing in the citizen suit provision requires  
19 that a plaintiff have any ownership interest in the contaminated site, there is no basis for limiting  
20 the scope of a partial owner’s right to demand action.

21 **666.** Although the ultimate scope of UPRR’s liability and responsibility under this RCRA suit is  
22 still to be determined, the Fifth Circuit’s opinion is yet another example of the broad reach of  
23 RCRA citizen suit liability.

#### 24 **Liberal Standing in RCRA Citizen Suits Endorsed by District Court**

25 **667.** On October 15, 2007, the United States Court for the Southern District of Indiana held that a  
26 RCRA citizen suit plaintiff need not hold legal title to the contaminated property which is the sub-  
27 ject of the lawsuit. *1100 West, LLC v. Red Spot Paint & Varnish Co.*, 2007 U.S. Dist. LEXIS  
28 76710 (S.D. Ind. Oct 15, 2007). In *Red Spot*, a partnership owned a 7-acre parcel until 1999, when

1 the partnership was converted into a limited liability company (“1100 West”). *Id.* at \*3. Due to an  
2 oversight, the legal title for the parcel was not altered to reflect that 1100 West was the owner until  
3 after the RCRA litigation began. The defendant, Red Spot, moved to dismiss for lack of standing  
4 because 1100 West did not own the parcel at the time of the suit and because 1100 West did not  
5 have any “injury in fact.”

6 **667.** The court denied Red Spot’s motion to dismiss. The court held that 1100 West satisfied the  
7 three requirements for standing to sue under Article III of the United States Constitution. In par-  
8 ticular, the court found that 1100 West’s failure to have title to the contaminated parcel was irrele-  
9 vant because RCRA allows a citizen suit by “any person,” not just one with legal title. Moreover,  
10 the court found sufficient allegations of “injury in fact” based on the partnership’s allegation that  
11 Red Spot’s historic contamination interfered with its business of buying and reselling old industrial  
12 sites.

13 **667.** The district court’s opinion is consistent with other courts’ recent broad interpretation of  
14 RCRA citizen suit standing. Companies in the business of buying contaminated property, who  
15 wish to use RCRA citizen suits to force prior owners and operators to remediate the site, will be  
16 encouraged by the 1100 West decision.

17 **668.** The Eastern District of Texas held on June 20, 2007, that contamination may pose an “immi-  
18 nent and substantial” endangerment under RCRA even if it has lasted for 20 years and the rate of  
19 contamination has slowed, or remained the same, over the last decade. *K-7 Enterprises v. Jester*,  
20 E.D. Texas, No. 06-57, 6/20/07. In *K-7*, property owners brought a RCRA citizen suit against cur-  
21 rent and former owners of a nearby convenience store, which allegedly had leaking underground  
22 gasoline tanks. The defendants, current and former owners and operators of the c-store and its pip-  
23 ing systems (collectively, “K-7”), raised several bases for their motion for summary judgment, all  
24 of which failed. First, the court refused to find that it should abstain from exercising jurisdiction in  
25 favor of ongoing state lawsuits brought by the same plaintiffs. Plaintiffs had filed a lawsuit in state  
26 court, seeking declaratory and monetary relief against K-7 under a variety of state law claims, in-  
27 cluding negligence, trespass and nuisance. Separately, plaintiffs sued the state for failing to order  
28 defendants to conduct a corrective action. Because RCRA allows distinctive injunctive relief

1 against defendants, the court declined to abstain from exercising federal jurisdiction. Defendants'  
2 argument that the contamination was neither imminent nor substantial also failed. The court al-  
3 lowed plaintiffs' case to proceed even though the contamination could date from 1987 or before;  
4 contaminant levels had remained the same or were declining; groundwater was not used for drink-  
5 ing water; and contaminants were moving very slowly. The court found imminent and substantial  
6 endangerment because the contaminants were above recommended state levels. The court also  
7 found that RCRA's liability, that encompasses anyone who "contributed" to the contamination, in-  
8 cludes any party exercising "some form of control" over the leaking tanks or related equipment.  
9 Having denied summary judgment, the case may now proceed to trial.

10 **669.** The U.S. District Court for the District of Idaho held that claims that the federal government's  
11 cleanup activities were negligently performed were insufficiently related to the government's claim  
12 for cost recovery and did not have to be heard as part of the government's cost recovery lawsuit.  
13 *United States v. Placer Mining Corp.*, 2007 U.S. Dist. LEXIS 39179 (D. Idaho May 30, 2007). The  
14 federal government sued Placer Mining Corp. ("Placer") in 2004, seeking response costs relating to  
15 Placer's alleged discharge of contaminated water onto the site. In response to the government's  
16 suit, Placer sought to file a counterclaim for negligence under the Federal Tort Claims Act  
17 ("FTCA"), asserting that the government engaged in negligent cleanup activities including: negli-  
18 gent construction of a structure, removal of significant amounts of valuable material, causing cave-  
19 ins and destroying mine portals, and constructing barriers which excluded Placer from property it  
20 owned. The issue arising before the court was whether the FTCA counterclaim was compulsory, in  
21 which case no notice of the claim is required prior to proceeding to federal court, or permissive, in  
22 which case Placer should have filed a notice of tort claim with the federal agency prior to proceed-  
23 ing before the federal court. The court held that the counterclaim was not compulsory because the  
24 factual basis for the counterclaim concerns events which primarily occurred after the original com-  
25 plaint was filed. The court found that there was no "logical relationship" between the facts forming  
26 the basis of the Section 107 claim and the facts forming the basis of the negligence counterclaim.  
27 Therefore, Placer's request to amend to allow a counterclaim under the FTCA was denied.

28 Intervention Under CERCLA



1 **670.** CERCLA Section 113(f)(2) provides that PRPs who settle with the government in an adminis-  
2 trative or a judicially approved settlement receive “contribution protection” as a means of encour-  
3 aging settlement. This protection allows settling PRPs to insulate themselves from future contribu-  
4 tion actions relating to the matters addressed in the settlement.[4] Non-settling PRPs continue to  
5 face exposure to cost-recovery or contribution actions by settling parties,[5] in addition to potential  
6 joint and several liability for past and future costs of cleanup.[6]

7 **671.** Non-settling PRPs have often sought to intervene in the approval of a consent decree in order  
8 to retain their ability to seek contribution from the settling parties and to ensure that settling parties  
9 absorb a fair share of the cleanup costs.

10 **672.** Section 113(i) of CERCLA provides “any person” with the right to intervene in “any action  
11 commenced” under CERCLA.[7] However, intervention is contingent on meeting the four-part test  
12 that normally governs intervention under Federal Rule of Civil Procedure (“FRCP”) 24(a)(2):[8] 1)  
13 a timely motion; 2) an interest relating to the action; 3) impairment of the party’s ability to protect  
14 its interest; and 4) a showing that the existing parties to the action do not adequately represent the  
15 party’s interest.[9] Where non-settling PRPs have attempted to intervene in approval of consent  
16 decrees under CERCLA, courts have focused on whether the party adequately asserts a protectable  
17 interest and whether denying intervention will impede that interest.

#### 18 The Court’s Decision

19 **673.** In *Exxon Mobil*, the plaintiff sought to recover response costs expended to remediate con-  
20 tamination at the Beede Waste Oil Superfund Site in Plaistow, New Hampshire (“Site”). Prior to  
21 filing suit, EPA ranked the PRPs at the Site according to the activities that had resulted in contami-  
22 nation at the Site.

23 **674.** In January 2007, plaintiffs sued Brodie Mountain Ski Area, Inc. (“Brodie”), whom EPA des-  
24 ignated as the second highest contributing PRP, along with other highly-ranked PRPs. Four months  
25 later, the plaintiffs lodged a consent decree with the district court for approval. Under the proposed  
26 consent decree, EPA was settling with a number of PRPs that it had ranked as *de minimus* (“Set-  
27 tling PRPs”).

1 **675.** Brodie and J.W. Kelly’s Enterprises Inc., also a non-settling PRP (collectively the “Intervenors”), sought to intervene in proceedings for approval of the consent decree. The Intervenors asserted that they had a right to participation under FRCP 24(a)(2) and CERCLA Section 113(i), claiming that they had a legally-protected interest in seeking contribution from the Settling PRPs, and that their interest would be adversely impacted by entry of the consent decree. The court allowed intervention on the basis that the consent decree might impact the Intervenors’ protectable interest to pursue claims for contribution from the Settling PRPs.

8 **676.** Relying on the majority of opinions that had addressed the issue, EPA and the Settling PRPs argued that allowing the intervention would frustrate CERCLA’s goal of expediting settlement.[10] The court rejected this argument, relying instead on the minority position represented in the Eighth Circuit Court of Appeal’s decision in *United States v. Union Electric Co.*[11]

12 **677.** The district court focused on the fact that Section 113(f)(1) creates a contribution interest that is “directly related to the subject matter of the litigation ... and arises from the liability or potential liability of persons as a result of that litigation.”[12] The court did not view the right to seek contribution as “wholly remote and speculative” solely because it was “contingent upon the outcome of the litigation.”[13] Instead, the court considered the Intervenors as having a protectable interest, “precisely because ‘the threat of cutting off contribution rights of non-settling PRPs creates a direct and immediate interest on the part of non-settling PRPs in the [Consent Decree] litigation.’”[14] The court also found that the consent decree might cut off the Intervenors’ abilities to “recoup excessive allocation of liability by way of contribution claims” from parties that EPA might have erroneously designated as de minimus PRPs,[15] and that none of the existing parties to the settlement adequately represented the Intervenors’ interests.[16]

23 **678.** Emphasizing the limited reach of its holding, the court cautioned that the Intervenors faced “a high hurdle in objecting to the proposed Consent Decree.”[17] The court emphasized that its holding merely afforded the Intervenors with “a seat at the table, and an opportunity to speak its piece,” but did not grant them with “veto power over the final settlement.”[18]

27 Decision Stands at Odds with the Majority Rule on Intervention

1 **679.** A majority of courts have held that non-settling PRPs may not intervene in consent decrees  
2 between the government and settling PRPs. These decisions have rejected intervention based on the  
3 finding that a non-settling PRP’s contribution interest is too “speculative” or “contingent” to satisfy  
4 the protectable interest criterion for intervention under both FRCP 24(a)(2) and Section 113(i) of  
5 CERCLA. For example, in *State of Arizona v. Motorola*, the court held that the non-settling PRPs  
6 lacked “a substantial and legally protectable interest,” and that their contingent contribution right  
7 was “[a]t best ... a remote economic interest that is insufficient to support intervention.”[19]  
8 These decisions have also rejected motions to intervene based on the impact that intervention  
9 would have on the settlement scheme in CERCLA. Drawing on principles of statutory construction,  
10 these courts have found conflict between a PRP’s right to intervene under Section 113(i) and the  
11 contribution protection Section 113(f)(2) affords to settling PRPs.[20] Relying on legislative his-  
12 tory, courts have ordinarily resolved this tension in favor of “those who live in close proximity to  
13 hazardous waste sites”[21]—not non-settling PRPs who seek to “undermine the consent decree and  
14 protect their contribution interests.”[22]

15 **680.** In contrast, the *ExxonMobil* court eschewed any consideration of CERCLA’s underlying pol-  
16 icy. While this approach reflects the minority view,[23] the *ExxonMobil* decision was based on  
17 similar reasoning from *Union Electric*,[24] where the Eighth Circuit Court of Appeals criticized the  
18 majority of courts for relying on legislative history and policy concerns, which it viewed as “inap-  
19 propriate for courts to consider in determining whether to allow intervention as of right under either  
20 [FRCP 24(a)] or the CERCLA provision.”[25] The Circuit Court had little difficulty finding that a  
21 prospective intervenor had a significant, legally protectable interest to reduce its financial liability  
22 and preserve contribution claims against all PRPs.[26]

### 23 **Conclusion**

24 **681.** While taking the minority approach, the court’s decision in *ExxonMobil* tracks the Eighth Cir-  
25 cuit’s decision in *Union Electric* and a few district courts that have followed the logic of that deci-  
26 sion. The law on this issue remains unclear, which may well encourage some parties to seek to in-  
27 tervene in CERCLA consent decree proceedings.

### 28 **Analysis**

1 **682.** Because a writ of incidental mandamus may not necessarily be as extraordinary a remedy as a  
2 writ of quo Warranto might be, the five factors that cabin your power to grant the writs are pre-  
3 sumably just as incidental:

- 4 1. “The party seeking the writ has no other adequate means, such as a  
5 direct appeal, to attain the relief he or she desires.”; Writ of quo Warranto; TRUE
  - 6 2. “The petitioner or defendants will be damaged or prejudiced in a way not  
7 correctable on appeal.” Writ of b<sup>TM</sup> u £ ,,,, jf- **ERROR**; TRUE
  - 8 3. “The circuit court’s order is clearly erroneous as a matter of law.” Writ of Right; TRUE
  - 9 4. “The circuit court’s order is an oft-repeated error, or manifests a  
10 persistent disregard of the federal rules.” Writ of INCIDENTAL MANDAMUS; TRUE
  - 11 5. “The circuit court’s order raises new and important problems, or  
12 issues of law of first impression.” Writ of DETINUE SUR BAILMENT; TRUE
- 13 Bauman v. U.S. Dist. Court, 557 F.2d 650, 654–55 (9th Cir. 1977).

14 The third factor is a necessary condition for granting a writ of mandamus.  
15 The apparently uncontested fact of fraud upon the court with malice and oppression in this case  
16 should be reason enough to grant the quo Warranto and incidental mandamus.  
17 Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1551 (9th Cir.  
18 1994). But “all five factors need not be satisfied at once.” Valenzuela-Gonzalez  
19 v. U.S. Dist. Court, 915 F.2d 1276, 1279 (9th Cir. 1990).

20 **683.** Since the appeals court clearly erred, you may determine whether the four additional factors  
21 “in the mandamus calculus point in favor of granting the writ.” Executive Software, 24 F.3d at  
22 1551.

23 **684.** Petitioner alleges that EPA has violated the most fundamental and cherished provisions of  
24 U.S. property law concerning mineral rights and miner’s rights, that the EPA has interfered with  
25 lawful mining operations by false pretenses and illegitimate animus, deceit and fraud upon the  
26 court, all to the violation of the covenants of preservation and perfection granted by warrants of  
27 patent title from the President of the United States, and in violation of the covenants of rights,  
28

1 privileges, and immunities provided therein. Petitioner and defendants are not parties to the fraudu-  
2 lent consent decree, so no direct appeal is available.

3 prima facie usurpation; see *Marbury v. Madison*

4  
5 **685.** Here, Petitioner has raised the constitutional state and federal law protections and of uncon-  
6 scionability, so you must determine which state and federal law applies.

7 **686.** California certainly has an interest in protecting the thousands of citizens in the California  
8 subclass of this class action from unconscionable environmental laws violating private property  
9 rights and other civil rights retained by the people. Yet the attorney general is moot.

10 **687.** The United States certainly has an interest in protecting the thousands of citizens in the  
11 United States of this class action from unconscionable environmental laws violating private prop-  
12 erty rights and other civil rights retained by the people, but the U.S. attorney is moot.

13 **688.** Because of § 3729. False claims, *qui tam* and 811, 1085, and 1160 Code of Civil Procedure  
14 questions, and the likelihood that this matter could go on indefinitely, if only for fraudulent *delec-*  
15 *tus persona* and *perfect title*, the Court should grant quo Warranto in this case.

#### 16 **FEDERAL QUESTION?**

17 689. Dogma is the established belief or doctrine held by a religion, ideology or any kind of  
18 organization: it is authoritative and not to be disputed, doubted or diverged from. The term derives  
19 from Greek δόγμα "that which seems to one, opinion or belief" and that from δοκέω (dokeo), "to  
20 think, to suppose, to imagine". The plural is either dogmas or dogmata , from Greek δόγματα.

21 At the core of the dogma concept is absolutism, infallibility, irrefutability, unquestioned acceptance  
22 (among adherents) and anti-skepticism. These concepts typically invoke criticism from moderate  
23 and modulated conceptual approaches, and thus "dogma" is often colloquially used to indicate a  
24 doctrine which has the problem of claiming absolute truth, when other concepts may be superior.

25 *Wikipedia*

26 690. Petitioners submit that the doctrine of “environmentalism” is in fact a government sponsored  
27 religion in violation of the constitution of the United States.

1 So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a par-  
2 ticular case, so that the Court must either decide that case conformably to the law, disregarding the  
3 Constitution, or conformably to the Constitution, disregarding the law, the Court must determine  
4 which of these conflicting rules governs the case. This is of the very essence of judicial duty.

5 **691. If, then, the Courts are to regard the Constitution, and the Constitution is superior to**  
6 **any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern**  
7 **the case to which they both apply.**

8 **692. Those, then, who controvert the principle that the Constitution is to be considered in**  
9 **court as a paramount law are reduced to the necessity of maintaining that courts must close**  
10 **their eyes on the Constitution, and see only the law.**

11 **693. This doctrine would subvert the very foundation of all written Constitutions. It would**  
12 **declare that an act which, according to the principles and theory of our government, is en-**  
13 **tirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature**  
14 **shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in**  
15 **reality effectual. It would be giving to the Legislature a practical and real omnipotence with**  
16 **the same breath which professes to restrict their powers within narrow limits. It is prescrib-**  
17 **ing limits, and declaring that those limits may be passed at pleasure.**

18 **694. That it thus reduces to nothing what we have deemed the greatest improvement on po-**  
19 **litical institutions -- a written Constitution, would of itself be sufficient, in America where**  
20 **written Constitutions have been viewed with so much reverence, for rejecting the construc-**  
21 **tion. But the peculiar expressions of the Constitution of the United States furnish additional**  
22 **arguments in favour of its rejection.**

23 **695. The judicial power of the United States is extended to all cases arising under the Consti-**  
24 **tution.**

25 **696. Could it be the intention of those who gave this power to say that, in using it, the Consti-**  
26 **tution should not be looked into? That a case arising under the Constitution should be de-**  
27 **ecided without examining the instrument under which it arises?**

28 **This is too extravagant to be maintained.**

1 697. In some cases then, the Constitution must be looked into by the judges. And if they can  
2 open it at all, what part of it are they forbidden to read or to obey?

3 698. There are many other parts of the Constitution which serve to illustrate this subject.  
4 It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose  
5 a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it.  
6 Ought judgment to be rendered in such a case? ought the judges to close their eyes on the  
7 Constitution, and only see the law?

8 699. The Constitution declares that "no bill of attainder or ex post facto law shall be passed."

9 700. If, however, such a bill should be passed and a person should be prosecuted under it,  
10 must the Court condemn to death those victims whom the Constitution endeavours to pre-  
11 serve?

12 701. "No person,' says the Constitution, 'shall be convicted of treason unless on the testimony  
13 of two witnesses to the same overt act, or on confession in open court."

14 702. Here. the language of the Constitution is addressed especially to the Courts. It pre-  
15 scribes, directly for them, a rule of evidence not to be departed from. If the Legislature  
16 should change that rule, and declare one witness, or a confession out of court, sufficient for  
17 conviction, must the constitutional principle yield to the legislative act?

18 703. From these and many other selections which might be made, it is apparent that the  
19 framers of the Constitution contemplated that instrument as a rule for the government of  
20 courts, as well as of the Legislature.

21 704. Why otherwise does it direct the judges to take an oath to support it? This oath cer-  
22 tainly applies in an especial manner to their conduct in their official character. How immoral  
23 to impose it on them if they were to be used as the instruments, and the knowing instruments,  
24 for violating what they swear to support!

25 705. The oath of office, too, imposed by the Legislature, is completely demonstrative of the  
26 legislative opinion on this subject. It is in these words:

27 706. "I do solemnly swear that I will administer justice without respect to persons, and do  
28 equal right to the poor and to the rich; and that I will faithfully and impartially discharge all



1 the duties incumbent on me as according to the best of my abilities and understanding,  
2 agreeably to the Constitution and laws of the United States."

3 707. Why does a judge swear to discharge his duties agreeably to the Constitution of the  
4 United States if that Constitution forms no rule for his government? if it is closed upon him  
5 and cannot be inspected by him?

6 If such be the real state of things, this is worse than solemn mockery. To prescribe or to take  
7 this oath becomes equally a crime.

8 708. It is also not entirely unworthy of observation that, in declaring what shall be the su-  
9 preme law of the land, the Constitution itself is first mentioned, and not the laws of the  
10 United States generally, but those only which shall be made in pursuance of the Constitution,  
11 have that rank.

12 709. Thus, the particular phraseology of the Constitution of the United States confirms and  
13 strengthens the principle, supposed to be essential to all written Constitutions, that a law re-  
14 pugnant to the Constitution is void, and that courts, as well as other departments, are bound  
15 by that instrument.

16 710. "Congress shall make no law respecting an establishment of religion ..."

17 711. The rule must be discharged.

18 *writ of unspeakable errors, divide et impera!* **RELIEF: UNCONSTITUTIONAL LAW IN**  
19 **VIOLATIONS OF FIRST AND TENTH AMENDMENT CIVIL RIGHTS PROTECTION.**  
20 **§ 3729. FALSE CLAIMS; MISTAKE! PROHIBITION!**

21 Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof.  
22 quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

23 June 3, 2009 Signature: \_\_\_\_\_

24 /s/ John F. Hutchens, *pro se; sui juris*; Tenant in

25 -Chief, Warden of the Forest & Stannaries

26 **MORE DEFINITE STATEMENT FOR INJUNCTIVE & MANDAMUS RELIEF**

27 (1) This is a Civil Action against violation of the Constitution.

1 (2) This is a Civil Action against an unfair and unjust law, void for vagueness, and founded on *illegitimate animus* in Congress, and against establishment of religion by State and Federal law.

3 (3) This is a Civil Action founded against civil rights and property rights violation by a regulation  
4 of an executive department; and contract, express or implied, with the government;

5 (4) This is a Civil Action with actions for damages, liquidated or unliquidated, pertaining to those  
6 matters of this case that are sounding in tort. The words 'sounding in tort' are in terms referable to  
7 these four classes of cases, and specifically do not imply that any civil rights violations, whether  
8 unconstitutional violations, congressional violations, or violations of any rights by regulation of an  
9 executive department; or violation of any rights by any contract, expressed or implied, with the  
10 United States Government, whether or not sounding in tort, are outside the jurisdiction of this  
11 Court. Accordingly, the fact that plaintiff has presented an administrative tort claim to the EPA is  
12 relevant to suit in this court. Accordingly, the fact that plaintiff has presented a Takings Claim in  
13 the Court of Federal Claims is relevant to suit in this court.

14 Plaintiff exhausted all administrative remedies. TRUE!

15 Plaintiff filed an administrative claim (Standard form 95) and was denied. TRUE!

16 Plaintiff notified agency inspector general of allegations of fraud, malice, deceit. TRUE!

17 Plaintiff filed tort claims as counter-claims in district court on motions to reopen.

18 COURT ordered motions stricken as improperly captioned. APPEALED

19 Plaintiffs filed emergency Appeals Court review for reckless negligent endangerment, mandamus  
20 denied, other motions moot. Original judicial remedy: case closed...

21 ABSOLUTE REMEDIES, CIVIL ACTION; TAKINGS: COURT OF FEDERAL CLAIMS

22 ABSOLUTE REMEDIES, CIVIL ACTION; TORTS: NINTH CIRCUIT COURT OF APPEALS.

23 Declarations; the taking of private property for the public benefit requiring the payment of just  
24 compensation; *quo Avarranto*

25 Constitutionality; **NOT**; *peremptory mandamus*

26 Law of Congress, illegitimate purpose and intent; void for vagueness; *illegitimate animus*, adjudication  
27 on the merits. *writ of error coram nobis*. **CONSTITUTIONAL CHALLENGE!**

28 Contract, express or implied, with the government; **YES**, *writs of prohibition, equitable estoppel*.

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INTERVENTION BRIEF for joint and several trespassers ejection; *parens patriae* 09-207L

1 Regulation of an executive department; *writ quo Warranto, incidental & peremptory mandamus*

2 Actions for damages, liquidated or unliquidated;

3 **MONEY MANDATED BY THE CONSTITUTION**

4 Actions for Errors; *coram nobis*; errors of impunity and miscarriage of justice, manifest injustice;

5 Actions for Writs; equitable estoppel; prohibition; quo Warranto; peremptory mandamus;

6 The taking of private property for the public benefit requiring the payment of just compensation;

7 **WRIT OF RIGHT! RCRA CITIZEN SUIT!**

8 False Claims; Conspiracy; Deprivation of Rights under color of law; Federally Protected Rights!

9 Trespassing; Usurpation, Despotism and Tyranny; reckless negligent endangerment;

10 Kidnapping of a corporation; joint repository of hazardous waste on private property.

11 Taking of private property for the public benefit requiring the payment of just compensation.

12 **CONCURRENT JURISDICTIONS, NINTH CIRCUIT: THREE JUDGE COURT;**

13 The Takings Clause is a money-mandating provision of the Constitution

14 Preseault v. ICC, 494 U.S. 1, 11-12 (1990). 9/

15 Specifically, the Court of Federal Claims does not have jurisdiction over suits against

16 the Government for discrimination, whether stated as a violation of equal protection, due

17 process, or otherwise. Mullenberg v. United States, 857 F.2d 770, 773 (Fed.Cir. 1988). The court

18 lacks jurisdiction over claims for fraud, Brown v. United States, 105 F.3d 621, 623 (Fed. Cir.

19 1997), nor does the court have jurisdiction over alleged violations of criminal statutes, Campbell v.

20 United States, 229 Ct. Cl. 706, 707 (1981).

21 The Court of Federal Claims has no power to adjudicate torts, Shearin v. United

22 States, 992 F.2d 1195, 1197 (Fed. Cir. 1993); Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599,

23 614, 372 F.2d 1002, 1013 (1967), whether brought under the FTCA or otherwise.

24 The Tucker Act specifically excludes tort claims from the jurisdiction of the [Federal Claims]

25 court, 28 U.S.C. § 1491(a)(1), and the FTCA vests exclusive jurisdiction over tort actions in the dis-

26 trict courts, id. § 1346(b). Accordingly, the fact that plaintiff has presented an administrative tort

27 claim to the EPA is relevant to his suit in this court.

1 The question was first considered in *Langford v. United States*, 101 U.S. 341 , 25 L. ed. 1010, un-  
2 der the statute above cited, giving the court of claims power to hear and determine 'all claims  
3 founded upon any law of Congress, or upon any regulation of an executive department, or upon any  
4 contract, express or implied, with the government of the United States.' The suit was brought to re-  
5 cover for the use and occupation of certain lands and buildings of which possession had been forc-  
6 bly taken by agents of the government, against the will of Langford, who claimed title to the lands.  
7 It was held that the act of the United States in taking and holding possession was an unequivocal  
8 tort, and a distinction was drawn between such a case and one where the government takes for pub-  
9 lic use lands to which it asserts no claim of title, but admits the ownership to be private or individ-  
10 ual, in which class there arises an implied obligation to pay the owner its just value. 'It is a very dif-  
11 ferent matter where the government claims that it is dealing with its own, and recognizes no title  
12 superior to its own. In such case the government, or the officers who seize such property, are guilty  
13 of a tort, if it be in fact private property.' It was held that the limitation of the act to cases of con-  
14 tract, express or implied, 'was established in reference to the distinction between actions arising out  
15 of contracts, as distinguished from those founded on torts, which is inherent in the essential nature  
16 of judicial remedies under all systems, and especially under the system of the common law.' [182  
17 U.S. 222, 227] The case was rested largely upon that of *Gibbons v. United States*, 8 Wall. 269, 19 L.  
18 ed. 453, in which an army contractor who had agreed to furnish certain oats at a fixed price had,  
19 after the delivery of part of the amount, been released from the obligation to deliver the balance. He  
20 was, however, carried before the military authority, and, influenced by threats, agreed to deliver,  
21 and did deliver, the full quantity of oats specified in the contract. He brought suit for the difference  
22 between the contract price and the market price of the oats at the time of delivery. It was said that  
23 'if such pressure was brought to bear upon him as would make the renewal of the contract void, as  
24 being obtained by duress, then there was no contract, and the proceeding was a tort for which the  
25 officer may have been personally liable,' but that it was not within the court of claims act.  
26 Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the  
27 claim as upon an implied contract.' 'An action in the nature of assumpsit for [182 U.S. 222, 228] the  
28 use and occupation of real estate will never lie where there has been no relation of contract between

1 the parties, and where the possession has been acquired and maintained under a different or adverse  
2 title, or where it is tortious and makes the defendant a trespasser.' No distinction was noticed be-  
3 tween the phraseology of the original act and the Tucker act, though it seems to have been assumed  
4 that the case was one for the recovery of 'damages' sounding in tort.

5 There are no expressed or implied promises from the EPA to Arman, Hutchens, or IMMI.

6 The EPA never had permission from Ted Arman or IMMI, the District Court ordered it.

7 All is retained which has not been surrendered. "In every stage of these oppressions we have Petitioned for  
8 Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."

9 **VOID AS UNCONSTITUTIONAL AN UNNECESSARY AND IMPROPER LAW**

10 **The rule must be discharged.**

11 ***writ of unspeakable errors, divide et impera!* RELIEF: UNCONSTITUTIONAL LAW IN**  
12 **VIOLATIONS OF FIRST, FOURTH, AND TENTH AMENDMENT PROTECTIONS.**

13 **§ 3729. FALSE CLAIMS; MISTAKE! PROHIBITION! EQUITABLE ESTOPPEL!**

14 Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof.  
15 quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

16 **COMPLAINT OF MANIFEST INJUSTICE, TYRANNY AND DESPOTISM**

17 **Extent of the Taking**

18 **712.** It is well established that a physical taking is defined by the government's corporeal violation  
19 of private property. As the Supreme Court has noted, "where real estate is actually invaded . . . so  
20 as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitu-  
21 tion." *Loretto v. Teleprompter Manhattan CATB Corp.*, 458 U.S. 419, 427 (1982) (quoting *Pum-*  
22 *pelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871)). The Court has similarly emphasized that,  
23 "[t]he hallmark of a physical taking is government occupation of real property." *Alameda Gateway,*  
24 *Ltd. v. United States*, 45 Fed. Cl. 757, 762 (1999), quoting *Loretto*, 458 U.S. at 426 (1982).

25 **713.** However, it has also recognized the possibility of compensable stigmatic injuries that extend  
26 beyond the tangible aspects of a physical taking. In *Hendler v. United States*, it held that "if fear of  
27 a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-  
28 informed seller, diminution in value caused by that fear may be recoverable as part of just compen-

1 sation.” *Hendler v. United States*, 38 Fed. Cl. 611, 625 (1995) (quoting *United States v. 760.807*  
2 *Acres of Land*, 731 F.2d 1443, 1447 (9th Cir. 1984)), *aff’d* 175 F.3d 1374 (Fed. Cir. 1999); see  
3 also *Shelden v. United States*, 34 Fed. Cl. 355, 373 (1995) (reducing post-taking fair market value  
4 of property due to stigma associated with earthquake damage).

5 **714.** Iron Mountain Mines contend that the physical taking of the Brick Flat Pit produced a com-  
6 pensable impact on the entire Property’s value. Petitioners claim that the remedial action produced  
7 two linked effects flowing from the EPA’s physical occupation of the Brick Flat Pit. The first effect  
8 was the physical taking of the Brick Flat Pit itself, which continues to prevent Iron Mountain  
9 Mines, Inc. et al from commercially exploiting the Brick Flat Pit. The second effect was the dimi-  
10 nution of the Property’s overall market value due to the stigma associated with possible liability to  
11 any buyer for the CERCLA action. It should be noted that this “stigma” amounts to considerably  
12 more than a mental attitude on the part of buyers. It is based upon a very real possibility that any  
13 commercial activity on the property might lead to regulatory prohibition or real physical danger.  
14 While T.W. Arman and John Hutchens are not convinced that in fact the Property is unusable, it  
15 seems clear that a reasonably prudent buyer would consider that quite probable, and be unwilling to  
16 purchase the property at any positive price, or share in the stigma of exterminating the salmon and  
17 trout.

18 Iron Mountain Mines, Inc. has expert testimony stating that, “the mere existence of this huge quan-  
19 tity of waste on the property, even in a constructed repository, creates too great a potential  
20 [CERCLA] liability for anyone to consider purchasing the land.”

21 **715.** In summary, Iron Mountain Mines experts in the valuation of contaminated property argue  
22 that anyone buying the Property before the EPA completes the removal action and removes the  
23 sludge from the Open Pit would potentially bear liability under CERCLA for costs incurred in the  
24 removal action.

25 **716.** Consequently, a reasonable purchaser would discount the purchase price of the Property by at  
26 least the amount of the liability assumed in the post-removal action condition of the Property.  
27 Similarly, Iron Mountain Mines will present evidence that once the presence of hazardous waste  
28 has stigmatized property, a reasonable purchaser of said property would discount the sales price for

1 the costs of removal of all of the offending material currently disposed in the Brick Flat Pit. Iron  
2 Mountain Mines noted that the stigma flows from the possibility of leakage of contaminants from  
3 the waste in the Open Pit and the potential “consequent liability placed upon Iron Mountain Mines,  
4 Inc. and T.W. Arman under CERCLA.”

5 **717.** According to Iron Mountain Mines, it follows that just compensation should be the difference  
6 between the Property’s pre-taking fair market value and the sum resulting from the cost of the re-  
7 moval of the hazardous waste in the Open Pit added to the CERCLA liability incurred.

8 **718.** The stigma associated with general contamination and burden of infamy associated with  
9 natural resource damage and fish extinction dramatically affects the entire Property’s value.

10 Hendler and Shelden permit recovery for diminution in value due to the general fear of a hazard  
11 caused by a taking, assuming that the hazard’s affect on marketability is measurable. See Hendler,  
12 38 Fed. Cl. at 625 (quoting *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir.  
13 1984)

14 **719.** (“[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to  
15 a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part  
16 of just compensation.”)); see Shelden, 34 Fed. Cl. at 373. It is generally recognized that general  
17 market perception of contamination on a future development site results in the depreciation of  
18 property value.

19 **720.** Iron Mountain Mines argument is that the Open Pit’s taking negatively impacts the entire  
20 Property’s value on the basis of the evidence.

21 **721.** In analyzing this impact, the’ computations regarding the Property’s diminution in value as a  
22 result of the stigma associated with hazardous waste and fish extinction.

### 23 **The Removal Action As A Special Benefit**

24 **722.** When only a portion of private property is physically taken, the amount of compensation  
25 owed for the property of Iron Mountain Mines must be reduced by any special benefits from the  
26 government action accruing to the remainder of the property. Hendler, 38 Fed. Cl. at 1380. Special  
27 benefits are benefits which inure to the particular property suffering the taking, rather than to the  
28 general public. The United States placed a statutory lien for “unrecovered past response costs” and



1 stated that the removal action conferred a special benefit upon the Property which we should de-  
2 duct from any ultimate damages valuation, and inferred that it was justified as a “windfall” lien.

3 **723.** Such arguments, however, lead nowhere. Even if the Court accepts the government’s  
4 argument that the removal action benefits the Property’s value, the United States will be unable to  
5 include any evidence regarding the amount by which such benefit increases the Property’s value.  
6 Thus, no offset of compensable damages for the benefits allegedly conferred by the removal action  
7 are possible.

8 **724.** Having resolved these issues, let us now turn to the determination of the Property’s fair mar-  
9 ket value as a function of calculating the just compensation owed to Iron Mountain Mines.

10 **725.** Just compensation for a taking under the Fifth Amendment requires that a deprived owner be  
11 put “in the same position monetarily as he would have occupied if his property had not been  
12 taken.” *Almota Farmers*, 409 U.S. at 474 (internal citations omitted). The necessary corollary to  
13 this basic damages principle is that the Court may not place a deprived owner in a better position  
14 by a Fifth Amendment taking recovery than if the taking at issue had not occurred.

15 The fair market value of the highest and best use of the Property before and after the action.

16 **726.** A reasonable valuation of the Property’s value as a mine before the EPA’s removal action  
17 estimates the Property’s value based upon the 20 million plus tons of proven ore reserves plus 5  
18 million tons of probable reserves and the assay of minerals and the prices of Gold, Silver, Copper,  
19 Zinc, Iron, Aluminum, Magnesium, Manganese, Vanadium, Titanium, Cobalt, Nickel, and other  
20 minerals and by-products at close to \$18,400,000,000 (billion). Assuming the EPA estimate of  
21 mining and remediation at \$1,400,000,000 (billion) is correct, The fair market value would be  
22 \$17,000,000,000 (billion). Add to that a fair market value of the land surface (4,400 acres) for the  
23 future complete development (1 billion), yields a gross takings value of \$18,000,000,000 (billion)  
24 of Just Compensation Valuation

25 **727.** Iron Mountain Mines calculates the fair market value of mining on the Property prior to the  
26 taking by determining the present value of the future income stream of minerals that could have  
27 mined on the Property absent the taking over a twenty year period. This methodology required an  
28

1 estimate of the annual production of minerals on the Property to determine the present value of the  
2 future royalty income stream.

3 **728.** Iron Mountain Mines, Inc., T.W. Arman and John Hutchens assume that solution mining  
4 would have averaged annual production of 500,000 tons of mineral products and a royalty of  
5 \$100,000,000 (million) per year. Multiplying projected annual production by this royalty rate, Iron  
6 Mountain Mines, Inc. and T.W. Arman projected annual royalties from January 1989 until January  
7 2009 of \$2,000,000,000.

8 **729.** Iron Mountain Mines therefore believe the present value of lost mining opportunity on the  
9 Property as of January 1, 1989, to the present at \$2,000,000,000.

10 **730.** It is well established that “comparable sales are considered by the courts to be the best evi-  
11 dence of fair market value, and thus preferable to other forms of valuation.” *Stearns Co., Ltd. v.*  
12 *United States*, 53 Fed. Cl. 446, 458 (2002) (citing *United States v. 50 Acres of Land*, 469 U.S. 24  
13 (1984)); *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1 (1984). Other valuation methods may  
14 prove useful, but a comparable sales methodology is a generally superior indicator of value if an  
15 active real estate market existed in the vicinity of the subject property prior to the taking. See *Flor-*  
16 *ida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 35 (1999) (citing *Whitney Benefits, Inc. v.*  
17 *United States*, 18 Cl. Ct. 394, affirmed 926 F.2d 1169 (Fed. Cir.), cert. denied, 502 U.S. 952  
18 (1991)).

19 **731.** Here, Iron Mountain Mines valued the Property’s worth for mining since no comparable com-  
20 parison was or is available, by analyzing the Property’s pre-taking future income stream.

21 **732.** Iron Mountain Mines claims that future income stream analysis is appropriate here because  
22 the valuation of mineral interests is preferably done by determining the present value of a future  
23 income stream. Iron Mountain Mines support this view by arguing that the federal government, in  
24 its Uniform Appraisal Standards for Federal Land Acquisitions, states that, “[p]roperty having a  
25 highest and best use for mineral production may be appraised utilizing an income approach when  
26 comparable sales are lacking.” Uniform Appraisal Standards at 23-24 (internal citations omitted).  
27 Iron Mountain Mines further points to *Whitney Benefits, Inc. v. United States*, in which the Federal  
28

1 Circuit approved of the use of future income stream analysis, as support for the relevance of future  
2 income stream analysis in the present case. See 962 F.2d 1169 (Fed. Cir. 1991).

3 **733.** Deprived owner Iron Mountain Mines, Inc. is entitled to interest on just compensation  
4 awarded pursuant to Fifth Amendment takings. *Stearns Co., Ltd, v. United States*, 53 Fed. Cl. 446,  
5 466 (2002) (citing *Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984)). Thus, an award to Iron  
6 Mountain Mines, with compounded prejudgment interest from the date of the taking until the date  
7 of the judgment is proper. See *Id.* (citing *United States v. Thayer-West Point Hotel Co.*, 329 U.S.  
8 585, 588 (1947); *Miller v. United States*, 223 Ct. Cl. 352, 360 (1980). We date the taking as having  
9 actually commenced on January 1st, 1989, as the first day of the production for the solution mining  
10 plan, for the calculation of pre-judgment interest. Iron Mountain Mines also uses this date because  
11 it marks the Courts approval of the physical intrusion from which all damages in this matter arise.  
12 Interest computation will be based upon the Contracts Disputes Act, 41 U.S.C. §§ 601-13 (1982).  
13 See *Jones v. United States*, 3 Cl. Ct. 4, 7 (1983). Iron Mountain Mines further seeks awards of at-  
14 torney fees and costs incurred as a result of litigation to Iron Mountain Mines, Inc. T.W. Arman  
15 and John F. Hutchens under the Uniform Relocation Assistance and Real Property Acquisition  
16 Policies Act of 1970. 42 U.S.C. § 4601 et seq. (1995 & 2002 Supp.).

17 **734.** Iron Mountain Mines, Inc., T.W. Arman and John F. Hutchens also seek compensation for  
18 stigmatic injuries. Iron Mountain Mines, Inc. et al have been unfairly blamed for the endangerment  
19 and possible extinction of salmon and trout in the Sacramento River, a crime of infamy if ever there  
20 was one, notwithstanding that there is no evidence that any fish have been killed in the affected  
21 reaches of the Sacramento River since at least 1969, seven years before T.W. Arman. purchased the  
22 property, or that T.W. Arman and Iron Mountain Mines, Inc. did not actively mine the massive sul-  
23 fide ores found to be the source of the minerals passively migrating from the property and alleged  
24 to pose an “imminent and substantial endangerment” to the environment, and in disregard of con-  
25 tributory factors, particularly the United States construction of dams that destroyed the habitat of  
26 the salmon and trout necessary for their reproduction, and without consideration of other factors  
27 affecting the fishes demise, such as urban run-off, untreated sewage, ranching, farming, global  
28 warming, and other forms of habitat destruction.

1 **735.** When the EPA first conducted its remedial investigation of Iron Mountain Mines, it consid-  
2 ered “Among the remedial action alternatives that could be implemented by the EPA, the total re-  
3 moval of the source and sediments in the receiving waters (Alternative CA-10) is considered the  
4 only remedy for the Iron Mountain Mine site which is capable of meeting project cleanup objec-  
5 tives and the full requirements of the Clean Water Act (CWA). This alternative would effectively  
6 eliminate discharges from Iron Mountain and restore all tributaries to pristine condition. This alter-  
7 native was based on total removal of all the source of contamination and disposing of them in a  
8 RCRA-approved facility.”

9 **736.** Without digressing to consider the notion of disposing of millions of tons of valuable ore and  
10 mining by-products, it will suffice to observe that having recognized that there was a viable alterna-  
11 tive that was fully protective of human health and the environment, the EPA elected to proceed  
12 with a remedial action (removal) that was less than fully protective of human health and the envi-  
13 ronment, and then and thereafter disregarded its duty and responsibilities to implement a remedial  
14 action that was fully protective of health and environment.

15 **737.** For these reasons Iron Mountain Mines, Inc. et al dispute the United States lawful authority to  
16 conduct these CERCLA remedial actions (removal) and demand the return of the property and res-  
17 toration of rights, privileges, and immunities of patent title to the possession and enjoyment of  
18 T.W. Arman and John F. Hutchens.

19 **738.** Because the United States has no actual justification for its actions, and the only remedy found  
20 to be fully protective of human health and the environment is to finish the mining begun 150 years  
21 ago, which is what Iron Mountain Mines, Inc. was doing before the EPA interfered, the EPA  
22 should be found liable for the taking of private property for the public benefit requiring the pay-  
23 ment of just compensation under the 5<sup>th</sup> amendment of the constitution.

24 **739.** T.W. Arman and Iron Mountain Mines, Inc. used “due care” in the purchase of the property,  
25 because copper, zinc, and cadmium were not listed as “hazardous substances” under the relevant  
26 provisions of the Clean Water Act (CWA) in 1976 when the property was purchased

27 **CONCLUSION of the extent of the TAKINGS**  
28

1 Iron Mountain Mines, Inc., T.W. Arman and John Hutchens claim that the EPA's remedial (re-  
2 moval) actions constitute a taking of the Iron Mountain Mines, Inc. property warranting just com-  
3 pensation to Iron Mountain Mines, Inc. et al under the Fifth Amendment of the constitution of the  
4 United States for a partial takings of private property with actual damages of lost mining opportuni-  
5 ties plus stigmatic injuries and property and incidental damages of \$7,074,500,000 (billion). We  
6 therefore seek an award to Iron Mountain Mines, Inc. et al of \$7,074,500,000 (billion) in just com-  
7 pensation, with detinue sur bailment, reversion, plus interest, attorney's fees, and costs. In the al-  
8 ternative that the United States actions are a condemnation that will prevent the lawful mining of  
9 Iron Mountain Mines, , T.W. Arman and John F. Hutchens seek an award to Iron Mountain Mines,  
10 Inc. et al for the complete taking of private property for the public benefit requiring the payment of  
11 \$18,000,000,000 (billion) in just compensation.

12 Plaintiff's "Two Miners" submit that plaintiff's mutual interests are undivided interests.

13 Wherefore, the United States is liable for the taking of private property requiring the payment  
14 of just compensation under the 5<sup>th</sup> amendment of the constitution of the United States, we demand  
15 judgment against the United States of seven billion, seventy four million, and five hundred thou-  
16 sand dollars for the partial takings and stigmatic injury, or eighteen billion dollars for the complete  
17 takings of the Iron Mountain Mines, Inc. properties, plus interest, fees, and costs.

18 Demand for injunctive relief, concurrent jurisdictions, § 2680. Exceptions!

19 **IMMINENT HAZARD AND SUBSTANTIAL ENDANGERMENT!**

20 **FRAUDULENT STIGMATIC INJURIES!**

21 **FRAUD UPON THE COURT!**

22 **FALSE CLAIMS!**

23 **ERRORS!**

24 **ABUSE OF DISCRETION!**

25 **TORT CLAIMS!**

26 **FRAUD! MALICE! DESPOTISM AND TYRANNY!**

27 **CLASS ACTIONS! REOPENS AND JOINDERS! INTERVENTIONS! REVIEWS!**

28 **VOID FOR VAGUENESS! UNCONSTITUTIONAL LEGISLATION!**

1 **740.** Writs of: manifest injustice; 10th Amendment repudiation; equitable estoppel.

2 Knowingly reckless disregard of the truth, deliberate ignorance of actual information; trespass:

3 Praeipere quod reddat & detinue sur bailment; subpoena ad testificandum; subpoena duces tecum;

4 impunity; miscarriage of justice; prohibition; illegitimate animus;

5 **741.** Differing court interpretations of a statute “is evidence that the statute is ambiguous and un-  
6 clear.” U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

7 **742.** Courts frequently interpret an ambiguous contract term against the interests of the party who  
8 prepared the contract and created the ambiguity. This is common in cases of adhesion contracts and  
9 insurance contracts. A drafter of a document should not benefit at the expense of an innocent party  
10 because the drafter was careless in drafting the agreement.

11 **743.** In Constitutional Law, statutes that contain ambiguous language are void for vagueness. The  
12 language of such laws is considered so obscure and uncertain that a reasonable person cannot de-  
13 termine from a reading what the law purports to command or prohibit. This statutory ambiguity de-  
14 prives a person of the notice requirement of Due Process of Law, and, therefore, renders the statute  
15 unconstitutional.

16 West’s Encyclopedia of American Law, edition 2.

17 **744.** CERCLA still has no preamble, and as applied in this case undermines RCRA, CWA, CAA,  
18 NEPA, EPCRA, NCP, and violates the petitioners and defendant’s constitutional protections, due  
19 process, equal protection, and is a negligently arbitrary and capricious imminent and substantial  
20 endangerment to the innocent landowner, miners, the public, and environment.

21 ***Writ of equitable estoppel;***

22 **745.** The EPA is required to determine liability based upon applicable law. The doctrine of equita-  
23 ble estoppel provides that in certain cases, the EPA may be estopped from asserting liability based  
24 upon actions taken by the EPA in the reliance of which leads to harm or “detriment.”

25 **746.** The doctrine of equitable estoppel will be applied against a governmental agency when appli-  
26 cation of estoppel is necessary to prevent manifest injustice.

27 1. Elements of *equitable estoppel*

28 (1) The EPA is fully advised of the facts; TRUE

1 (2) The party claiming estoppel had a right to believe it was so intended and intentional; TRUE  
2 (33 counter-claims with malice, fraud, oppression, deceit, negligent endangerment)

3 (3) Ignorant of the true facts; conflict of interest, libel and slander, infamy, stigmatic injuries, con-  
4 cealment, deliberate ignorance, errors of impunity, miscarriage of justice; TRUE

5 (4) The party claiming estoppel suffered detrimental reliance. TRUE!

6 (25 years of invasion and occupation, taking private property requiring just compensation, civil  
7 rights violations of equal protection and due process, tyranny and despotism, false claims and fraud  
8 upon the court, unnecessary negligent endangerment.

9 2. Detrimental Reliance

10 Detrimental reliance is present where the EPA's action results in an increased liability. TRUE

11 3. Application of the Doctrine of Equitable Estoppel

12 The EPA, as an administrative agency, does not have the legal authority to interpret a statute in  
13 such a way as to change its meaning or effect. (Or to alter prior statutes!)

14 Petition to strike and release liens.

15 Pursuant to 1107 of the Code, you may grant such protective relief *ex parte*

16 ***Writ of certiorari:***

17 **747.** You should consider whether a government agency may abrogate the laws of the United States  
18 and the State of California concerning mineral rights and patent title by merely posting a revised  
19 and unattainable environmental law, and then by its actions of despotism and tyranny fail to pro-  
20 tect, preserve, or perfect the mine property during its fraudulently obtained receivership, funded by  
21 fraudulent trusts and created by false claims and misrepresentations, discrimination, and coercion  
22 of the owners and previous owners, with breach of duty, negligently fraudulent violation of envi-  
23 ronmental laws with the impunity of judicial swaddling and judicial deference, and resulting in the  
24 owners and the public's negligent endangerment, with ulterior government motives; to hold a lien  
25 against the property for same, as it operates at a loss, and hold the property as they do against the  
26 true and rightful owner, even to his entry, with illegitimate animus, and by fraud upon the court.

27 **748.** You should as well consider whether the government agency, swaddled in judicial deference,  
28 engaged in despotism and tyranny to damage these persons or the general welfare, infringed and



1 usurped the corporate franchise, slandered and libeled the petitioners and the true and rightful own-  
2 ers, defamed their honor, poisoned their reputations, invaded and occupied their private property  
3 without justification and without compensation, and that those who pretended to claim such rights  
4 in the water or lands against the true and rightful owner that is Iron Mountain Mines, Inc. make  
5 such claims in violation of the constitution of California. When Iron Mountain Mines concluded  
6 underground mining in 1954, the copper cementation process continued as it had since copper min-  
7 ing began in 1896. Copper cementation had been practiced almost continuously until the EPA  
8 forced T.W. Arman to retire. Copper cementation has been known for over 2000 years and has  
9 been practiced on an industrial scale for over 1000 years. You should further consider whether  
10 agency actions serve to undermine and abrogate principles of liberty and justice and principles of  
11 our democracy and republican form of government, and endanger the general welfare.

12 **Facts**

13 **749.** Petitioner contracted for mineral rights and a mining lease for the sludge with T.W. Arman  
14 and Iron Mountain Mines, Inc. Petitioner formed Artesian Mineral Development & Consolidated  
15 Sludge, Inc. which acquired those rights, and which continues to prepare for the resumption of min-  
16 ing using natural biomining (in situ) technologies that have been practiced industrially by the Chi-  
17 nese for over 1000 years, and in Spain for at least 250. These processes, with modern precipitation  
18 and solvent extraction techniques and with water recycling, and with the advent of markets for iron  
19 oxy-hydroxides, ferro-fluids and spinel ferrites and other natural and synthetic nano-catalysts, zinc  
20 and aluminum battery technologies, photo-voltaics, superconductors, etc. not to mention the abun-  
21 dance of precious metals, has made the value of Iron Mountain Mines, Inc. 20 million tons of  
22 proven ore reserves a matter of strategic importance and under the circumstances of the emergency  
23 situation and imminent and substantial endangerment, and the economic crisis, and with the facts  
24 and information showing the fraudulent settlement, is a valid question for this court.

25 **750.** As an EPA Superfund site, 500,000 tons of solid waste from treatment of acid mine drainage  
26 has unnecessarily accumulated. These wastes were being recovered and recycled by the mine  
27 owner until the EPA implemented its sludge treatment remedy, the EPA knew that recycling could  
28 be done profitably, but intentionally prevented the recycling and forced construction of an entirely

1 unnecessary \$50 million dam and sludge disposal cell where these wastes accumulate at a rate of  
2 30–40 thousand tons annually. The court and the petitioners were deceived and misled by the gov-  
3 ernment agency, with fraud and with malice and deceit, and with despotism and tyranny in viola-  
4 tion of petitioners civil rights by militant libertarian environmentalists and reactionaries in the gov-  
5 ernment agency.

6 **751.** The concealment of known and viable technologies from the owner, the failure to assist in the  
7 implementation of best available technologies to accomplish this recycling, the interference with  
8 the owner and the responsible parties efforts facilitating the proper remedy, the conceit of the gov-  
9 ernment to preserve Iron Mountain Mines, Inc. in a state of calamity, with clouded title by statutory  
10 lien, and infamy of public persona, with dubious claims of public and natural resource injury, and  
11 falsified scientific data, and the selection of a remedial action that is not fully protective of human  
12 health and the environment when such remedy was known and achievable at less expense, is a  
13 travesty of government ulterior motives. That these actions serve to violate the petitioners civil  
14 rights, and violate fundamental principles of republican government protection of private property  
15 rights, sound the alarm of tyranny throughout the land.

16 **752.** The office of Project Manager is authorized by the existing consent decree and statement of  
17 work. The true and rightful owner of Iron Mountain Mines, Inc. has assigned this responsibility to  
18 the Petitioner.

19 **753.** Petitioner is intervener by quo Warranto to the office of Project Manager and of Trustee.

20 **754.** Petitioner is intervener by incidental and peremptory mandamus for rents and wages, due  
21 process, equal protection, and equal protection of a private attorney general to the private Warden  
22 of the Forest, for the perfect jurisdiction of Iron Mountain Mines, Inc., and its properties.

23 **755.** After becoming aware of the malice, fraud, oppression, and deceit, discrimination and denial  
24 of equal protection and due process, and tyranny and despotism, Petitioners filed a citizen and class  
25 action lawsuit in the eastern district court, charging EPA with violations the United States and Cali-  
26 fornia Constitution, breach of United States and California environmental and property laws, and  
27 violation of California codes and statutes. Those petitions were stricken on Dec. 17, 2008. On Dec.  
28 24, 2008, petitioner filed an instant appeal with the 9th Circuit Court, also seeking emergency re-

1 view for imminent and substantial endangerment. (That same day, an EPA approved mountain of  
2 sludge collapsed into a river in Tennessee.) Petitioner subsequently filed qui tam notice to the  
3 court, but the Court failed to intervene or grant the writs, and ruled the pleadings moot on March  
4 23, 2009.

## 5 **Analysis**

6 **756.** As an extraordinary remedy, a writ of quo Warranto with incidental and peremptory manda-  
7 mus may be qualified by the five factors that cabin your power to grant the writs:

8 1. “The party seeking the writ has no other adequate means, such as a  
9 direct appeal, to attain the relief he or she desires.”; Writ of quo Warranto; TRUE

10 2. “The petitioner or defendants will be damaged or prejudiced in a way not  
11 correctable on appeal.” Writ of unspeakable ERRORS; Stigmatic Injuries: TRUE

12 3. “The circuit court’s order is clearly erroneous as a matter of law.” Writ of Right; TRUE  
13 The petitioner is entitled to intervention and citizen suit by right.

14 4. “The circuit court’s order is an oft-repeated error, or manifests a  
15 persistent disregard of the federal rules.” Writ of INCIDENTAL MANDAMUS; TRUE

16 5. “The circuit court’s order raises new and important problems, or  
17 issues of law of first impression.” Writ of DETINUE SUR BAILMENT; TRUE  
18 *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977).

19 The third factor is a necessary condition for granting a writ of mandamus.

20 **757.** The apparently uncontested fact of fraud upon the court with malice and oppression in this  
21 case should be reason enough to grant the quo Warranto and incidental mandamus.

22 *Executive Software N. Am., Inc. v. U.S. Dist. Court*, 24 F.3d 1545, 1551 (9th Cir.

23 1994). But “all five factors need not be satisfied at once.” *Valenzuela-Gonzalez*

24 *v. U.S. Dist. Court*, 915 F.2d 1276, 1279 (9th Cir. 1990). Since the district court clearly erred, you  
25 may determine whether the four additional factors “in the mandamus calculus point in favor of  
26 granting the writ.” *Executive Software*, 24 F.3d at 1551.

27 **758.** Petitioner alleges that the U.S. EPA has violated the most fundamental and cherished princi-  
28 ples of U.S. property law concerning safety and security, mineral rights and miner’s rights, protec-

1 tions against invasion and occupation, and that the EPA has interfered with lawful mining opera-  
2 tions by false claims and illegitimate animus, fraudulent deceit and fraud upon the court, fraudulent  
3 pretenses, and willful and fraudulent misrepresentations, all to the violation of the covenants of  
4 preservation and perfection granted by warrants of patent title from the President of the United  
5 States. Petitioners are not parties to the fraudulent consent decree, so no direct appeal is available.  
6 Petitioner has shown that the EPA treatment of Iron Mountain Mines, Inc. as a superfund site effec-  
7 tively constitutes creation of a federal instrumentality and is therefore properly before the court by  
8 writ of quo Warranto.

9 **759.** Petitioner has shown that the EPA has violated the petitioners civil rights by denying an inno-  
10 cent landowner defense by false claims of a failure to use “due care” in the property purchase based  
11 upon “due care” standards adopted by amendment to the legislation from 1986 to 2002 being ap-  
12 plied retroactively as a standard for purchase of real property in 1976. It is not possible for T.W.  
13 Arman to have had knowledge in 1976, a priori, of copper, zinc, and cadmium being designated as  
14 “hazardous substances” for purposes of the clean water act (CWA) in 1977. This is the EPA’s only  
15 basis for denial of the innocent landowner defense to the non-settling defendants. Petitioner has  
16 further shown that the illegitimate animus of the EPA and its misapplication of these environmental  
17 laws have resulted in its unconstitutional application ex post facto, and as a bill of attainder. Peti-  
18 tioner has shown that petitioners have been libeled and slandered by false accusations and of crime  
19 of infamy, and have presented facts and information of a substantial nature to be recognized as rep-  
20 resentatives of a class.

21 **760.** Petitioners have shown the necessary conditions for joinder and intervention, meeting all three  
22 criteria recognized by the Courts, so petitioner is entitled to intervention of right by Fed.R.Civ.P.  
23 24(a)(2),

24 **761.** Petitioners have shown that EPA actions have failed to achieve the legislations goals while at  
25 the same time they have served to undermine fundamental principles of republican government and  
26 are in violation of civil rights with illegitimate animus.

27 **762.** Petitioner has shown that a fundamental failure of government has occurred, that a basic im-  
28 balance of powers in contravention of the Constitution of the United States exists, that this imbal-

1 ance serves to endanger the health, wealth, and prosperity of the citizens of the United States as  
2 well as petitioners, and Petitioners have provided a reasonable and logical course of remedy to the  
3 governments problems.

4 **763.** The courts thus erred in holding that Petitioner was not properly before the courts.

5 **764.** These errors reflect fundamental misapplications of law and go to the heart of petitioner's  
6 claims. They alone should be sufficient to satisfy the third Bauman factor.

7 **765.** Here, Petitioner has raised the alarm to the most fundamental constitutional state and federal  
8 law protections of property; of endangerment, raised the alarm of environmental disaster pepe-  
9 trated by agents and agencies of the federal government acting out of despotism and tyranny; and  
10 unconscionability, so you must determine which state and federal law applies.

11 **766.** California certainly has an interest in protecting the thousands of citizens in the California  
12 subclass of this class action from unconscionable environmental laws violating private property  
13 rights and other civil rights retained by the people. Yet the attorney general is moot.

14 **767.** The United States certainly has an interest in protecting the thousands of citizens in the United  
15 States of this class action from unconscionable environmental laws violating private property rights  
16 and other civil rights retained by the people, but the U.S. attorney is moot.

17 **768.** Because of § 3729. False claims, with qui tam and 811, 1085, and 1160 Code of Civil Proce-  
18 dure, and the likelihood that this matter could go on indefinitely, the Court should grant quo War-  
19 ranto with incidental mandamus in this case. The petitioner has further demonstrated a willingness  
20 to serve in a capacity consistent with the office and agency, and the factors for creation quo War-  
21 ranto of such office and agency by writ or letters patents.

22 **769.** The circuit court erred in not analyzing U.S. and California law as to whether the EPA actions  
23 are both procedurally and substantively unfair and unconscionable.

24 **770.** You generally examine the first and second factors together. See Bauman,  
25 557 F.2d at 654 (the second factor "is closely related to the first").  
26 Inc., 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006),

27 **771.** The first and second Bauman factors weigh in favor of granting the relief requested. Peti-  
28 tioner "has no other adequate means" of becoming project manager or joining the case, as the EPA

1 is not communicating with the petitioner or the property owner because of these allegations, and  
2 the EPA apparently continues to hold that its actions are appropriate and do not represent a failure  
3 or violation on its part, nor is anyone else protecting petitioners interests as a miner and mining  
4 joint venturer, or for his and his heirs and successors interests in the assignment, or for ensuring  
5 that he and his successors and assigns can continue as the class representative. Bauman, 557 F.2d at  
6 654. This would “prejudice [ ]” Petitioner “in a way not correctable on appeal.” Id. (and which is  
7 not available anyway).

8 **772.** The fifth Bauman factor also favors the relief requested. The district court’s order discriminat-  
9 ing against an innocent landowner and enforcing reckless negligent endangerment through judicial  
10 swaddling and judicial deference to EPA misconduct with malice and oppression “raises new and  
11 important problems” addresses “issues of law of first impression.” Bauman, 557 F.2d at 655, and  
12 raises fundamental constitutional questions.

13 **773.** This hopefully is the last time any federal court will have to consider whether the EPA en-  
14 forcement of environmental laws is being used to intentionally deprive vested property rights by  
15 the EPA’s pretended protection and preservation with illegitimate animus, to the exclusion of the  
16 prior rights of the real parties in interest, and to the exclusion of the properties real protection, pres-  
17 ervation, and perfection, all working to the dissipation and degeneration of the general welfare, and  
18 in violation of prior rights to complete development of mining property that is unconstitutional and  
19 a negligently malicious unnecessary imminent and substantial endangerment, thus deserving im-  
20 mediate resolution.

21 **774.** Because all five Bauman factors favor relief, and none militates against it, you should con-  
22 clude that the balance of factors favors issuing all the writs. The district court’s consent decree  
23 should be stayed by rule 62(g)(h), and the intervention should be granted with;

24 CREATION OF THE OFFICE OF THE PRIVATE WARDEN OF THE FOREST;

25 CREATION OF THE ESSENTIAL PRODUCTS ADMINISTRATION;

26 REVERSION TO THE OFFICE OF PROJECT MANAGER SHOULD BE GRANTED;

27 REMISSION OF WAGES AND RENTS SHOULD BE GRANTED;

28 DETINUE SUR BAILMENT SHOULD BE GRANTED.

1 THE PETITION TO STRIKE THE STATUTORY LIEN SHOULD BE GRANTED.

2 THE PETITIONS FOR JOINDER AND INTERVENTION SHOULD BE GRANTED

3 **775.** ...the terms of a penal statute... must be sufficiently explicit to inform those who are subject  
4 to it what conduct on their part will render them liable to its penalties... and a statute which either  
5 forbids or requires the doing of an act in terms so vague that men of common intelligence must  
6 necessarily guess at its meaning and differ as to its application violates the first essential of due  
7 process of law. *Connally v. General Const. Co* by Justice Southerland

8 **776.** (The court refused to extend the recoupment doctrine to action under the Comprehensive En-  
9 vironmental Response, Compensation and Liability Act for purposes of establishing a waiver of  
10 sovereign immunity for mine owners' counter-claim.). *United States v. Iron Mountain Mines* , 881  
11 F. Supp. 1432, 1445 (E.D. Cal. 1995) (citing opinions in which courts held that the United States  
12 did not waive immunity for purposes of regulatory acts under CERCLA, and rejecting those opin-  
13 ions). Claims that the United States was contributorily negligent, caused harm at the site, or as-  
14 sumed the risk of harm at the site have been stricken as, in reality, alleging third party defenses that  
15 are not within the terms of §107(b). *United States v. Kramer*, but see *United States v. Iron Moun-*  
16 *tain Mines, Inc.*, 881 F.Supp. 1432 (ED Cal 1995) (declining to follow cases holding that EPA has  
17 immunity for regulatory or remedial acts under CERCLA and suggesting defendant has good claim  
18 in contribution if government fits within the four categories of liable parties.)

19 **777.** The court of appeals agreed with a district court decision that arranger liability should not ap-  
20 ply to “a party who never owned or possessed, and never had any authority to control or duty to  
21 dispose of, the hazardous materials at issue.” *Id.* at 22a (quoting *United States v. Iron Mountain*  
22 *Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

23 **778.** The Acushnet River burden of proof allocation was ignored by the District Court for the East-  
24 ern District of California in *United States v. Iron Mountain Mines, Inc.*, even though the court cited  
25 Acushnet River as positive authority. In *Iron Mountain Mines*, permits existed for some but not all  
26 of the metal mining waste. The court held that evidence of ‘the mere existence’ of non-permitted  
27 releases ‘is sufficient to suggest that non- permitted releases contributed to the harm.



1 **779.** Clearly, these decisions establish two divergent bases for proving liability. According to  
2 Acushnet River, and to some extent Bunker Hill, a plaintiff must prove not only the existence of  
3 the non-permitted releases, but also that the releases contributed to the harm. According to Iron  
4 Mountain Mines, on the other hand, a plaintiff need only show the ‘mere existence’ of the non-  
5 permitted releases; that alone is sufficient to suggest contribution. Notably, none of these decisions  
6 explains the difference, suggested by the Acushnet River court, between contribution to harm and  
7 causation of harm.

8 **780.** Appeals were taken to the United States Court of Appeals Ninth Circuit by the petitioner; and  
9 after their abuse of discretion and failure to intervene or perform, this complaint with petitions for  
10 leave to file writs, briefs, and memorandum are presented asking for emergency review without  
11 waiting. Because of the importance of the question and the advantage of a speedy final determina-  
12 tion thereof, the writs should be granted. 296 U.S. 571, 56 S.Ct. 371.

13 **781.** The injury to appellees is present and very real, not a mere possibility in the remote future. If  
14 no relief is possible ...” the injury will become irreparable. Prevention of impending injury by  
15 unlawful action is a well-recognized function of courts of equity.” *Pierce v. Society of Sisters*, 268  
16 U.S. 510, 535, 536 S., 45 S.Ct. 571, 574, 39 A.L.R. 468

17 **782.** See, also, *Terrace v. Thompson*, 263 U.S. 197, 215, 216 S., 44 S.Ct. 15; *Swift & Co. v.*  
18 *United States*, 276 U.S. 311, 326, 48 S.Ct. 311; *Euclid v. Ambler Co.*, 272 U.S. 365, 386, 47 S.Ct.  
19 114, 54 A.L.R. 1016; *City Bank Co. v. Schnader*, 291 U.S. 24, 34, 54 S.Ct. 259.

20 73. In *United States v. Butler*, 56 S. Ct. 312, 297 U.S. 1, 80 L. Ed. 477 (1936), the U.S. Supreme  
21 Court invalidated a federal agricultural spending program because a specific congressional power  
22 over agricultural production appeared nowhere in the Constitution. According to the Court in But-  
23 ler, the spending program invaded a right reserved to the states by the Tenth Amendment.

24 **783.** Though the Court decided that *Butler* was consistent with Madison’s philosophy of limited  
25 federal government, it adopted Hamilton’s interpretation of the General Welfare Clause, which  
26 gave Congress broad powers to spend federal money. It also established that determination of the  
27 general welfare would be left to the discretion of Congress. In its opinion, the Court warned that to  
28 challenge a federal expense on the ground that it did not promote the general welfare would “natu-

1 rally require a showing that by no reasonable possibility can the challenged legislation fall within  
2 the wide range of discretion permitted to the Congress.” The Court then obliquely confided, “[H]ow  
3 great is the extent of that range ... we need hardly remark.” “[D]espite the breadth of the legislative  
4 discretion,” the Court continued, “our duty to hear and to render judgment remains.” The Court  
5 then rendered the federal agricultural spending program at issue invalid under the Tenth Amend-  
6 ment.

7 **784.** Nowhere in the federal Constitution is Congress given authority to regulate local matters con-  
8 cerning the health, safety, and morality of state residents. Known as police powers, such authority  
9 is reserved to the states under the Tenth Amendment. “it must never be forgotten that the nation is  
10 made up of states to which are entrusted the powers of local government. And to them the powers  
11 not expressly delegated to the national government are reserved.” *hammer v. dagenhart*, 247 U.S.  
12 251, 38 S. Ct. 529, 62 L. Ed. 1101

13 **785.** “Beneficent aims however great or well directed can never serve in lieu of constitutional  
14 power”.

15 **786.** ‘Any person aggrieved by an order issued by the [EPA] in a proceeding to which such person  
16 is a party may obtain a review of such order in the Circuit Court of Appeals of the United States,  
17 within any circuit wherein such person resides or has his principal place of business, or in the  
18 United States Court of Appeals for the District of Columbia, by filing in such court, within sixty  
19 days after the entry of such order, a written petition praying that the order of the [EPA] be modified  
20 or set aside in whole or in part. ... The judgment and decree of the court, affirming, modifying, and  
21 enforcing or setting aside, in whole or in part, any such order of the [EPA], as the case may be,  
22 shall be final, subject to review by the Supreme Court of the United States upon certiorari or certi-  
23 fication as provided in sections 239 and 240 of the Judicial Code, as amended (sections 346 and  
24 347 (1254) of Title 28).’ *CARTER v. CARTER COAL CO.*, 298 U.S. 238 (1936)

25 **787.** (The Court of Appeals should have certified these questions, and granted intervention).

26 ‘One does not have to await the consummation of threatened injury to obtain preventive relief. If  
27 the injury is certainly impending, that is enough. *Pennsylvania v. West Virginia*, 262 U.S. 553,  
28 592-595.

1 **788.** “The genius of our government provides that, within the sphere of constitutional action, the  
2 people....have the power to determine as conditions demand, what services and functions the pub-  
3 lic welfare requires.” *Helvering v. Gerhardt*, 304 U.S., at 427 (concurring opinion).

4 79. AFTER an unequivocal experience of the inefficiency of the subsisting federal government,  
5 you are called upon to deliberate on a alternative.

6 **789.** Here, in strictness, the people surrender nothing; and as they retain every thing they have no  
7 need of particular reservations. “WE, THE PEOPLE of the United States, to secure the blessings of  
8 liberty to ourselves and our posterity, do ORDAIN and ESTABLISH this Constitution for the  
9 United States of America.” Here is a better recognition of popular rights, than volumes of those  
10 aphorisms which make the principal figure in several of our State bills of rights, and which would  
11 sound much better in a treatise of ethics than in a constitution of government.

12 **WHEREFORE;**

13 The United States is liable for violations of civil rights (§ 1343), United States as defendant  
14 (§ 1346), injuries under federal law (§ 1357), supplemental jurisdiction (§1367), United States as  
15 defendant (§ 1402), venue of cases under chapter 5 of title 3 (§ 1413), creation of remedy (§ 2201),  
16 further relief (§ 2202), process and procedure (§ 2361), three-judge court (§ 2284), constitutional  
17 question (§ 2403), quiet title action (§ 2409a), federal lien (§ 2410), liability of United States (§  
18 2674), exceptions (§ 2680), false claims (§ 3729), vindictive actions, illegitimate animus, and an  
19 abuse of discretion in despotism and tyranny, and maliciously and negligently arbitrary and capri-  
20 cious acts.

21 The finding of Probable Cause of May, 2000, the Consent Decree of Dec. 2000, and Partial Sum-  
22 mary Judgment of 10-04-2005 denying property owner an innocent land owner defense under  
23 101(35) are void and vacated for fraud upon the Court.

24 The innocent landowner defense, the third party defense, and the act of God defense are hereby  
25 granted to T.W. Arman and Iron Mountain Mines, Inc. The United States is liable as a responsible  
26 party for clean-up and recycling costs of the toxic pit disposal with contributory negligence for  
27 CERCLA and RCRA hazardous wastes

1 Judgment against the United States of seven billion, seventy four million, five hundred thousand  
2 dollars; ORDER FOR CERTIFICATION OF CLASS ACTION

3 Inverse condemnation with stigmatic injury, libel and slander, fraudulent *delectus personae*, delib-  
4 erate ignorance of actual information, reckless disregard of the truth, and takings of private prop-  
5 erty for the public benefit requiring the payment of just compensation is GRANTED.

6 The Constitutional questions are certified to the Supreme Court of the United States.

7 §§ 42 U.S.C 9601 *et seq* (9601-9675) is void for vagueness and therefore is unconstitutional.

8 LIENS imposed against the properties of Iron Mountain Mines, Inc. are stricken and VOID!

9 QUO WARRANTO with Incidental and Peremptory MANDAMUS is GRANTED

10 ABSOLUTE ORDER IS GRANTED: writs of *fieri facia*; *mutatis mutandis*. CITIZEN SUIT!

11 **FEDERAL QUESTION & EXTRAORDINARY WRIT IN THE NATURE OF MANDAMUS**

12 The authority given to the Supreme Court by the act establishing the judicial system of the United  
13 States to issue writs of mandamus to private officers is warranted by the Constitution:

14 **WRIT OF RIGHT! QUO WARRANTO! INCIDENTAL & PEREMPTORY MANDAMUS!**

15 To the extent that the verbosity of the fact based pleadings is intended to expedite the speedy  
16 resolution of this matter by presenting the facts of the case in the complaint rather than merely giv-  
17 ing notice, plaintiff reaffirms the request and motion for adjudication on the merits.

18 **PETITION FOR WRIT OF ERROR, SPECIAL INJURIES, MALICE AND DECEIT**

19 **790. In 1993, on motion of Rhone Polenc Basic Chemicals, the U.S. v. Iron Mountain Mines,**  
20 **Inc. case was bifurcated, and Rhone Polenc went on to defend itself alone, leaving Iron**  
21 **Mountain Mines, Inc. to ride on its coattails and see what the outcome of that litigation would**  
22 **be. The Courts records officially lists the litigation with IMMI as closed since 1993.**

23 **791. Hence, here is the evidence of a bonafide termination of litigation.**

24 **792. In 1997 the EPA entered into settlement negotiations with Rhone Polenc (successor to**  
25 **Stauffer Chemical, soon to become Aventis Crop Sciences, etc.) after a decision was made by**  
26 **the Court in the bifurcated proceedings.**

27 **793. T.W. Arman and Iron Mountain Mines, Inc. were not a party to the decision.**

1 794. E.D. Cal. 1997 “Acquisition of mining companies assets accomplished through two tender  
2 offers, which gave acquiring company control and ownership of mining company, and subsequent  
3 liquidation and distribution of mining company assets to acquiring company as sole shareholder,  
4 constituted “asset purchase” for purposes of determining whether acquiring company was liable for  
5 response costs under the Comprehensive Environmental Response, Compensation, and Liability  
6 Act (CERCLA).

7 795. Company that acquired assets of mining company was mining company corporate successor,  
8 and therefore, acquiring companies corporate successor was “responsible party” liable under  
9 CERCLA for response costs incurred in connection with investigation and abatement of hazardous  
10 substances contamination at mining site; assignment agreements between mining company and ac-  
11 quiring company explicitly provided that acquiring company would assume all mining liabilities.”

12 987 F. Supp. 1233

13 796. This was in effect the conclusion of the principle litigation, for although Rhone Polenc had  
14 presented a credible case that it did not perform any of the mining determined to constitute the  
15 “disposal” giving rise to CERCLA liability and the cause of the migration of “hazardous sub-  
16 stances” in the acid mine drainage, it was stuck with the successor liability.

17 **797. Therefore the EPA knew since 1997 that the “responsible party” was identified in the**  
18 **person of Rhone Polenc.**

19 **798. Hence there was an absence of probable cause.**

20 **799.** On May 4th, 2000, EPA Regional Judicial Officer Stephen W. Anderson conducted a  
21 CERCLA lien proceeding concerning Iron Mountain Mines, Inc properties.

22 “DETERMINATION OF PROBABLE CAUSE

23 **800.** This matter is a proceeding to determine whether the United States Environmental Protection  
24 Agency (EPA) has a reasonable basis to perfect a lien pursuant to Section 107(l)of the Comprehen-  
25 sive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on certain  
26 property in Shasta County, California owned by Iron Mountain Mine, Inc. (IMMI).

27 **801.** The proceeding is being conducted in accordance with EPA’s Supplemental Guidance on  
28 Federal Superfund Liens dated July 29, 1993 (OSWER Directive No. 9832.12-1a). In accordance

1 with the Supplemental Guidance, I have been designated to make a written recommendation to the  
2 Regional Counsel (the Region official authorized to file liens) as to whether EPA has a reasonable  
3 basis to perfect the lien.

4 **802.** A telephone conference call was held on April 25, 2000 with the owner and chief executive  
5 officer of IMMI, IMMI's attorney, and representatives of EPA, at which each party made oral pres-  
6 entations in support of its position. IMMI also presented facts and arguments in support of its posi-  
7 tion in a letter dated March 9, 2000 to the Regional Counsel.

8 **803.** After considering the lien filing record and presentations made by the parties in the April 25,  
9 2000 conference call, I find that the lien filing record supports the determination that EPA has  
10 probable cause, or a reasonable basis to believe that the requisite statutory criteria have been met,  
11 to file a CERCLA lien against this property.”

#### 12 CERCLA Lien Provision

13 **804.** Section 107(l) of CERCLA, 42 U.S.C. §9607(l), provides that all costs and damages for  
14 which a person is liable to the United States in a cost recovery action under CERCLA shall consti-  
15 tute a lien in favor of the United States upon all real property and rights to such property which (1)  
16 belong to such person and (2) are subject to or affected by a removal or remedial action. The lien  
17 arises at the time costs are first incurred by the United States with respect to a response action un-  
18 der CERCLA or at the time the landowner is provided written notice of potential liability, which-  
19 ever is later. CERCLA Section 107(l)(2); 42 U.S.C. 9607(l)(2). The lien also applies to all future  
20 costs incurred at the site. The lien continues until the liability for the costs or a judgment against  
21 the person arising out of such liability is satisfied or becomes unenforceable through operation of  
22 the statute of limitations. CERCLA Section 107(l)(2); 42 U.S.C. 9607(l)(2).

#### 23 Due Process Requirements

24 **805.** While CERCLA does not provide for challenges to imposition of a lien under Section 107(l),  
25 in accordance with the Supplemental Guidance the Agency affords property owners an opportunity  
26 to present evidence and to be heard when it files CERCLA lien notices. The Supplemental Guid-  
27 ance was issued by the Agency in response to the decision in *Reardon v. U.S.*, 947 F.2d 1509 (1st  
28 Cir. 1991). Under *Reardon*, the minimum procedural requirements would be notice of an intention

1 to file a lien and provision for a hearing if the property owner claimed that the lien was wrongfully  
2 imposed. Reardon at 1522; In the Matter of Harbucks, Inc., Revere Chemical Site, EPA Docket No.  
3 III-93-004L, Probable Cause Determination, November 2, 1994.

#### 4 Criteria for Review

5 **806.** Under the Supplemental Guidance, I am to consider all facts relating to whether EPA has a  
6 reasonable basis to believe that the statutory elements for perfecting a lien under Section 107(l) of  
7 CERCLA have been satisfied. Specific factors for my consideration include:

8 (1) Was the property owner sent notice by certified mail of potential liability?

9 (2) Is the property owned by a person who is potentially liable under CERCLA?

10 (3) Is the property subject to or affected by a removal or remedial action?

11 (4) Has the United States incurred costs with respect to a response action under CERCLA?

12 (5) Does the record contain any other information which is sufficient to show that the lien should  
13 not be filed?

14 **807.** In order to demonstrate that EPA lacks a reasonable basis for perfecting the lien, IMMI must  
15 show by a preponderance of the evidence that the property owner is not liable for cleanup or that  
16 the property is not subject to or affected by a removal or remedial action.

#### 17 Factual Background

18 **808.** The property at issue in this proceeding consists of approximately thirty-six legal parcels lo-  
19 cated in Shasta County, California. See parcel maps in the lien filing record, and Attachments 1, 2,  
20 and 3 to the Notice of Intent to File Lien. According to IMMI, sulfide ore bodies on the property  
21 were mined from 1896 through 1962 by the Mountain Copper Company. IMMI purchased the  
22 property from Stauffer Chemical Company, a successor in interest to the Mountain Copper Com-  
23 pany, in 1976.

24 **809.** IMMI states that it has not conducted mining activities on the property. However, the earlier  
25 mining activities have resulted in continuing acid mine drainage and runoff of heavy metals into  
26 Keswick Lake and the Sacramento River from the property, causing significant environmental  
27 harm. See Declaration of James C. Pedri, Engineer-in-Charge of the Redding Office of the Califor-  
28 nia Regional Water Quality Control Board, Central Valley Region. Beginning in August, 1977, the



1 Regional Water Quality Control Board (RWQCB) issued a series of orders to IMMI directing it to  
2 abate the effects of the discharge of acid mine drainage and runoff containing heavy metals from  
3 IMMI's property; IMMI has not complied with the orders to the RWQCB's satisfaction. See Decla-  
4 ration of James C. Pedri.

5 **810. Here Judicial Officer Anderson refers to allegations by James C. Pedri of the RWQCB,**  
6 **an official of the State of California repeatedly identified by T.W. Arman as harboring per-**  
7 **sonal animosity and bias against T.W. Arman and IMMI.**

8 **811.** In 1982 and thereafter, EPA notified IMMI that it considered IMMI to be a responsible party  
9 at the Iron Mountain Mine Superfund Site, and, in accordance with the provision for joint and sev-  
10 eral liability of Section 107 of CERCLA, demanded payment of costs incurred to date in excess of  
11 \$7.75 million. Letters dated April 5, 1982 and [date illegible on file copy]. By letter dated January  
12 25, 2000, EPA notified IMMI of its intent to perfect a lien on the property in order to secure pay-  
13 ment to the United States of costs and damages for which IMMI, as the owner of the property,  
14 would be liable to the United States under Section 107(a) of CERCLA.

15 **812.** In 1982, and thereafter, EPA notified IMMI that it considered IMMI to be a "potentially re-  
16 sponsible party."

17 Issues Presented

18 **813.** With respect to the five factors listed for consideration in the Supplemental Guidance:

19 (1) There is no dispute that the property owner, IMMI, was sent notice by certified mail of potential  
20 liability. See letters dated April 5, 1982 and [date illegible on file copy] in the lien filing record.

21 (2) IMMI disputes that the property is owned by a person who is potentially liable under CERCLA.  
22 IMMI appears to make two arguments in this regard: (1) that since IMMI "did not mine or aggra-  
23 vate the ore bodies to cause AMD [acid mine drainage]" it should not be held liable for any re-  
24 sponse costs at the site, and (2) that IMMI is entitled to the "innocent landowner defense." IMMI's  
25 arguments are discussed below. As explained there, I find that IMMI has failed to show by a pre-  
26 ponderance of the evidence that it is not liable under CERCLA for cleanup costs at the property.

27 (3) IMMI does not dispute EPA's assertion that the property is subject to or affected by a removal  
28 or remedial action.

1 (4) IMMI does not dispute that the United States incurred costs with respect to a response action  
2 under CERCLA.1 See cost documents in the lien filing record.

3 (5) With respect to the fifth factor, IMMI argues (1)that “it was defrauded at the point of the prop-  
4 erty sale by Stauffer . . .” in that Stauffer “intentionally failed to disclose material facts about the  
5 AMD [acid mine drainage]problem at the property to IMMI,” and that Stauffer should bear all of  
6 the cost to remedy the acid mine drainage situation at the site, (2) that EPA has “waived its right to  
7 impose a lien against IMMI’s real property due to the EPA’s failure to exhaust its Administrative  
8 Law Remedies prior to initiating its legal action against IMMI and the other potentially responsible  
9 parties” at the site, (3) that EPA should “mediate or discuss the lien issue” in ongoing settlement  
10 negotiations between the parties rather than filing a lien unilaterally, and (4) that because of pend-  
11 ing cost recovery litigation involving EPA, IMMI, Stauffer and a third potentially responsible  
12 party, the lien “is premature and legally improper because the United States Federal District Court  
13 has superior jurisdiction over this matter.” IMMI’s arguments are discussed below. I find that none  
14 of IMMI’s arguments are sufficient to show that the lien should not be filed against the property.

15 Discussion

16 **814.** (1) With respect to IMMI’s argument that it should not be held liable for any response costs at  
17 the site because it did not mine or aggravate the ore bodies to cause acid mine drainage, it is clear  
18 under the liability scheme of Section 107 of CERCLA that a subsequent landowner may be liable  
19 for response costs for environmental contamination it did not cause. CERCLA Section 107(a)(1);  
20 42 U.S.C. Section 9607(a)(1). It should also be noted that one purpose of the lien authority in Sec-  
21 tion 107(l) is to prevent windfalls: “A statutory lien would allow the Federal Government to re-  
22 cover the enhanced value of the property and thus prevent the owner from realizing a windfall from  
23 cleanup and restoration activities.” 131 Cong. Rec. S11580 (statement of Senator Staf-  
24 ford)(September 17, 1985). See also House Energy and Commerce Report on H.R.2817, p.40, indi-  
25 cating that the lien provision was intended to prevent unjust enrichment. In the Matter of Copley  
26 Square Plaza Site, Determination of Probable Cause, June 5, 1997. Thus, IMMI’s assertion that it  
27 did not cause the contamination at the site is not a sufficient basis for finding that a CERCLA lien  
28 should not be filed.

1 **815. Here is the evidence of the EPA’s malicious agenda being carried out. Even though it**  
2 **had established blanket liability against one of the worlds largest pharmaceutical & chemical**  
3 **conglomerates of liability for the CERCLA clean-up, it resumed the prosecution against**  
4 **IMMI in this most sinister and diabolical way by falsely establishing probable cause. Al-**  
5 **though IMMI presented substantial evidence that would easily meet a much higher standard**  
6 **of “beyond a reasonable doubt” innocence, the EPA judicial officer systematically ignored,**  
7 **denied, dismissed, obfuscated, or plainly lied about the merit of T.W. Arman and IMMI as-**  
8 **sertions of innocence and the third party defense.**

9 **816.** (2) With respect to IMMI’s assertion that it is entitled to the “innocent landowner” defense  
10 against CERCLA liability, IMMI’s argument fails on several points. A potentially responsible party  
11 [PRP] under CERCLA may have a defense to liability where the contamination at issue was caused  
12 by an act or omission of a third party, if it meets certain conditions specified in the statute.<sup>2</sup> See  
13 CERCLA Section 107(b); 42 U.S.C. Section 9607(b).

14 **817. Here the EPA judicial officer Anderson fails to make an effort to even appear to give**  
15 **credible consideration to the innocent landowner defense, and obfuscates and confuses it with**  
16 **the third party defense. This in itself is effectively an abuse of process.**

17 **818.** One such condition is that the PRP must establish by a preponderance of the evidence that (a)  
18 he exercised due care with respect to the hazardous substance concerned, taking into consideration  
19 the characteristics of such hazardous substance,  
20 in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts  
21 or omissions of any such third party and the consequences that could foreseeably result from such  
22 acts or omissions. CERCLA Section 107(b)(3);42 U.S.C. Section 9607(b)(3).

23 **819.** IMMI has failed to establish by a preponderance of the evidence that it has exercised due  
24 care with respect to the acid mine drainage and other contamination at the site. IMMI has not rebut-  
25 ted the Declaration of James Pedri, cited above, which states that for significant periods of time  
26 from 1977 through 1981, and for an unspecified period thereafter, IMMI failed to properly operate  
27 copper cementation plants on Slickrock Creek and Boulder Creek which were intended to reduce  
28 copper and other heavy metal contamination and acid mine drainage which otherwise would dis-

1 charge into Keswick Lake and the Sacramento River. According to Mr. Pedri's Declaration, the  
2 Boulder Creek plant had been operated by the Stauffer Chemical Company (prior to the transfer of  
3 the property to IMMI) so as to achieve 95 percent removal of copper, but over a period of four  
4 years after IMMI purchased the property it generally failed to operate the plant so as to achieve the  
5 required reduction of copper. The Declaration states that the reduction is necessary to prevent toxic  
6 concentrations of copper from occurring in Keswick Lake and the Sacramento River. Declaration  
7 of James C. Pedri, par. 4. In view of the unrebutted statements in the Declaration, I find that IMMI  
8 has not established by a preponderance of the evidence that it exercised due care with respect to the  
9 preexisting contamination at the site.<sup>3</sup>

10 **820. Here Anderson again cites Pedri, and we can glimpse the bias that pervades these pro-**  
11 **ceedings, as Pedri accuses Arman and IMMI of failing to operate the copper cementation**  
12 **plants. Such a claim might give someone the impression that copper cementation was a pollu-**  
13 **tion control measure. Copper cementation was not a pollution control measure, but an ex-**  
14 **ceedingly primitive method of recovering copper from the leachate of copper sulfate in wa-**  
15 **ters percolating through copper bearing soils and ores. The fact that it was beneficial to fish**  
16 **to remove the copper sulfate from waters draining into the river was incidental. In fact, it**  
17 **would not be possible to have a copper cementation plant certified as any sort of pollution**  
18 **control device, then or now. In fact T.W. Arman rebutted all of Pedri's statements, but these**  
19 **rebuttals were entirely ignored by Anderson.**

20 **821. It is hard to imagine what Pedri is talking about here, for few people have any clue what**  
21 **a copper cementation plant is. These are a series of large basins about 3 feet deep, 15 feet**  
22 **wide and 20 ft. long; large concrete boxes, filled with scrap iron, usually scrap from canning**  
23 **companies. The acid mine drainage is conveyed about a half mile in stainless steel troughs**  
24 **into these boxes, where the acid reacts with the iron, making rust. A significant portion of the**  
25 **rust dissolves into the acid water, but what remains is coated with a layer of copper sulfate.**  
26 **Periodically the boxes are cleaned of their contents with a large bucket loader, and the cop-**  
27 **per laden scrap is lifted about 20 ft. and dumped into a large hopper, where a laborer forces**  
28 **shovel loads of the scrap into a large cylindrical steel screen cage, which is rotated by a large**

1 electric motor, and the copper is shaken off of the scrap. The scrap then gets pushed into an-  
2 other hopper with a finer screen where it is physically beaten once more. The slime that is  
3 removed from the scrap contains around 50% copper sulfate, which can then be sold for  
4 about 1/8 the going price of copper. In all it is a tremendously labor intensive process, prone  
5 to constant breakdown of equipment, easily overwhelmed by inclement weather, and at the  
6 mercy of a willing and affordably cooperative labor force. The equipment that T.W. Arman  
7 inherited with Iron Mountain Mines was already at least 30 years old.

8 **822. In retrospect it is easy to understand why Pedri would harbor animosity towards T.W.**  
9 **Arman and IMMI, since Pedri had initiated the litigation against IMMI in the first place.**

10 When IMMI complied with the new State requirement to obtain an NPDES permit for  
11 pollution discharges, and when IMMI was unable to meet these discharge requirements, the  
12 State began fining IMMI, fines that ultimately exceeded 16 million dollars.

13 **823. When those fines were reduced by the Courts to under 500 hundred thousand, and**  
14 **IMMI was allowed to remain in business, Pedri's credibility was severely tarnished and he**  
15 **suffered humiliation and public ridicule. So it is easy to understand why Pedri would have an**  
16 **ax to grind with T.W. Arman and IMMI.**

17 **824. The administrative record reflected facts indicate that Pedri intentionally lied against**  
18 **T.W. Arman, and intentionally framed IMMI to assist in its terminal injury.**

19 **825. Hence there was Malice.**

20 **826. Another condition which a landowner who takes title from a third party who caused contami-**  
21 **nation must meet in order to avoid CERCLA liability is that the real property must have been ac-**  
22 **quired by the PRP after the disposal or placement of the hazardous substances on, in, or at the facil-**  
23 **ity,<sup>4</sup> and**

24 . . . [a]t the time the PRP acquired the facility the PRP did not know and had no reason to know that  
25 any hazardous substance which is the subject of the release or threatened release was disposed of  
26 on, in, or at the facility.

27 CERCLA Section 101(35)(A)(i); 42 U.S.C. §9601(35)(A)(i).  
28

1 In order to establish that it had no reason to know of the disposal of hazardous substances at the  
2 facility, a defendant  
3 must have undertaken, at the time of acquisition, all appropriate inquiry into the previous owner-  
4 ship and uses of the property consistent with good commercial or customary practice in an effort to  
5 minimize liability. . . . The court shall take into account commonly known or reasonably ascertain-  
6 able information about the property, the obviousness of the presence or likely presence of contami-  
7 nation at the property, and the ability to detect such contamination by appropriate inspection.  
8 CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B).

9 **827.** IMMI has failed to show by a preponderance of the evidence that it meets this condition.  
10 While there is evidence that Stauffer Chemical Company attempted to withhold information “relat-  
11 ing to environmental issues” from IMMI, see memorandum from T.J. Kent to L.E. Mannion dated  
12 February 4, 1977, there is no dispute that prior to the close of escrow on the property<sup>5</sup> IMMI was  
13 aware the property had been the site of large scale mining. This alone should have been enough to  
14 put a prospective buyer on notice of possible environmental problems at the site. In addition, IMMI  
15 was aware that the RWQCB was interested in having IMMI continue operation of the cleanup ac-  
16 tivities at the site. Either a failure to obey cleanup orders or the described interference with Agency  
17 cleanup activities could constitute an independent basis for finding that IMMI has failed to show  
18 that it exercised due care with respect to the hazardous substances at the site.

19 **828. This is the most glaring example of the maliciousness of these proceedings, and the de-**  
20 **ception and subterfuge of Anderson by ignoring the fact that copper, cadmium, and zinc**  
21 **were not regulated substances at the time of the purchase, were not considered “hazardous**  
22 **substances” under the law, (the transportation committee of Congress added them in July**  
23 **1977, and Congress amended the legislation in December of 1977, which is when the State be-**  
24 **gan requiring NPDES permits).**

25 **829. There were no “clean-up orders”, no law regulating the “due care” of such property**  
26 **purchase, or any evidence of “interference” with Agency cleanup activities that could consti-**  
27 **tute an independent basis for finding that IMMI has failed to show that it exercised due care**  
28 **with respect to the hazardous substances at the site.**

1 **830. T.W. Arman and IMMI were simply framed by State and Federal Officers with oppres-**  
2 **sion, malice, fraud, and deceit under color of law.**

3 **831.** (3) IMMI argues that “it was defrauded at the point of the property sale by Stauffer . . .” in  
4 that Stauffer “intentionally failed to disclose material facts about the AMD[acid mine drainage]  
5 problem at the property to IMMI,” and that Stauffer should therefore bear all of the cost to remedy  
6 the acid mine drainage situation at the site.

7 **832.** Without expressing any opinion as to the likelihood that IMMI would or would not prevail in  
8 civil litigation against Stauffer on grounds of fraud, I note that IMMI’s argument does not present a  
9 defense to liability under Section 107 of CERCLA. As discussed above, in order to avoid CERCLA  
10 liability a purchaser of property must undertake “all appropriate inquiry into the previous owner-  
11 ship and uses of the property consistent with good commercial or customary practice in an effort to  
12 minimize liability.” CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B). Stauffer appears to  
13 have withheld information from IMMI regarding environmental conditions on the property. See the  
14 Stauffer internal memorandum dated February 4, 1977 from T.J.Kent to L.E.Mannion, in which  
15 Mr. Kent states:

16 . . . we agreed that you would not provide IMM [IMMI]with any geological or technical informa-  
17 tion not pertinent to the 1900 acres sold last year to IMM nor would you give up any correspon-  
18 dence, reports, etc. relating to environmental issues at Iron Mountain.

19 In spite of this, IMMI should have been able to inform itself about the acid mine drainage and other  
20 environmental problems at the property by reviewing RWQCB records or by conducting a thor-  
21 ough inspection of the property. I therefore find that, with respect to its liability under Section  
22 107(a)of CERCLA, IMMI did not undertake an “appropriate inquiry into the previous . . . uses of  
23 the property” before purchase, regardless of any efforts by Stauffer to avoid disclosing environ-  
24 mental information in its possession.

25 **833.** (4) IMMI argues that EPA has “waived its right to impose a lien against IMMI’s real property  
26 due to the EPA’s failure to exhaust its Administrative Law Remedies prior to initiating its legal ac-  
27 tion against IMMI and the other potentially responsible parties” at the site. It is unclear what “ad-  
28 ministrative law remedies” are referred to, since CERCLA does not set any time deadlines or simi-



1 lar administrative requirements on EPA's decision to impose a lien on property subject to a re-  
2 moval or remedial action. See, CERCLA Section 107(l); 42 U.S.C. 9607(l) and CERCLA Guidance  
3 on Federal Superfund Liens dated September 22, 1987 at Section III. To the contrary, a CERCLA  
4 lien may be imposed at any time after EPA incurs costs and provides notice of potential liability to  
5 the landowner.<sup>6</sup> CERCLA Guidance on Federal Superfund  
6 Liens dated September 22, 1987.

7 **834.** "The lien imposed by this subsection shall arise at the latter of the following:

8 (A) The time costs are first incurred by the United States with respect to a response action under  
9 this chapter. (B) The time that the person referred to in paragraph (1) is provided (by certified or  
10 registered mail) written notice of potential liability.

11 CERCLA Section 107(l)(2); 42 U.S.C. 9607(l)(2).<sup>10</sup>

12 (5) IMMI argues that EPA should "mediate or discuss the lien issue" in ongoing settlement nego-  
13 tiations<sup>7</sup> between the parties rather than filing a lien unilaterally. While EPA could elect to do so as  
14 an exercise of discretion, the fact that EPA and a PRP are currently in settlement negotiations does  
15 not in any way diminish the Agency's legal authority to file a lien under Section 107(l) of  
16 CERCLA. Furthermore, in light of the underlying purpose of a CERCLA lien, to protect the Gov-  
17 ernment's ability to recover public funds expended on the cleanup of contamination on the property  
18 and to avoid a windfall to the landowner, as a matter of policy the Agency will consider perfecting  
19 a lien whenever settlement negotiations have not yet resulted in appropriate assurance that the  
20 Government will be able to recover the funds it has expended at the site. CERCLA Guidance on  
21 Federal Superfund Liens dated September 22, 1987, Section IV.

22 **835.** Since a CERCLA lien is "subject to the rights of any purchaser, holder of a security interest,  
23 or judgment lien creditor whose interest is perfected under applicable State law before notice of the  
24 federal lien has been filed," CERCLA Section 107(l)(3), 42 U.S.C. Section 9607(l)(3), any delay  
25 by EPA in filing the lien risks that EPA's ability to recover costs will be impaired.

26 **836.** (6) IMMI argues that because of pending cost recovery litigation brought by EPA against  
27 IMMI, Stauffer and other companies considered by EPA to be potentially responsible parties at the  
28 site, the lien "is premature and legally improper because the United States Federal District Court

1 has superior jurisdiction over this matter.”<sup>8</sup> IMMI suggests that EPA could “request” a lien if a  
2 judgment is rendered in that case against IMMI.

3 **837.** Contrary to the argument put forward by IMMI, a CERCLA lien can be filed irrespective of  
4 whether there is pending cost recovery litigation regarding the site. Section 107(l)

5 48. IMMI does not concede the reasonableness of the costs.

6 Stauffer . . .” in that Stauffer “intentionally failed to disclose material facts about the AMD [acid  
7 mine drainage]problem at the property to IMMI,” and that Stauffer should bear all of the cost to  
8 remedy the acid mine drainage situation at the site, (2) that EPA has “waived its right to impose a  
9 lien against IMMI’s real property due to the EPA’s failure to exhaust its Administrative Law  
10 Remedies prior to initiating its legal action against IMMI and the other potentially responsible par-  
11 ties” at the site, (3) that EPA should “mediate or discuss the lien issue” in ongoing settlement nego-  
12 tiations between the parties rather than filing a lien unilaterally, and (4) that because of pending  
13 cost recovery litigation involving EPA, IMMI, Stauffer and a third potentially responsible party,  
14 the lien “is premature and legally improper because the United States Federal District Court has  
15 superior jurisdiction over this matter.” IMMI’s arguments are discussed below. I find that none of  
16 IMMI’s arguments are sufficient to show that the lien should not be filed against the property.

17 **838.** Section 107(b) of CERCLA provides that defenses to liability under CERCLA §107(a) in-  
18 clude:

19 The release or threat of release of a hazardous substance and the damages resulting therefrom were  
20 caused solely by:

21 (1) an act of God;

22 (2) an act of war;

23 (3) an act or omission of a third party other than an employee or agent of the defendant, or than one  
24 whose act or omission occurs in connection with a contractual relationship, existing directly or in-  
25 directly, with the defendant (except where the sole contractual arrangement arises from a published  
26 tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a  
27 preponderance of the evidence that (a) he exercised due care with respect to the hazardous sub-  
28 stance concerned, taking into consideration the characteristics of such hazardous substance, in light

1 of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or  
2 omissions of any such third party and the consequences that could foreseeably result from such acts  
3 or omissions; or

4 (4) any combination of the foregoing paragraphs.

5 CERCLA §107(b); 42 U.S.C. Section 9607(b).6

6 **839.** 3 The Declaration and lien filing record also refer to cleanup orders issued to IMMI by state  
7 and federal regulatory agencies, and an injunction obtained by EPA to enjoin IMMI from interfer-  
8 ing with EPA’s cleanup and restoration activities.” 131 Cong. Rec. S11580 (statement of Senator  
9 Stafford)(September 17, 1985). See also House Energy and Commerce Report on H.R.2817, p.40,  
10 indicating that the lien provision was intended to prevent unjust enrichment. In the Matter of Cop-  
11 ley Square Plaza Site, Determination of Probable Cause, June 5, 1997. Thus, IMMI’s assertion that  
12 it did not cause the contamination at the site is not a sufficient basis for finding that a CERCLA  
13 lien should not be filed.

14 **840.** IMMI asserts that all the contamination at the site was caused by previous owners; EPA  
15 notes that release of hazardous substances(for example, acid mine drainage) continues to occur at  
16 the site.

17 **841.** IMMI entered into an agreement to purchase the property October 22, 1976; escrow closed  
18 December 15, 1976.

19 **842.** Boulder Creek copper cementation plant. Deposition of Theodore Arman dated August 12,  
20 1996, vol. 1, at 166:11-24. While IMMI disputes that Mr. Pedri, the RWQCB engineer, told it at  
21 that time of the RWQCB’s full environmental concerns regarding the property, even if Mr. Pedri  
22 only inquired whether IMMI would continue to operate the Boulder Creek copper cementation  
23 plant, that inquiry by a state regulatory official should have been enough to put a prospective buyer  
24 on notice of possible water contamination problems at the site. In addition, the RWQCB issued a  
25 cleanup and abatement order to Stauffer Chemical Company on November 5, 1976, which ad-  
26 dressed the effects of the discharge of acid mine drainage into Spring Creek and the Sacramento  
27 River. A copy of the cleanup and abatement order was received by IMMI some time in Novem-  
28 ber,1976. Deposition of Theodore Arman dated August 12, 1996,vol. 1, at 129:5-22 and 161:8-17.

1 Thus, before the close of escrow in December, 1976, IMMI had specific information as to a signifi-  
2 cant environmental problem at the property. IMMI has therefore failed to show by a preponderance  
3 of the evidence that it did not know and had no reason to know that hazardous substances had been  
4 disposed of on the property.

5 **843.** The “settlement negotiations” referred to is a mediation proceeding before Judge Julius Irving  
6 in *United States and State of California v. Iron Mountain Mines, Inc., et al.*, No. CIV-S-91-  
7 0768DFL JFM

8 **844.** CERCLA provides for an independent in rem action against the property subject to the lien:  
9 The costs constituting the lien may be recovered in an action in rem in the United States district  
10 court for the district in which the removal or remedial action is occurring or has occurred.

11 **845.** CERCLA Section 107(l)(4); 42 U.S.C. Section 9607(l)(4). There is no requirement that EPA  
12 institute a civil cost recovery action under CERCLA as a prerequisite to the imposition of a  
13 CERCLA lien or for the purpose of recovering costs under the lien. To the contrary, it was antici-  
14 pated that CERCLA liens would often be filed early in the history of a response action, at a point  
15 where EPA would not know the full cost of its response action, let alone have filed any type of cost  
16 recovery case. *Reardon v. U.S.*, 947 F.2d. 1509, 1513 (1st Cir.1991). Just as it is not necessary to  
17 institute a cost recovery action under CERCLA in order to impose a CERCLA lien, this CERCLA  
18 lien proceeding is not part of the pending cost recovery action referred to by IMMI, and EPA is  
19 free to proceed with lien filing regardless of the procedural posture of the pending cost recovery  
20 litigation. In the Matter of Paoli Rail Yard Superfund Site, EPA Docket No. III-93-  
21 004L, Determination of Probable Cause, November 30, 1995.

22 **846.** To the extent IMMI suggests that EPA could “request” alien if a judgment is rendered  
23 against IMMI in the pending cost recovery litigation, IMMI is confusing a judgment lien with a  
24 CERCLA lien under Section 107(l).

25 **847.** As noted below, this determination of probable cause does not bar EPA or the property owner  
26 from raising any claims or defenses in further proceedings. Consequently, the present determina-  
27 tion does not limit or foreclose any claims or defenses either EPA or IMMI may have in the pend-  
28 ing cost recovery litigation.

1 Conclusion

2 **848.** After considering the lien filing record and presentations made by the parties in the April 25,  
3 2000 conference call, I find that the lien filing record supports a determination that EPA has a rea-  
4 sonable basis to perfect alien under Section 107(l) of CERCLA against the specified property  
5 owned by Iron Mountain Mine, Inc. in Shasta County,  
6 California. IMMI has not established any issue of fact or law which rebuts EPA's claim that it has a  
7 reasonable basis to perfect a lien.

8 **849.** The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a  
9 reasonable basis to perfect its lien and whether or not the property owner has proven any of the de-  
10 fenses available under Section 107 of CERCLA. This recommended decision does not bar EPA or  
11 the property owner from raising any claims or defenses in further proceedings. This recommended  
12 decision is not a binding determination of ultimate liability or non-liability. This recommended de-  
13 cision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in  
14 any subsequent proceeding.

15 /S/ Steven W. Anderson

16 Regional Judicial Officer

17 Dated: May 4, 2000

18 **850. Although the conclusion qualifies these proceedings as narrowly limited and only a rec-**  
19 **ommended decision with no preclusive effect, it may be seen from the proceedings that fol-**  
20 **lowed such was not the case, and the EPA and the Courts effectively adopted these findings as**  
21 **conclusive evidence of T.W. Arman and IMMI liability.**

22 **851. On September 30, 2002, Judge Levi issued an order:**

23 “To establish liability for CERCLA clean-up costs, a plaintiff must show that the defendant is a  
24 potentially responsible party (“PRP”). The United States and California claim that IMMI and Ar-  
25 man are PRP’s because they are either “owner[s] [or] operator[s] of a vessel or a facility [in need of  
26 clean-up].” 42 U.S.C 9607 (a)(1). Defendants asserts that the plaintiffs did not adequately define  
27 the “facility” in question, and did not prove that defendants were ”operators” of such facility.1  
28 These contentions lack merit. Arman is an operator under CERCLA because he is someone who

1 currently “manage[s], direct[s], or conduct[s]... operations having to do with the leakage or dis-  
2 posal of hazardous waste, or decisions about compliance with environmental regulations.” United  
3 States v. Best Foods, 524 U.S. 51, 66-67 (1998). For example, under Arman’s management, IMMI  
4 operated Boulder Creek and Slickrock Creek copper cementation plants. Arman is the decision-  
5 maker for IMMI concerning compliance with environmental regulations, and he deals directly with  
6 State and Federal environmental agencies.

7 Also, plaintiffs have submitted more than adequate evidence to describe the bounds of the relevant  
8 facility.

9 **852.** Because IMMI is already liable under CERCLA as a “current owner” of the facility in ques-  
10 tion, it is not necessary to establish IMMI’s liability as an “operator” of the same facility.

11 **853.** After a potentially responsible party (“PRP”) is identified under CERCLA, the PRP may be  
12 entitled to defeat liability if all elements of an affirmative defense are proven. Defendant IMMI  
13 first asserts the innocent landowner defense under 42 U.S.C. 9601 (35(A)-(B). 2 This defense,  
14 however, is only available to PRPs who, at the time of purchase, “did not know or had no reason to  
15 know that any hazardous substance which is the subject of the release or threatened release is dis-  
16 posed of on, in, or at the facility.” 8691 (35)(A)(i). Because IMMI purchased the property with  
17 knowledge of – indeed, at least in part, because of – the presence of hazardous materials, the inno-  
18 cent landowner defense is not available to IMMI.

19 **854.** IMMI and Arman also assert the third party defense, available to PRPs who can establish  
20 that the release of the hazardous substances or threat thereof was caused solely by “an act or omis-  
21 sion of a third party other than and employee or agent of the defendant....” 42 U.S.C. 9607(b)(3). It  
22 may be doubted whether or not the third party defense is available to landowners who do not qual-  
23 ify for the innocent landowner defense. See Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.  
24 3d. 863, 887 (9th Cir. 2001) (“In a single stroke, SARA first clarified that one who purchases land  
25 from a polluting owner or operator cannot present a third-party defense.”) Even if the third party

26 **855.** The innocent landowner defense is not available to Arman because he is not the “owner” of  
27 the facility in need of clean-up.

1 Defense were available to IMMI, however, IMMI has not established the necessary elements of the  
2 defense. The defense only applies to defendants who do not have a contractual relationship with the  
3 alleged third party polluter. See 42 U.S.C. 9607 (b)(3). But IMMI purchased the land from Stauffer  
4 Chemical Company (“Staffer”), successor to Mountain Copper Company, the third party most re-  
5 sponsible for the pollution. IMMI’s transaction with Stauffer thereby created a contractual relation-  
6 ship via land deed as defined in CERCLA 9601 (35)(A). Further, defendant Arman could only as-  
7 sert the third party defense could he show that he has “exercised due care” in the handling of the  
8 hazardous waste after discovery of the contamination. 9607 (b)(3)(a). He cannot meet this burden  
9 in light of his violation of state court and EPA orders concerning the site.

10 **856.** Finally, defendants assert the “divisibility of harm” defense.<sup>3</sup> This defense allows a PRP to  
11 avoid joint and several liability by showing that the harm caused by the hazardous waste is divisi-  
12 ble. See Carson Harbor, 270 F. 3d at 871. Defendants in this case have not made such a showing.  
13 Given the nature of the pollution at the site, it would be difficult to identify distinct harms. To the  
14 extent that IMMI and Arman may be less responsible than others for acid mine drainage, this is a  
15 factor that may considered in a contribution proceeding.

16 **857.** Although CERCLA is based on a strict liability scheme, most circuits, including the Ninth,  
17 have recognized a common law divisibility of harm defense in a few narrow situations.

18 **858.** For the foregoing reasons, the plaintiffs’ summary judgment motion is hereby GRANTED.

19 **859.** IT IS SO ORDERED.

20 Dated: 30 September, 2002

21 **860. Clearly, Judge Levi accepted the government’s claims for summary judgment almost**  
22 **verbatim.**

23 **861. One must still wonder why the EPA thought it necessary to entrap T.W., Arman and**  
24 **IMMI, having achieved the record setting Consent Decree it proudly trumpeted as the “bil-**  
25 **lion dollar settlement”. It is understandable though if one considers the prosecutions perspec-**  
26 **tive, which must have immediately recognized the potential exposure of the settlement and its**  
27 **capture by IMMI should the defendants be able to find a way to implement an actual remedy.**  
28 **Having effectively precluded any realistic possibility of the resumption of hardrock mining,**



1 the only possible opportunity for IMMI would be for a serious mining company to step for-  
2 ward and join IMMI in a solution mining venture. As this industry was beginning to show  
3 real vitality, the best way to prevent IMMI from seizing such an opportunity would be to  
4 burden it with an enormous CERCLA liability, effectively shutting off any possible mining  
5 venture capital. So the EPA fabricated the entire IMMI liability, including declining to reim-  
6 burse itself for its fraudulent “unrecovered past response costs” in order to cloud title and  
7 stigmatize the property so thoroughly that no prudent company would have anything to do  
8 with it.

9 **862. T.W. Arman believed that when the litigation was over he would be able to get back into**  
10 **business, and to this day remains incredulous and angry that with a property holding billions**  
11 **more in mineral resources than all but a handful of other mines in this country, that not one**  
12 **mining company will even return phone calls from Iron Mountain Mines, Inc.**

13 **863. On May 20, 2005, the District Court heard a joint status conference**

14 **864.** “As stated in the plaintiffs’ memorandum in support of their motion to enter the 2000 Consent  
15 Decree [Docket No. 1178, at 10–14], the monies paid by Rhône-Poulenc under that settlement  
16 (with a few excepted items) secured future operation and maintenance of the Iron Mountain Mine  
17 remedial actions.

18 **865.** The plaintiffs were not reimbursed for their past costs (with the exception of two payments of  
19 \$1 million that DTSC and the Regional Board each received from certain insurance proceeds and  
20 applied towards their past costs); and Rhône-Poulenc absorbed its own past costs.

21 **866.** Accordingly, because of the competing claims and defenses of the parties to the settlement  
22 memorialized in the Consent Decree, the settlement specifically settled the settling parties’ respec-  
23 tive past costs as among those parties. All costs, including past costs, are included as “matters ad-  
24 dressed” under Paragraph 86 of the Consent Decree, contrary to defendants’ mischaracterizations.  
25 Therefore, the settling parties are entitled under Paragraph 85 of the Decree to contribution protec-  
26 tion as to all such matters, and a third-party claim by defendants Arman and IMMI against any set-  
27 tling party would be inappropriate.

1 **867.** Defendants Arman and IMMI agreed at the time that the Court was considering entry of the  
2 Consent Decree not to oppose approval of the settlement and entry of the Decree. See Statement of  
3 Proceedings at 3–4 (entered December 11, 2000) [Docket No. 1186]; see also Reply Declaration by  
4 T.W. Arman and Iron Mountain Mines, Inc. to Joint Motion for Entry of Consent Decree at 2:1  
5 [Docket No. 1183]. The plaintiffs therefore oppose any attempt by defendants to collaterally attack  
6 the 2000 settlement.

7 **868.** B. Defendants’ Statement

8 **869.** Despite the settlement embodied in this Court’s consent decree entered December 2000, it is  
9 possible that defendants IMMI and Arman would seek to file a third-party complaint for contribu-  
10 tion against former defendant and settling party Aventis (formerly known as Rhône-Poulenc).  
11 IMMI and Arman briefly explain why.

12 **870.** Plaintiffs’ settlement with Aventis includes total payments made by or on behalf of the set-  
13 tling parties in excess of \$835 million. With respect to those payments and other aspects of the set-  
14 tlement, the consent decree provides that the “matters addressed in the settlement” include, among  
15 other things, “all response actions taken or to be taken, [and] all response costs incurred or to be  
16 incurred” by the plaintiffs (emphasis added). Consent Decree, 86.

17 **871.** Accordingly, it would appear that under the express terms of the settlement, the settling de-  
18 fendants were making payments and providing other valuable consideration worth in excess of  
19 \$835 million in satisfaction of their potential liability for past response costs incurred by the plain-  
20 tiffs.

21 **872.** CERCLA Section 113(f)(2) provides that the potential liability of defendants IMMI and Ar-  
22 man shall be “reduced by the amount of the settlement” between plaintiffs and Aventis.

23 Notwithstanding that the value of the settlement greatly exceeds plaintiffs past response costs,  
24 plaintiffs apparently now contend that they somehow “reserved” and/or “carved out” their right to  
25 seek all of their past response costs from the non-settling defendants, i.e., that their settlement with  
26 Aventis included only future response costs.

27 **873.** Plaintiffs cannot have it both ways, namely: if the settlement with Aventis addresses plain-  
28 tiffs’ past response costs, as the consent decree that plaintiffs submitted to this Court states, then

1 IMMI's and Arman's potential liability to plaintiffs must be reduced by the "amount of the settle-  
2 ment" between plaintiffs and Aventis (with the result that defendants are not liable for any of plain-  
3 tiffs' past response costs and not likely to have any liability for plaintiffs' future response costs for  
4 the foreseeable future, if at all); alternatively, if plaintiffs have in fact reserved or carved out a right  
5 to seek all past response costs from defendants

6 **874.** IMMI and Arman, as plaintiffs appear to presently contend, the settlement with Aventis did  
7 not "address" those past response costs. If that is the case, claims by IMMI and Arman against  
8 Aventis for contribution would therefore not be barred. See CERCLA Section 113(f)(2), (contribu-  
9 tion claims are barred only as to those "matters addressed in the settlement").

10 **875.** Defendants presently believe the right result is that the Aventis settlement did in fact satisfy  
11 plaintiffs' claims for past response costs. Nevertheless, defendants necessarily reserve their right to  
12 seek to file a third-party complaint for contribution against Aventis in the event that this Court were  
13 to rule otherwise.

14 **876.** Citing a hearing transcript of December 11, 2000 and a declaration submitted by defendant  
15 Arman, plaintiffs say that "Arman and IMMI agreed at the time that the Court was considering en-  
16 try of the Consent Decree not to oppose approval of the settlement and entry of Decree."

17 **877.** Whether or not defendants Arman and IMMI objected to the Consent Decree is relevant to the  
18 determination of the "matters addressed." Further, the Arman declaration is fact an objection to the  
19 Consent Decree to the extent that the Decree purports to allocate significant responsibility to Ar-  
20 man and/or IMMI for "Site costs." As Mr. Arman stated in that declaration (at 3): "I do strongly  
21 object to the factual and legal characterization and formula used to apportion the alleged liability  
22 among the defendants in this matter." As Mr. Arman further stated in that declaration (at 5): "De-  
23 fendant Aventis (formerly Rhône-Poulenc and Stauffer) actively mined the Massive Sulfide ore  
24 bodies.... IMMI and myself have never actively mined the Massive Sulfide ore bodies.... IMMI  
25 and I are not responsible for the damage to the property, which caused the AMD condition. Thus, it  
26 is factually and legally incorrect when the Settling parties allege that I am 22% responsible for the  
27 liability and Site costs."

28 **878.** Any Expected or Desired Amendment of Pleadings

1 **879.** A. Plaintiffs' Statement

2 **880.** Plaintiffs do not anticipate amending their pleadings at this point. Defendants evidently intend  
3 to file amended answers to the respective complaints the United States and the State plaintiffs.

4 Plaintiffs would object to defendants' attempt to amend their answers for two reasons. First, defen-  
5 dants' current answers to the complaints contain a recoupment defense, which Judge Schwartz ear-  
6 lier determined may be deemed a counterclaim. See *United States, et al. v. Iron Mountain Mines,*  
7 *Inc., et al.*, 812 F. Supp. 1528, 1552 (E.D. Cal. 1992). However, this Court in a 1995 ruling held  
8 that defendants' "recoupment claims" could not be maintained in the face of the federal govern-  
9 ment's sovereign immunity and the State's Eleventh Amendment immunity. 881 F. Supp. 1432,  
10 1456-57 & n.43 (E.D. Cal. 1995).<sup>2/</sup> Accordingly, proposed amendments to bring claims for set-off  
11 would be both unnecessary and futile.

12 Second, as noted above, defendants' view of the scope of the December 2000 settlement with  
13 Rhône-Poulenc is dramatically flawed and cannot give rise to any claim or defense against the  
14 plaintiffs.

15 **881.** B. Defendants' Statement

16 **882.** Defendants anticipate filing a motion for leave to amend and supplement their answer in or-  
17 der to allege at least one additional affirmative defense, including the following: that the settlement  
18 embodied in this Court's December 13, 2000, consent decree has fully satisfied plaintiffs' mone-  
19 tary claims in this action against defendants, at least to date and for the foreseeable future. Defen-  
20 dants are presently studying their current pleadings to determine whether any further amendments  
21 would be appropriate, even if necessary only to preserve the record on appeal with respect to prior  
22 rulings by this Court. Defendants will prepare the amended and supplemental answer and seek  
23 plaintiffs' stipulation that it may be filed without necessity of a formal motion.

24 **883.** Since Plaintiffs already obtained a ruling on defendants' liability on October 1, 2002, Plain-  
25 tiffs anticipate moving for summary judgment as to the amount of response costs each is owed.  
26 Plaintiffs further anticipate that a scheduling conference may be required to discuss this and other  
27 matters set out below. Plaintiffs do object to defendants' stated desire to take discovery concerning  
28 the 2000 settlement with Rhône-Poulenc; such discovery amounts to a collateral attack on the set-

1 tlement, which defendants previously did not oppose although they were given ample opportunity  
2 to do so.

3 **884.** VIII. Future Proceedings

4 **885.** A. Plaintiffs' Statement

5 As noted, Plaintiffs have already obtained a ruling on defendants' liability. All that remains is to  
6 determine the amount of response costs due the governments. Plaintiffs believe that determination  
7 can be made on summary judgment, especially given the Court's prior ruling on the appropriate-  
8 ness of administrative record review in this case, see *United States v. Iron Mountain Mines, Inc.*,  
9 987 F. Supp. 1250 (E.D. Cal. 1997), as well as *State of California, On behalf of the Department of*  
10 *Toxic Substances Control v. Alco Pacific*, 317 F.Supp.2d 1188 (2004) (DTSC costs reviewable on  
11 the record). At the same time, plaintiffs recognize that limited discovery may be appropriate before  
12 such a motion may be brought. Again, these issues may need to be addressed at a scheduling con-  
13 ference.

14 **886. Therefore it is clear that the EPA was conducting this CERCLA lien proceeding with**  
15 **ulterior government motives, and was furthermore committing a willful act in a wrongful**  
16 **manner. The EPA conduct was clearly designed to inflict harm and damage the plaintiffs.**

17 **887.** Restatement Second of Torts, section 682 provides: "One who uses a legal process, whether  
18 criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is  
19 subject to liability to the other for harm caused by the abuse of process."

20 **888.** "Malicious prosecution and abuse of process are distinct. The former concerns a meritless  
21 lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords  
22 litigants once they are in a lawsuit (regardless of whether there was probable cause to commence  
23 that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or exces-  
24 sive attachments or improper use of discovery." (*Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 40 [23  
25 Cal.Rptr.2d 251], internal citations omitted.)

26 **889.** "The gist of the tort is the misuse of the power of the court: It is an act done under the author-  
27 ity of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process  
28 to the accomplishment of an improper purpose. Some definite act or threat not authorized by the

1 process or aimed at an objective not legitimate in the use of the process is required. And, generally,  
2 an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this  
3 reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to  
4 the tort." (Younger v. Solomon (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113], internal cita-  
5 tions omitted.)

6 **890.** "Process is action taken pursuant to judicial authority. It is not action taken without reference  
7 to the power of the court." (Adams v. Superior Court (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d  
8 49].)

9 **891.** "The term 'process' as used in the tort of abuse of process has been broadly interpreted to en-  
10 compass the entire range of procedures incident to litigation. . . . This broad reach of the 'abuse of  
11 process' tort can be explained historically, since the tort evolved as a 'catch-all' category to cover  
12 improper uses of the judicial machinery that did not fit within the earlier established, but narrowly  
13 circumscribed, action of malicious prosecution." (Younger, supra, 38 Cal.App.3d at p. 296, internal  
14 citations omitted.)

15 **892.** " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage,  
16 not properly involved in the proceeding itself, such as the surrender of property or the payment of  
17 money, by the use of the process as a threat or a club.' " (Spellens v. Spellens (1957) 49 Cal.2d 210,  
18 232-233 [317 P.2d 613], internal citation omitted.)

19 **893.** "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a  
20 result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does  
21 not constitute an ulterior or improper motive." (Ion Equipment Corp. v. Nelson (1980) 110  
22 Cal.App.3d 868, 876 [168 Cal.Rptr. 361], internal citations omitted.)

23 **894.** "Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a  
24 misuse of the judicial process for a purpose other than that which it was intended to serve. The gist  
25 of the tort is the improper use of the process after it is issued." (Adams, supra, 2 Cal.App.4th at pp.  
26 530-531, internal citations omitted.)

27 **895.** " 'Some definite act or threat not authorized by the process, or aimed at an objective not  
28 legitimate in the use of the process, is required; and here is no liability where the defendant has

1 done nothing more than carry out the process to its authorized conclusion, even though with bad  
2 intentions." ' ' (Clark Equipment Co. v. Wheat (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874],  
3 internal citations omitted.)

4 **896.** Civil Code section 47 provides, in part, that a privileged publication or broadcast is one made  
5 "(b) . . . (2) in any judicial proceeding." The privilege applies to statements that are (1) made in ju-  
6 dicial or quasi-judicial proceedings, (2) by litigants or other participants authorized by law, (3) to  
7 achieve the objects of the litigation, and (4) that [have] some connection or logical relation to the  
8 action." (Kimmel v. Goland (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)

9 **897.** "[T]he scope of 'publication or broadcast' includes noncommunicative conduct like the filing  
10 of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic's lien. The  
11 privilege also applies to conduct or publications occurring outside the courtroom, to conduct or  
12 publications which are legally deficient for one reason or another, and even to malicious or fraudu-  
13 lent conduct or publications." (O'Keefe v. Kompa (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d  
14 602], internal citations omitted.)

15 **898.** "[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prose-  
16 cution while still applying the privilege to abuse of process causes of action." (Abraham v. Lancas-  
17 ter Community Hospital (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360].)

18 **899.** "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the  
19 tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit. Sim-  
20 ply filing a lawsuit for an improper purpose is not abuse of process." (Trear v. Sills (1999) 69  
21 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281], internal citations omitted.)

22 **900.** [T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an  
23 act done in the name of the court and under its authority for the purpose of perpetrating an injus-  
24 tice.' We have located no authority extending the tort of abuse of process to administrative proceed-  
25 ings. Application of the tort to administrative proceedings would not serve the purpose of the tort,  
26 which is to preserve the integrity of the court." (Stolz v. Wong Communications Ltd. Partnership  
27 (1994) 25 Cal.App.4th 1811, 1822-1823 [31 Cal.Rptr.2d 229], internal citations omitted.)

28 **Therefore, the damage was intentional and with malice, fraud, oppression, and deceit**



1 **CONCLUSION**

2 **901.** Wherefore, petitioners have established the necessary elements of: (a) bonafide termination of  
3 litigation, (b) absence of probable cause, (c) malice, and (d) damage to plaintiffs, to show abuse of  
4 process. Further, since the fraudulent lien of \$51 million dollars and the stigmatic injury of  
5 CERCLA liability were perpetrated to intentionally damage the plaintiffs and prevent their business  
6 opportunities and deny them the means to implement the actual remedy by fraud upon the court, a  
7 special injury rising to malicious prosecution exists.

8 **902. The clear presence of malicious government motives in these intentional and fraudulent**  
9 **actions is the hallmark of tyranny and despotism, and the incontrovertible facts of vindictive**  
10 **actions and illegitimate animus rise to unconstitutional and unconscionable abuses of process**  
11 **and deceit under color of law and fraud upon the Court with negligently arbitrary endan-**  
12 **germent.**

13 **STRIKE THE LIENS! SPECIAL INJURIES! MERITLESS PROSECUTION!**

14 **CITIZEN SUIT!**

15 **903.** To the extent that any inadvertence may present an obstacle to that purpose, Plaintiffs refer to  
16 the publications of the California Judicial Counsel, summarized to wit:  
17

18 **904.** The State of California Judicial Counsel has, through published materials addressed the need  
19 of the Judiciary to act in the interests of fairness to self-represented litigants. The California rules  
20 express a preference for resolution of every case on the merits, even if resolution requires excusing  
21 inadvertence by a pro se litigant that would otherwise result in a dismissal. The Judicial Counsel  
22 justifies this position based on the idea that "Judges are charged with ascertaining the truth, not just  
23 playing referee... A lawsuit is not a game, where the party with the cleverest lawyer prevails  
24 regardless of the merits." It suggests "the court should take whatever measures may be reasonable  
25 and necessary to insure a fair trial"

26 **905. In consideration of the gravity of the Absolute Orders, the First Amended Complaint**  
27 **and Special Injury Writ of Error *Coram Nobis*; Plaintiffs refer to our founding fathers, Court**  
28 **precedent, and the wisdom of our constitution, that "We the People do Ordain", to wit:**

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

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

14 There is no position which depends on clearer principles, than that **every act of a delegated au-**  
15 **thority, contrary to the tenor of the commission under which it is exercised, is void. No legis-**  
16 **lative act, therefore, contrary to the Constitution, can be valid.** To deny this, would be to af-  
17 firm, that the deputy is greater than his principal; that the servant is above his master; that the rep-  
18 resentatives of the people are superior to the people themselves; that men acting by virtue of pow-  
19 ers, may do not only what their powers do not authorize, but what they forbid.”

20 “If it be said that the legislative body are themselves the constitutional judges of their own powers,  
21 and that the construction they put upon them is conclusive upon the other departments, it may be  
22 answered, that this **cannot be the natural presumption, where it is not to be collected from any**  
23 **particular provisions in the Constitution. It is not otherwise to be supposed, that the Consti-**  
24 **tution could intend to enable the representatives of the people to substitute their will to that**  
25 **of their constituents. It is far more rational to suppose, that the courts were designed to be an**  
26 **intermediate body between the people and the legislature, in order, among other things, to**  
27 **keep the latter within the limits assigned to their authority.** The interpretation of the laws is the  
28 proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the

1 judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the  
2 meaning of any particular act proceeding from the legislative body. **If there should happen to be**  
3 **an irreconcilable variance between the two, that which has the superior obligation and valid-**  
4 **ity ought, of course, to be preferred; or, in other words, the Constitution ought to be pre-**  
5 **ferred to the statute, the intention of the people to the intention of their agents”.**

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

24 **Federalist No. 78: Alexander Hamilton.**

25 **907. Plaintiffs demand by Original Absolute Order an Answer to the First Amended Com-**  
26 **plaint.**

27 **908. In the matter of Marbury v. Madison, it was laid down that:**  
28

1 The clerks of the Department of State of the United States may be called upon to give evidence of  
2 transactions in the Department which are not of a confidential character.

3 **909.** The Secretary of State cannot be called upon as a witness to state transactions of a confiden-  
4 tial nature which may have occurred in his Department. But he may be called upon to give testi-  
5 mony of circumstances which were not of that character.

6 **910.** Clerks in the Department of State were directed to be sworn, subject to objections to ques-  
7 tions upon confidential matters.

8 **911.** Some point of time must be taken when the power of the Executive over an officer, not re-  
9 movable at his will, must cease. That point of time must be when the constitutional power of ap-  
10 pointment has been exercised. And the power has been exercised when the last act required from  
11 the person possessing the power has been performed. This last act is the signature of the commis-  
12 sion.

13 **912.** If the act of livery be necessary to give validity to the commission of an officer, it has been  
14 delivered when executed, and given to the Secretary of State for the purpose of being sealed, re-  
15 corded, and transmitted to the party.

16 **913.** In cases of commissions to public officers, the law orders the Secretary of State to record  
17 them. When, therefore, they are signed and sealed, the order for their being recorded is given, and,  
18 whether inserted into the book or not, they are recorded.

19 **914.** When the heads of the departments of the Government are the political or confidential offi-  
20 cers of the Executive, merely to execute the will of the President, or rather to act in cases in which  
21 the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear  
22 than that their acts are only politically examinable. But where a specific duty is assigned by law,  
23 and individual rights depend upon the performance of that duty, it seems equally clear that the in-  
24 dividual who considers himself injured has a right to resort to the laws of his country for a remedy.

25 **915.** The President of the United States, by signing the commission, appointed Mr. Marbury a jus-  
26 tice of the peace for the County of Washington, in the District of Columbia, and the seal of the  
27 United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the  
28 signature, and of the completion of the appointment; and the appointment conferred on him a legal

1 right to the office for the space of five years. Having this legal right to the office, he has a conse-  
2 quent right to the commission, a refusal to deliver which is a plain violation of that right for which  
3 the laws of the country afford him a remedy.

4 **916.** To render a mandamus a proper remedy, the officer to whom it is directed must be one to  
5 whom, on legal principles, such writ must be directed, and the person applying for it must be with-  
6 out any other specific remedy.

7 **917.** Where a commission to a public officer has been made out, signed, and sealed, and is with-  
8 held from the person entitled to it, an action of detinue for the commission against the Secretary of  
9 State who refuses to deliver it is not the proper remedy, as the judgment in detinue is for the thing  
10 itself, or its value. The value of a public office, not to be sold, is incapable of being ascertained. It  
11 is a plain case for a mandamus, either to deliver the commission or a copy of it from the record.

12 **918. You are commanded by 1086, 1088, and 1094 of the Code of Civil Procedure to issue**  
13 **the Writs. Pursuant to 1107 of the Code, you may grant such relief *ex parte* to compel the**  
14 **admission of the Petitioner to the use and enjoyment of the right and office.**

15 **919.** To enable the Court to issue a mandamus to compel the delivery of the commission of a pub-  
16 lic office by the Secretary of State, it must be shown that it is an exercise of appellate jurisdiction,  
17 or that it be necessary to enable them to exercise appellate jurisdiction. It is the essential criterion  
18 of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted,  
19 and does not create the cause.

20 **920.** The authority given to the Supreme Court by the act establishing the judicial system of the  
21 United States to issue writs of mandamus to private officers appears to be warranted by the Consti-  
22 tution.

23 **921.** It is emphatically the duty of the Judicial Department to say what the law is. Those who apply  
24 the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict  
25 with each other, the Court must decide on the operation of each.

26 **922.** If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of  
27 the legislature, the Constitution, and not such ordinary act, must govern the case to which they both  
28 apply.

1 **923.** At the December Term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe,  
2 and William Harper, by their counsel, severally moved the court for a rule to James Madison, Sec-  
3 retary of State of the United States, to show cause why a mandamus should not issue commanding  
4 him to cause to be delivered to them respectively their several commissions as justices of the peace  
5 in the District of Columbia. This motion was supported by affidavits of the following facts: that  
6 notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the  
7 United States, nominated the applicants to the Senate for their advice and consent to be appointed  
8 justices of the peace of the District of Columbia; that the Senate advised and consented to the ap-  
9 pointments; that commissions in due form were signed by the said President appointing them jus-  
10 tices, &c., and that the seal of the United States was in due form affixed to the said commissions by  
11 the Secretary of State; that the applicants have requested Mr. Madison to deliver them their said  
12 commissions, who has not complied with that request; and that their said commissions are withheld  
13 from them; that the applicants have made application to Mr. Madison as Secretary of State of the  
14 United States at his office, for information whether the commissions were signed and sealed as  
15 aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry,  
16 either by the Secretary of State or any officer in the Department of State; that application has been  
17 made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the  
18 advice and consent of the Senate, who has declined giving such a certificate; whereupon a rule was  
19 made to show cause on the fourth day of this term. This rule having been duly served, Mr. Jacob  
20 Wagner and Mr. Daniel Brent, who had been summoned to attend the court and were required to  
21 give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and  
22 not bound to disclose any facts relating to the business or transactions of the office.

23 **924.** The court ordered the witnesses to be sworn, and their answers taken in writing, but informed  
24 them that, when the questions were asked, they might state their objections to answering each par-  
25 ticular question, if they had any.

26 **925.** Mr. Lincoln, who had been the acting Secretary of State, when the circumstances stated in the  
27 affidavits occurred, was called upon to give testimony. He objected to answering. The questions  
28 were put in writing.

1 **926.** The court said there was nothing confidential required to be disclosed. If there had been, he  
2 was not obliged to answer it, and if he thought anything was communicated to him confidentially,  
3 he was not bound to disclose, nor was he obliged to state anything which would criminate himself.  
4 The questions argued by the counsel for the relators were, 1. Whether the Supreme Court can  
5 award the writ of mandamus in any case. 2. Whether it will lie to a Secretary of State, in any case  
6 whatever. 3. Whether, in the present case, the Court may award a mandamus to James Madison,  
7 Secretary of State.

8 Mr. Chief Justice MARSHALL delivered the opinion of the Court.

9 **927.** “At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this  
10 case requiring the Secretary of State to show cause why a mandamus should not issue directing him  
11 to deliver to William Marbury his commission as a justice of the peace for the county of Washing-  
12 ton, in the District of Columbia.

13 **928.** No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy  
14 of this case, the novelty of some of its circumstances, and the real difficulty attending the points  
15 which occur in it require a complete exposition of the principles on which the opinion to be given  
16 by the Court is founded.

17 **929.** These principles have been, on the side of the applicant, very ably argued at the bar. In ren-  
18 dering the opinion of the Court, there will be some departure in form, though not in substance, from  
19 the points stated in that argument.

20 **930.** In the order in which the Court has viewed this subject, the following questions have been  
21 considered and decided.

- 22 1. Has the applicant a right to the commission he demands?
- 23 2. If he has a right, and that right has been violated, do the laws of his country afford him a rem-  
24 edy?
- 25 3. If they do afford him a remedy, is it a mandamus issuing from this court?

26 The first object of inquiry is:

- 27 1. Has the applicant a right to the commission he demands?
- 28



1 His right originates in an act of Congress passed in February, 1801, concerning the District of Co-  
2 lumbia.

3 After dividing the district into two counties, the eleventh section of this law enacts,  
4 "that there shall be appointed in and for each of the said counties such number of discreet persons  
5 to be justices of the peace as the President of the United States shall, from time to time, think expe-  
6 dient, to continue in office for five years. "

7 It appears from the affidavits that, in compliance with this law, a commission for William Marbury  
8 as a justice of peace for the County of Washington was signed by John Adams, then President of  
9 the United States, after which the seal of the United States was affixed to it, but the commission has  
10 never reached the person for whom it was made out.

11 In order to determine whether he is entitled to this commission, it becomes necessary to inquire  
12 whether he has been appointed to the office. For if he has been appointed, the law continues him in  
13 office for five years, and he is entitled to the possession of those evidences of office, which, being  
14 completed, became his property.

15 The second section of the second article of the Constitution declares,

16 **931.** "The President shall nominate, and, by and with the advice and consent of the Senate, shall  
17 appoint ambassadors, other public ministers and consuls, and all other officers of the United States,  
18 whose appointments are not otherwise provided for."

19 **932.** The third section declares, that "He shall commission all the officers of the United States."

20 An act of Congress directs the Secretary of State to keep the seal of the United States,  
21 "to make out and record, and affix the said seal to all civil commissions to officers of the United  
22 States to be appointed by the President, by and with the consent of the Senate, or by the President  
23 alone; provided that the said seal shall not be affixed to any commission before the same shall have  
24 been signed by the President of the United States."

25 **933.** These are the clauses of the Constitution and laws of the United States which affect this part  
26 of the case. They seem to contemplate three distinct operations:

27 1. The nomination. This is the sole act of the President, and is completely voluntary.  
28

1 2. The appointment. This is also the act of the President, and is also a voluntary act, though it can  
2 only be performed by and with the advice and consent of the Senate.

3 3. The commission. To grant a commission to a person appointed might perhaps be deemed a duty  
4 enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the  
5 United States."

6 **934.** The acts of appointing to office and commissioning the person appointed can scarcely be con-  
7 sidered as one and the same, since the power to perform them is given in two separate and distinct  
8 sections of the Constitution. The distinction between the appointment and the commission will be  
9 rendered more apparent by adverting to that provision in the second section of the second article of  
10 the Constitution which authorizes Congress

11 "to vest by law the appointment of such inferior officers as they think proper in the President alone,  
12 in the Courts of law, or in the heads of departments;"

13 thus contemplating cases where the law may direct the President to commission an officer ap-  
14 pointed by the Courts or by the heads of departments. In such a case, to issue a commission would  
15 be apparently a duty distinct from the appointment, the performance of which perhaps could not  
16 legally be refused.

17 **935.** Although that clause of the Constitution which requires the President to commission all the  
18 officers of the United States may never have been applied to officers appointed otherwise than by  
19 himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of conse-  
20 quence, the constitutional distinction between the appointment to an office and the commission of  
21 an officer who has been appointed remains the same as if in practice the President had commis-  
22 sioned officers appointed by an authority other than his own.

23 **936.** It follows too from the existence of this distinction that, if an appointment was to be evi-  
24 denced by any public act other than the commission, the performance of such public act would cre-  
25 ate the officer, and if he was not removable at the will of the President, would either give him a  
26 right to his commission or enable him to perform the duties without it.

27 These observations are premised solely for the purpose of rendering more intelligible those which  
28 apply more directly to the particular case under consideration.

1 **937. (This is an appointment made by Original Absolute Order of a Grantee, without advice**  
2 **or consent, and is evidenced by no act but the commission itself.)**

3 **938.** This is an appointment made by the President, by and with the advice and consent of the Sen-  
4 ate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission  
5 and the appointment seem inseparable, it being almost impossible to show an appointment other-  
6 wise than by proving the existence of a commission; still, the commission is not necessarily the ap-  
7 pointment; though conclusive evidence of it.

8 **939.** But at what stage does it amount to this conclusive evidence?

9 **940.** The answer to this question seems an obvious one. The appointment, being the sole act of the  
10 President, must be completely evidenced when it is shown that he has done everything to be per-  
11 formed by him.

12 **941.** Should the commission, instead of being evidence of an appointment, even be considered as  
13 constituting the appointment itself, still it would be made when the last act to be done by the Presi-  
14 dent was performed, or, at furthest, when the commission was complete.

15 **942.** The last act to be done by the President is the signature of the commission. He has then acted  
16 on the advice and consent of the Senate to his own nomination. The time for deliberation has then  
17 passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his  
18 nomination, has been made, and the officer is appointed. This appointment is evidenced by an  
19 open, unequivocal act, and, being the last act required from the person making it, necessarily ex-  
20 cludes the idea of its being, so far as it respects the appointment, an inchoate and incomplete trans-  
21 action.

22 **943.** Some point of time must be taken when the power of the Executive over an officer, not re-  
23 movable at his will, must cease. That point of time must be when the constitutional power of ap-  
24 pointment has been exercised. And this power has been exercised when the last act required from  
25 the person possessing the power has been performed. This last act is the signature of the commis-  
26 sion. This idea seems to have prevailed with the Legislature when the act passed converting the  
27 Department of Foreign Affairs into the Department of State. By that act, it is enacted that the Sec-  
28 retary of State shall keep the seal of the United States,

1 "and shall make out and record, and shall affix the said seal to all civil commissions to officers of  
2 the United States, to be appointed by the President: . . . provided that the said seal shall not be af-  
3 fixed to any commission before the same shall have been signed by the President of the United  
4 States, nor to any other instrument or act without the special warrant of the President therefor."

5 **944. The signature is a warrant for affixing the great seal to the commission, and the great**  
6 **seal is only to be affixed to an instrument which is complete.** It attests, by an act supposed to be  
7 of public notoriety, the verity of the Presidential signature.

8 **945.** It is never to be affixed till the commission is signed, because the signature, which gives force  
9 and effect to the commission, is conclusive evidence that the appointment is made.

10 **946. The commission being signed, the subsequent duty of the Secretary of State is pre-**  
11 **scribed by law, and not to be guided by the will of the President. He is to affix the seal of the**  
12 **United States to the commission, and is to record it.**

13 **947.** This is not a proceeding which may be varied if the judgment of the Executive shall suggest  
14 one more eligible, but is a precise course accurately marked out by law, and is to be strictly pur-  
15 sued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the  
16 United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at  
17 the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act  
18 which the law enjoins on a particular officer for a particular purpose.

19 **948.** If it should be supposed that the solemnity of affixing the seal is necessary not only to the va-  
20 lidity of the commission, but even to the completion of an appointment, still, when the seal is af-  
21 fixed, the appointment is made, and the commission is valid. No other solemnity is required by  
22 law; no other act is to be performed on the part of government. All that the Executive can do to in-  
23 vest the person with his office is done, and unless the appointment be then made, the Executive  
24 cannot make one without the cooperation of others.

25 **949.** After searching anxiously for the principles on which a contrary opinion may be supported,  
26 none has been found which appear of sufficient force to maintain the opposite doctrine.

1 Such as the imagination of the Court could suggest have been very deliberately examined, and after  
2 allowing them all the weight which it appears possible to give them, they do not shake the opinion  
3 which has been formed.

4 **950.** In considering this question, it has been conjectured that the commission may have been as-  
5 similated to a deed to the validity of which delivery is essential.

6 **951.** This idea is founded on the supposition that the commission is not merely evidence of an ap-  
7 pointment, but is itself the actual appointment -- a supposition by no means unquestionable. But,  
8 for the purpose of examining this objection fairly, let it be conceded that the principle claimed for  
9 its support is established.

10 **952.** The appointment being, under the Constitution, to be made by the President personally, the  
11 delivery of the deed of appointment, if necessary to its completion, must be made by the President  
12 also. It is not necessary that the livery should be made personally to the grantee of the office; it  
13 never is so made. The law would seem to contemplate that it should be made to the Secretary of  
14 State, since it directs the secretary to affix the seal to the commission after it shall have been signed  
15 by the President. If then the act of livery be necessary to give validity to the commission, it has  
16 been delivered when executed and given to the Secretary for the purpose of being sealed, recorded,  
17 and transmitted to the party.

18 **953. But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President and the seal of the United States are those solemnities. This objection therefore does not touch the case.**

22 **954.** It has also occurred as possible, and barely possible, that the transmission of the commission  
23 and the acceptance thereof might be deemed **necessary to complete the right of the plaintiff.**

24 The transmission of the commission is a practice directed by convenience, but not by law. It cannot  
25 therefore be necessary to constitute the appointment, which must precede it and which is the mere  
26 act of the President. If the Executive required that every person appointed to an office should him-  
27 self take means to procure his commission, the appointment would not be the less valid on that ac-  
28 count. The appointment is the sole act of the President; the transmission of the commission is the

1 sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circum-  
2 stances which can have no influence on the appointment. A commission is transmitted to a person  
3 already appointed, not to a person to be appointed or not, as the letter enclosing the commission  
4 should happen to get into the post office and reach him in safety, or to miscarry.

5 It may have some tendency to elucidate this point to inquire whether **the possession of the original**  
6 **commission be indispensably necessary to authorize a person appointed to any office to per-**  
7 **form the duties of that office.** If it was necessary, then a loss of the commission would lose the  
8 office. Not only negligence, but accident or fraud, fire or theft might deprive an individual of his  
9 office. In such a case, I presume it could not be doubted but that a copy from the record of the Of-  
10 fice of the Secretary of State would be, to every intent and purpose, equal to the original. The act of  
11 Congress has expressly made it so. To give that copy validity, it would not be necessary to prove  
12 that the original had been transmitted and afterwards lost. The copy would be complete evidence  
13 that the original had existed, and that the appointment had been made, but not that the original had  
14 been transmitted. If indeed it should appear that the original had been mislaid in the Office of State,  
15 that circumstance would not affect the operation of the copy. **When all the requisites have been**  
16 **performed which authorize a recording officer to record any instrument whatever, and the**  
17 **order for that purpose has been given, the instrument is in law considered as recorded,** al-  
18 though the manual labour of inserting it in a book kept for that purpose may not have been per-  
19 formed.

20 **955. In the case of commissions, the law orders the Secretary of State to record them. When,**  
21 **therefore, they are signed and sealed, the order for their being recorded is given, and,**  
22 **whether inserted in the book or not, they are in law recorded.**

23 **956.** A copy of this record is declared equal to the original, and the fees to be paid by a person re-  
24 quiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commis-  
25 sion which has been recorded? Or can he refuse a copy thereof to a person demanding it on the  
26 terms prescribed by law?

27 **957.** Such a copy would, equally with the original, authorize the justice of peace to proceed in the  
28 performance of his duty, because it would, equally with the original, attest his appointment.

1 **If the transmission of a commission be not considered as necessary to give validity to an ap-**  
2 **pointment, still less is its acceptance. The appointment is the sole act of the President; the ac-**  
3 **ceptance is the sole act of the officer, and is, in plain common sense, posterior to the appoint-**  
4 **ment. As he may resign, so may he refuse to accept; but neither the one nor the other is capa-**  
5 **ble of rendering the appointment a nonentity.**

6 **958. That this is the understanding of the government is apparent from the whole tenor of its**  
7 **conduct.**

8 **959.** A commission bears date, and the salary of the officer commences from his appointment, not  
9 from the transmission or acceptance of his commission. When a person appointed to any office re-  
10 fuses to accept that office, the successor is nominated in the place of the person who has declined  
11 to accept, and not in the place of the person who had been previously in office and had created the  
12 original vacancy.

13 **960. It is therefore decidedly the opinion of the Court that, when a commission has been**  
14 **signed by the President, the appointment is made, and that the commission is complete when**  
15 **the seal of the United States has been affixed to it by the Secretary of State.**

16 **961.** Where an officer is removable at the will of the Executive, the circumstance which completes  
17 his appointment is of no concern, because the act is at any time revocable, and the commission may  
18 be arrested if still in the office. But when the officer is not removable at the will of the Executive,  
19 the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot  
20 be resumed.

21 **962.** The discretion of the Executive is to be exercised until the appointment has been made. But  
22 having once made the appointment, his power over the office is terminated in all cases, where by  
23 law the officer is not removable by him. **The right to the office is then in the person appointed,**  
24 **and he has the absolute, unconditional power of accepting or rejecting it.**

25 **963.** Mr. Marbury, then, since his commission was signed by the President and sealed by the Sec-  
26 retary of State, was appointed, and as the law creating the office gave the officer a right to hold for  
27 five years independent of the Executive, the appointment was not revocable, but vested in the offi-  
28 cer legal rights which are protected by the laws of his country.



1 To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but  
2 violative of a vested legal right.

3 **964. This brings us to the second inquiry, which is:**

4 **2. If he has a right, and that right has been violated, do the laws of his country afford him a**  
5 **remedy?**

6 **965.** The very essence of civil liberty certainly consists in the right of every individual to claim the  
7 protection of the laws whenever he receives an injury. One of the first duties of government is to  
8 afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition,  
9 and he never fails to comply with the judgment of his court.

10 **966.** In the third volume of his Commentaries, page 23, Blackstone states two cases in which a  
11 remedy is afforded by mere operation of law.

12 "In all other cases," he says,

13 **967. "it is a general and indisputable rule that where there is a legal right, there is also a le-**  
14 **gal remedy by suit or action at law whenever that right is invaded."**

15 And afterwards, page 109 of the same volume, he says,

16 **968.** "I am next to consider such injuries as are cognizable by the Courts of common law. And  
17 herein I shall for the present only remark that all possible injuries whatsoever that did not fall  
18 within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals are, for  
19 that very reason, within the cognizance of the common law courts of justice, for **it is a settled and**  
20 **invariable principle in the laws of England that every right, when withheld, must have a rem-**  
21 **edy, and every injury its proper redress."**

22 **969.** The Government of the United States has been emphatically termed a government of laws,  
23 and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy  
24 for the violation of a vested legal right.

25 **970.** If this obloquy is to be cast on the jurisprudence of our country, it must arise from the pecu-  
26 liar character of the case.

27 **971.** It behooves us, then, to inquire whether there be in its composition any ingredient which shall  
28 exempt from legal investigation or exclude the injured party from legal redress. In pursuing this

1 inquiry, the first question which presents itself is whether this can be arranged with that class of  
2 cases which come under the description of *damnum absque injuria* -- a loss without an injury.  
3 This description of cases never has been considered, and, it is believed, never can be considered, as  
4 **comprehending offices of trust, of honour or of profit.** The office of justice of peace in the Dis-  
5 trict of Columbia is such an office; it is therefore worthy of the attention and guardianship of the  
6 laws. It has received that attention and guardianship. It has been created by special act of Congress,  
7 and has been secured, so far as the laws can give security to the person appointed to fill it, for five  
8 years. **It is not then on account of the worthlessness of the thing pursued that the injured**  
9 **party can be alleged to be without remedy.**

10 **972.** Is it in the nature of the transaction? Is the act of delivering or withholding a commission to  
11 be considered as a mere political act belonging to the Executive department alone, for the perform-  
12 ance of which entire confidence is placed by our Constitution in the Supreme Executive, and for  
13 any misconduct respecting which the injured individual has no remedy?

14 **973.** That there may be such cases is not to be questioned, but that every act of duty to be per-  
15 formed in any of the great departments of government constitutes such a case is not to be admitted.  
16 By the act concerning invalids, passed in June, 1794, the Secretary at War is ordered to place on  
17 the pension list all persons whose names are contained in a report previously made by him to Con-  
18 gress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be con-  
19 tended that where the law, in precise terms, directs the performance of an act in which an individ-  
20 ual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the  
21 character of the person against whom the complaint is made? **Is it to be contended that the heads**  
22 **of departments are not amenable to the laws of their country?**

23 **974.** **Whatever the practice on particular occasions may be, the theory of this principle will**  
24 **certainly never be maintained.**

25 **975.** **No act of the Legislature confers so extraordinary a privilege, nor can it derive counte-**  
26 **nance from the doctrines of the common law.**

27 **976.** After stating that personal injury from the King to a subject is presumed to be impossible,  
28 Blackstone, Vol. III. p. 255, says,

1 977. "but injuries to the rights of property can scarcely be committed by the Crown without the  
2 intervention of its officers, for whom, the law, in matters of right, entertains no respect or delicacy,  
3 but furnishes various methods of detecting the errors and misconduct of those agents by whom the  
4 King has been deceived and induced to do a temporary injustice."

5 978. By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky  
6 river, the purchaser, on paying his purchase money, becomes completely entitled to the property  
7 purchased, and, on producing to the Secretary of State the receipt of the treasurer upon a certificate  
8 required by the law, the President of the United States is authorized to grant him a patent. It is fur-  
9 ther enacted that all patents shall be countersigned by the Secretary of State, and recorded in his  
10 office. If the Secretary of State should choose to withhold this patent, or, the patent being lost,  
11 should refuse a copy of it, **can it be imagined that the law furnishes to the injured person no**  
12 **remedy?**

13 979. **It is not believed that any person whatever would attempt to maintain such a proposi-**  
14 **tion.**

15 980. It follows, then, that the question whether the legality of an act of the head of a department be  
16 examinable in a court of justice or not must always depend on the nature of that act.  
17 If some acts be examinable and others not, there must be some rule of law to guide the Court in the  
18 exercise of its jurisdiction.

19 981. In some instances, there may be difficulty in applying the rule to particular cases; but there  
20 cannot, it is believed, be much difficulty in laying down the rule.

21 982. By the Constitution of the United States, the President is invested with certain important po-  
22 litical powers, in the exercise of which he is to use his own discretion, and is accountable only to  
23 his country in his political character and to his own conscience. To aid him in the performance of  
24 these duties, he is authorized to appoint certain officers, who act by his authority and in conformity  
25 with his orders.

26 983. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner  
27 in which executive discretion may be used, still there exists, and can exist, no power to control that  
28 discretion. The subjects are political. They respect the nation, not individual rights, and, being en-

1 trusted to the Executive, the decision of the Executive is conclusive. The application of this remark  
2 will be perceived by adverting to the act of Congress for establishing the Department of Foreign  
3 Affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of  
4 the President. He is the mere organ by whom that will is communicated. The acts of such an offi-  
5 cer, as an officer, can never be examinable by the Courts.

6 **984. But when the Legislature proceeds to impose on that officer other duties; when he is di-**  
7 **rected peremptorily to perform certain acts; when the rights of individuals are dependent on**  
8 **the performance of those acts; he is so far the officer of the law, is amenable to the laws for**  
9 **his conduct, and cannot at his discretion, sport away the vested rights of others.**

10 **985.** The conclusion from this reasoning is that, where the heads of departments are the political or  
11 confidential agents of the Executive, merely to execute the will of the President, or rather to act in  
12 cases in which the Executive possesses a constitutional or legal discretion, nothing can be more  
13 perfectly clear than that their acts are only politically examinable. **But where a specific duty is**  
14 **assigned by law, and individual rights depend upon the performance of that duty, it seems**  
15 **equally clear that the individual who considers himself injured has a right to resort to the**  
16 **laws of his country for a remedy.**

17 **986.** If this be the rule, let us inquire how it applies to the case under the consideration of the  
18 Court.

19 **987.** The power of nominating to the Senate, and the power of appointing the person nominated,  
20 are political powers, to be exercised by the President according to his own discretion. When he has  
21 made an appointment, he has exercised his whole power, and his discretion has been completely  
22 applied to the case. If, by law, the officer be removable at the will of the President, then a new ap-  
23 pointment may be immediately made, and the rights of the officer are terminated. But as a fact  
24 which has existed cannot be made never to have existed, the appointment cannot be annihilated,  
25 and consequently, **if the officer is by law not removable at the will of the President, the rights**  
26 **he has acquired are protected by the law, and are not resumable by the President. They can-**  
27 **not be extinguished by Executive authority, and he has the privilege of asserting them in like**  
28 **manner as if they had been derived from any other source.**

1 **988.** The question whether a right has vested or not is, in its nature, judicial, and must be tried by  
2 the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate and pro-  
3 ceeded to act as one, in consequence of which a suit had been instituted against him in which his  
4 defense had depended on his being a magistrate; the validity of his appointment must have been  
5 determined by judicial authority.

6 **989.** So, if he conceives that, by virtue of his appointment, he has a legal right either to the com-  
7 mission which has been made out for him or to a copy of that commission, it is equally a question  
8 examinable in a court, and the decision of the Court upon it must depend on the opinion entertained  
9 of his appointment.

10 **990.** That question has been discussed, and the opinion is that the latest point of time which can be  
11 taken as that at which the appointment was complete and evidenced was when, after the signature  
12 of the President, the seal of the United States was affixed to the commission.

13 **991.** It is then the opinion of the Court:

14 1. That, by signing the commission of Mr. Marbury, the President of the United States appointed  
15 him a justice of peace for the County of Washington in the District of Columbia, and that the seal  
16 of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity  
17 of the signature, and of the completion of the appointment, and that the appointment conferred on  
18 him a legal right to the office for the space of five years.

19 **2. That, having this legal title to the office, he has a consequent right to the commission, a re-**  
20 **fusal to deliver which is a plain violation of that right, for which the laws of his country af-**  
21 **ford him a remedy.**

22 It remains to be inquired whether,

23 3. He is entitled to the remedy for which he applies. This depends on:

24 1. The nature of the writ applied for, and

25 2. The power of this court.

26 1. The nature of the writ.

27 Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be  
28

1 "a command issuing in the King's name from the Court of King's Bench, and directed to any per-  
2 son, corporation, or inferior court of judicature within the King's dominions requiring them to do  
3 some particular thing therein specified which appertains to their office and duty, and which the  
4 Court of King's Bench has previously determined, or at least supposes, to be consonant to right and  
5 justice."

6 Lord Mansfield, in 3 Burrows, 1266, in the case of *The King v. Baker et al.*, states with much pre-  
7 cision and explicitness the cases in which this writ may be used.

8 "Whenever," says that very able judge,

9 **992. "there is a right to execute an office, perform a service, or exercise a franchise (more**  
10 **especially if it be in a matter of public concern or attended with profit), and a person is kept**  
11 **out of possession, or dispossessed of such right, and has no other specific legal remedy, this**  
12 **court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon**  
13 **reasons of public policy, to preserve peace, order and good government."**

14 In the same case, he says,

15 **993. "this writ ought to be used upon all occasions where the law has established no specific**  
16 **remedy, and where in justice and good government there ought to be one."**

17 **994.** In addition to the authorities now particularly cited, many others were relied on at the bar  
18 which show how far the practice has conformed to the general doctrines that have been just quoted.  
19 This writ, if awarded, would be directed to an officer of government, and its mandate to him would  
20 be, to use the words of Blackstone,

21 **995.** "to do a particular thing therein specified, which appertains to his office and duty and which  
22 the Court has previously determined or at least supposes to be consonant to right and justice."

23 Or, in the words of Lord Mansfield, **the applicant, in this case, has a right to execute an office of**  
24 **public concern, and is kept out of possession of that right.**

25 **996. These circumstances certainly concur in this case.**

26 **997.** Still, to render the mandamus a proper remedy, the officer to whom it is to be directed must  
27 be one to whom, on legal principles, such writ may be directed, and the person applying for it must  
28 be without any other specific and legal remedy.

1 **998.** With respect to the officer to whom it would be directed. The intimate political relation, sub-  
2 sisting between the President of the United States and the heads of departments, necessarily renders  
3 any legal investigation of the acts of one of those high officers peculiarly irksome, as well as deli-  
4 cate, and excites some hesitation with respect to the propriety of entering into such investigation.  
5 Impressions are often received without much reflection or examination, and it is not wonderful that,  
6 in such a case as this, the assertion by an individual of his legal claims in a court of justice, to  
7 which claims it is the duty of that court to attend, should, at first view, be considered by some as an  
8 attempt to intrude into the cabinet and to intermeddle with the prerogatives of the Executive.

9 **999.** It is scarcely necessary for the Court to disclaim all pretensions to such a jurisdiction. An ex-  
10 travagance so absurd and excessive could not have been entertained for a moment. The province of  
11 the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Ex-  
12 ecutive officers perform duties in which they have a discretion. Questions, in their nature political  
13 or which are, by the Constitution and laws, submitted to the Executive, can never be made in this  
14 court.

15 **1000.** But, if this be not such a question; if so far from being an intrusion into the secrets of the  
16 cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law  
17 gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the  
18 Executive can be considered as having exercised any control; **what is there in the exalted station**  
19 **of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or**  
20 **shall forbid a court to listen to the claim or to issue a mandamus directing the performance of**  
21 **a duty not depending on Executive discretion, but on particular acts of Congress and the gen-**  
22 **eral principles of law?**

23 **1001.** If one of the heads of departments commits any illegal act under colour of his office by  
24 which an individual sustains an injury, it cannot be pretended that his office alone exempts him  
25 from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of  
26 the law. How then can his office exempt him from this particular mode of deciding on the legality  
27 of his conduct if the case be such a case as would, were any other individual the party complained  
28 of, authorize the process?



1 **1002.** It is not by the office of the person to whom the writ is directed, but the nature of the thing  
2 to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the  
3 head of a department acts in a case in which Executive discretion is to be exercised, in which he is  
4 the mere organ of Executive will, it is again repeated, that any application to a court to control, in  
5 any respect, his conduct, would be rejected without hesitation.

6 **1003.** But where he is directed by law to do a certain act affecting the **absolute rights of indi-**  
7 **viduals**, in the performance of which he is not placed under the particular direction of the Presi-  
8 dent, and **the performance of which the President cannot lawfully forbid**, and therefore is never  
9 presumed to have forbidden -- as **for example, to record a commission, or a patent for land,**  
10 **which has received all the legal solemnities; or to give a copy of such record -- in such cases, it**  
11 **is not perceived on what ground the Courts of the country are further excused from the duty**  
12 **of giving judgment that right to be done to an injured individual than if the same services**  
13 **were to be performed by a person not the head of a department.**

14 **1004.** This opinion seems not now for the first time to be taken up in this country.

15 It must be well recollected that, in 1792, an act passed, directing the secretary at war to place on the  
16 pension list such disabled officers and soldiers as should be reported to him by the Circuit Courts,  
17 which act, so far as the duty was imposed on the Courts, was deemed unconstitutional; but some of  
18 the judges, thinking that the law might be executed by them in the character of commissioners, pro-  
19 ceeded to act and to report in that character.

20 **1005.** This law being deemed unconstitutional at the circuits, was repealed, and a different system  
21 was established; but the question whether those persons who had been reported by the judges, as  
22 commissioners, were entitled, in consequence of that report, to be placed on the pension list was a  
23 legal question, properly determinable in the Courts, although the act of placing such persons on the  
24 list was to be performed by the head of a department.

25 **1006.** That this question might be properly settled, Congress passed an act in February, 1793, mak-  
26 ing it the duty of the Secretary of War, in conjunction with the Attorney General, to take such  
27 measures as might be necessary to obtain an adjudication of the Supreme Court of the United  
28 States on the validity of any such rights, claimed under the act aforesaid.

1 **1007.** After the passage of this act, a mandamus was moved for, to be directed to the Secretary of  
2 War, commanding him to place on the pension list a person stating himself to be on the report of  
3 the judges.

4 **1008. There is, therefore, much reason to believe that this mode of trying the legal right of**  
5 **the complainant was deemed by the head of a department, and by the highest law officer of**  
6 **the United States, the most proper which could be selected for the purpose.**

7 **1009.** When the subject was brought before the Court, the decision was not that a mandamus  
8 would not lie to the head of a department directing him to perform an act enjoined by law, in the  
9 performance of which an individual had a vested interest, but that a mandamus ought not to issue in  
10 that case -- the decision necessarily to be made if the report of the commissioners did not confer on  
11 the applicant a legal right.

12 **1010.** The judgment in that case is understood to have decided the merits of all claims of that de-  
13 scription, and the persons, on the report of the commissioners, found it necessary to pursue the  
14 mode prescribed by the law subsequent to that which had been deemed unconstitutional in order to  
15 place themselves on the pension list.

16 **The doctrine, therefore, now advanced is by no means a novel one.**

17 **1011.** It is true that the mandamus now moved for is not for the performance of an act expressly  
18 enjoined by statute.

19 **1012.** (It is true that the mandamus now Ordained is for an act expressly enjoined by statue.)  
20 It is to deliver a commission, on which subjects the acts of Congress are silent. This difference is  
21 not considered as affecting the case. It has already been stated that the applicant has, to that com-  
22 mission, a vested legal right of which the Executive cannot deprive him. He has been appointed to  
23 an office from which he is not removable at the will of the Executive, and, being so  
24 appointed, he has a right to the commission which the Secretary has received from the President for  
25 his use. The act of Congress does not, indeed, order the Secretary of State to send it to him, but it is  
26 placed in his hands for the person entitled to it, and cannot be more lawfully withheld by him than  
27 by another person.

1 **1013.** It was at first doubted whether the action of detinue was not a specific legal remedy for the  
2 commission which has been withheld from Mr. Marbury, in which case a mandamus would be im-  
3 proper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing  
4 itself, or its value. The value of a public office not to be sold is incapable of being ascertained, and  
5 the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the  
6 commission or a copy of it from the record.

7 **1014.** This, then, is a plain case of a mandamus, either to deliver the commission or a copy of it  
8 from the record, and it only remains to be inquired:  
9 Whether it can issue from this Court.

10 **1015.** The act to establish the judicial courts of the United States authorizes the Supreme Court  
11 "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts  
12 appointed, or persons holding office, under the authority of the United States."

13 The Secretary of State, **being a person, holding an office under the authority of the United**  
14 **States, is precisely within the letter of the description, and if this Court is not authorized to**  
15 **issue a writ of mandamus to such an officer, it must be because the law is unconstitutional,**  
16 **and therefore absolutely incapable of conferring the authority and assigning the duties which**  
17 **its words purport to confer and assign.**

18 **1016.** The Constitution vests the whole judicial power of the United States in one Supreme Court,  
19 and such inferior courts as Congress shall, from time to time, ordain and establish. This power is  
20 expressly extended to all cases arising under the laws of the United States; and consequently, in  
21 some form, may be exercised over the present case, **because the right claimed is given by a law**  
22 **of the United States.**

23 In the distribution of this power. it is declared that

24 **1017.** "The Supreme Court shall have **original jurisdiction in all cases affecting** ambassadors,  
25 other public ministers and consuls, and **those in which a state shall be a party.** In all other cases,  
26 the Supreme Court shall have appellate jurisdiction."

27 **1018.** It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme and  
28 inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court con-

1 tains no negative or restrictive words, the power remains to the Legislature to assign original juris-  
2 diction to that Court in other cases than those specified in the article which has been recited, pro-  
3 vided those cases belong to the judicial power of the United States.

4 **1019.** If it had been intended to leave it in the discretion of the Legislature to apportion the judicial  
5 power between the Supreme and inferior courts according to the will of that body, it would cer-  
6 tainly have been useless to have proceeded further than to have defined the judicial power and the  
7 tribunals in which it should be vested. The subsequent part of the section is mere surplusage -- is  
8 entirely without meaning -- if such is to be the construction. If Congress remains at liberty to give  
9 this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be origi-  
10 nal, and original jurisdiction where the Constitution has declared it shall be appellate, the distribu-  
11 tion of jurisdiction made in the Constitution, is form without substance.

12 **1020.** Affirmative words are often, in their operation, negative of other objects than those af-  
13 firmed, and, in this case, a negative or exclusive sense must be given to them or they have no op-  
14 eration at all.

15 **1021.** It cannot be presumed that any clause in the Constitution is intended to be without effect,  
16 and therefore such construction is inadmissible unless the words require it.

17 **1022.** If the solicitude of the Convention respecting our peace with foreign powers induced a pro-  
18 vision that the Supreme Court should take original jurisdiction in cases which might be supposed to  
19 affect them, yet the clause would have proceeded no further than to provide for such cases if no  
20 further restriction on the powers of Congress had been intended. That they should have appellate  
21 jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction unless  
22 the words be deemed exclusive of original jurisdiction.

23 **1023.** When an instrument organizing fundamentally a judicial system divides it into one Supreme  
24 and so many inferior courts as the Legislature may ordain and establish, then enumerates its pow-  
25 ers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court by de-  
26 claring the cases in which it shall take original jurisdiction, and that in others it shall take appellate  
27 jurisdiction, the plain import of the words seems to be that, in one class of cases, its jurisdiction is  
28 original, and not appellate; in the other, it is appellate, and not original. ,If any other construction

1 would render the clause inoperative, that is an additional reason for rejecting such other construc-  
2 tion, and for adhering to the obvious meaning.

3 **1024.** To enable this court then to issue a mandamus, it must be shown to be an exercise of appel-  
4 late jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

5 **1025.** It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of  
6 forms, and that, if it be the will of the Legislature that a mandamus should be used for that purpose,  
7 **that will must be obeyed.** This is true; yet the jurisdiction must be appellate, not original.

8 **1026.** It is the essential criterion of appellate jurisdiction that it revises and corrects the proceed-  
9 ings **in a cause already instituted,** and does not create that case. Although, **therefore, a manda-**  
10 **mus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper**  
11 **is, in effect, the same as to sustain an original action for that paper, and therefore seems not**  
12 **to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this**  
13 **to enable the Court to exercise its appellate jurisdiction.**

14 **1027.** The authority, therefore, given to the Supreme Court by the act establishing the judicial  
15 courts of the United States to issue writs of mandamus to public officers appears not to be war-  
16 ranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred  
17 can be exercised.

18 **1028.** The question whether an act repugnant to the Constitution can become the law of the land is  
19 a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to  
20 its interest. It seems only necessary to recognize certain principles, supposed to have been long and  
21 well established, to decide it.

22 **1029.** **That the people have an original right to establish for their future government such**  
23 **principles as, in their opinion, shall most conduce to their own happiness is the basis on which**  
24 **the whole American fabric has been erected. The exercise of this original right is a very great**  
25 **exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so estab-**  
26 **lished are deemed fundamental. And as the authority from which they proceed, is supreme,**  
27 **and can seldom act, they are designed to be permanent.**

1 **1030. This original and supreme will organizes the government** and assigns to different de-  
2 partments their respective powers. It may either stop here or **establish certain limits not to be**  
3 **transcended by** those departments.

4 **1031.** The Government of the United States is of the latter description. The powers of the Legisla-  
5 ture are defined and limited; and that those limits may not be mistaken or forgotten, the Constitu-  
6 tion is written. To what purpose are powers limited, and to what purpose is that limitation commit-  
7 ted to writing, if these limits may at any time be passed by those intended to be restrained? The dis-  
8 tinction between a government with limited and unlimited powers is abolished if those limits do not  
9 confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal  
10 obligation. It is a proposition too plain to be contested that the Constitution controls any legislative  
11 act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.

12 **1032.** Between these alternatives there is no middle ground. The Constitution is either a superior,  
13 paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts,  
14 and, like other acts, is alterable when the legislature shall please to alter it.

15 If the former part of the alternative be true, then a legislative act contrary to the Constitution is not  
16 law; if the latter part be true, then written Constitutions are absurd attempts on the part of the peo-  
17 ple to limit a power in its own nature illimitable.

18 **1033.** Certainly all those who have framed written Constitutions contemplate them as forming the  
19 fundamental and paramount law of the nation, and consequently the theory of every such govern-  
20 ment must be that an act of the Legislature repugnant to the Constitution is void.

21 This theory is essentially attached to a written Constitution, and is consequently to be considered  
22 by this Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight  
23 of in the further consideration of this subject.

24 **1034.** If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its  
25 invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not  
26 law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact  
27 what was established in theory, and would seem, at first view, an absurdity too gross to be insisted  
28 on. It shall, however, receive a more attentive consideration.

1 **1035.** It is emphatically the province and duty of the Judicial Department to say what the law is.  
2 Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If  
3 two laws conflict with each other, the Courts must decide on the operation of each.

4 **1036.** So, if a law be in opposition to the Constitution, if both the law and the Constitution apply  
5 to a particular case, so that the Court must either decide that case conformably to the law, disre-  
6 garding the Constitution, or conformably to the Constitution, disregarding the law, the Court must  
7 determine which of these conflicting rules governs the case. This is of the very essence of judicial  
8 duty.

9 **1037.** If, then, the Courts are to regard the Constitution, and the Constitution is superior to any or-  
10 dinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to  
11 which they both apply.

12 **1038.** Those, then, who controvert the principle that the Constitution is to be considered in court as  
13 a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the  
14 Constitution, and see only the law.

15 **1039.** This doctrine would subvert the very foundation of all written Constitutions. It would de-  
16 clare that an act which, according to the principles and theory of our government, is entirely void,  
17 is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is  
18 expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It  
19 would be giving to the Legislature a practical and real omnipotence with the same breath which  
20 professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that  
21 those limits may be passed at pleasure.

22 **1040.** That it thus reduces to nothing what we have deemed the greatest improvement on political  
23 institutions -- a written Constitution, would of itself be sufficient, in America where written Consti-  
24 tutions have been viewed with so much reverence, for rejecting the construction. But the peculiar  
25 expressions of the Constitution of the United States furnish additional arguments in favour of its  
26 rejection.

27 **1041.** The judicial power of the United States is extended to all cases arising under the Constitu-  
28 tion.



1 Could it be the intention of those who gave this power to say that, in using it, the Constitution  
2 should not be looked into? That a case arising under the Constitution should be decided without  
3 examining the instrument under which it arises?

4 This is too extravagant to be maintained.

5 **1042.** In some cases then, the Constitution must be looked into by the judges. And if they can open  
6 it at all, what part of it are they forbidden to read or to obey?

7 There are many other parts of the Constitution which serve to illustrate this subject.

8 **1043.** It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose  
9 a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought  
10 judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution,  
11 and only see the law?

12 **1044.** The Constitution declares that "no bill of attainder or ex post facto law shall be passed."

13 **1045.** If, however, such a bill should be passed and a person should be prosecuted under it, must  
14 the Court condemn to death those victims whom the Constitution endeavours to preserve?  
15 "No person," says the Constitution, "shall be convicted of treason unless on the testimony of two  
16 witnesses to the same overt act, or on confession in open court."

17 **1046.** Here, the language of the Constitution is addressed especially to the Courts. It prescribes,  
18 directly for them, a rule of evidence not to be departed from. If the Legislature should change that  
19 rule, and declare one witness, or a confession out of court, sufficient for conviction, must the con-  
20 stitutional principle yield to the legislative act?

21 **1047.** From these and many other selections which might be made, it is apparent that the framers  
22 of the Constitution contemplated that instrument as a rule for the government of courts, as well as  
23 of the Legislature.

24 **1048.** Why otherwise does it direct the judges to take an oath to support it? This oath certainly ap-  
25 plies in an especial manner to their conduct in their official character. How immoral to impose it on  
26 them if they were to be used as the instruments, and the knowing instruments, for violating what  
27 they swear to support!

1 **1049.** The oath of office, too, imposed by the Legislature, is completely demonstrative of the legis-  
2 lative opinion on this subject. It is in these words:

3 **1050.** "I do solemnly swear that I will administer justice without respect to persons, and do equal  
4 right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties  
5 incumbent on me as according to the best of my abilities and understanding, agreeably to the Con-  
6 stitution and laws of the United States."

7 **1051.** Why does a judge swear to discharge his duties agreeably to the Constitution of the United  
8 States if that Constitution forms no rule for his government? if it is closed upon him and cannot be  
9 inspected by him?

10 **1052.** If such be the real state of things, this is worse than solemn mockery. To prescribe or to take  
11 this oath becomes equally a crime.

12 **1053.** It is also not entirely unworthy of observation that, in declaring what shall be the supreme  
13 law of the land, the Constitution itself is first mentioned, and not the laws of the United States gen-  
14 erally, but those only which shall be made in pursuance of the Constitution, have that rank.

15 Thus, the particular phraseology of the Constitution of the United States confirms and strengthens  
16 the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Con-  
17 stitution is void, and that courts, as well as other departments, are bound by that instrument.

18 *writ of unspeakable errors, divide et impera!* **RELIEF: VIOLATIONS OF TITLE 18. U.S.C.**

19 **§ 241. CONSPIRACY. MALICE AND DECEIT; ABUSE OF PROCESS AND DISCRETION.**

20 **§ 242. DEPRIVATION OF RIGHTS UNDER COLOR OF LAW. FRANCHISE TRESSPASS.**

21 **§ 245. FEDERALLY PROTECTED RIGHTS. FRAUD UPON THE COURT. ABUSE.**

22 **§ 3729. FALSE CLAIMS; HARD BARGAIN, FRAUD, ACCIDENT, TRUST, HARDSHIP;**

23 **MALICE. WRITS OF EQUITABLE ESTOPPEL! PROHIBITION! NEGLIGENCE!**

24 Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof.

25 quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

26  
27 June 14, 2009                      Signature: \_\_\_\_\_

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

1 1. The circuit court erred in not analyzing U.S. and California law as to whether the EPA actions  
2 are both procedurally and substantively unfair or unconscionable.

3 You generally examine the first and second factors together. See Bauman,  
4 557 F.2d at 654 (the second factor “is closely related to the first”).  
5 Inc., 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006),

6 **2.** The first and second Bauman factors weigh in favor of granting the relief requested. petitioner  
7 “has no other adequate means” of becoming project manager or joining the case, nor is anyone else  
8 protecting his interests as a mining joint venturer, and his and his heirs and successors interests in  
9 the assignment, or ensuring that he and his successors and assigns can continue as the class repre-  
10 sentative. Bauman, 557 F.2d at 654. This would “prejudice[]” Petitioner “in a way not correctable  
11 on appeal.” Id. (which is not available anyway).

12 **3.** The fifth Bauman factor also favors the relief requested. The district court’s order discriminating  
13 against an innocent landowner and enforcing reckless negligent endangerment through judicial  
14 swaddling and judicial deference to EPA misconduct with malice and oppression “raises new and  
15 important problems” and addresses “issues of law of first impression.” Bauman, 557 F.2d at 655.

16 **1054.** This hopefully is the last time any federal court has to consider whether the enforcement of  
17 environmental laws to intentionally deprive vested property rights by pretended preservation and  
18 illegitimate animus to the exclusion of the prior rights of the real parties in interest, and to the ex-  
19 clusion of the properties real perfection and preservation, all working to the dissipation and degen-  
20 eration of the general welfare, and in violation of prior rights to complete development is unconsti-  
21 tutional, thus deserving immediate resolution.

22 \* \* \*

23 Because all five Bauman factors favor relief, and none militates against it, you should conclude that  
24 the balance of factors favors issuing all the writs.

25 **VIOLATION OF ESTBLISHMENT CLAUSE, ESTABLISHED BELIEFS**

26 The Supreme Court has interpreted religion to mean a sincere and meaningful belief that occupies  
27 in the life of its possessor a place parallel to the place held by God in the lives of other persons.

1 The religion or religious concept need not include belief in the existence of God or a supreme be-  
2 ing to be within the scope of the First Amendment.

3 As the case of *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944), demon-  
4 strates, the Supreme Court must look to the sincerity of a person's beliefs to help decide if those  
5 beliefs constitute a religion that deserves constitutional protection. The *Ballard* case involved the  
6 conviction of organizers of the I Am movement on grounds that they defrauded people by falsely  
7 representing that their members had supernatural powers to heal people with incurable illnesses.

8 The Supreme Court held that the jury, in determining the line between the free exercise of religion  
9 and the punishable offense of obtaining property under False Pretenses, should not decide whether  
10 the claims of the I Am members were actually true, only whether the members honestly believed  
11 them to be true, thus qualifying the group as a religion under the Supreme Court's broad definition.

12 In addition, a belief does not need to be stated in traditional terms to fall within First Amendment  
13 protection. For example, Scientology—a system of beliefs that a human being is essentially a free  
14 and immortal spirit who merely inhabits a body—does not propound the existence of a supreme  
15 being, but it qualifies as a religion under the broad definition propounded by the Supreme Court.

16 The Supreme Court has deliberately avoided establishing an exact or a narrow definition of relig-  
17 ion because freedom of religion is a dynamic guarantee that was written in a manner to ensure  
18 flexibility and responsiveness to the passage of time and the development of the United States.

19 Thus, religion is not limited to traditional denominations.

20 The First Amendment guarantee of freedom of religion has deeply rooted historical significance.

21 Many of the colonists who founded the United States came to this continent to escape religious  
22 persecution and government oppression.

23 This country's founders advocated religious freedom and sought to prevent any one religion or  
24 group of religious organizations from dominating the government or imposing its will or beliefs  
25 on society as a whole. The revolutionary philosophy encompassed the principle that the interests  
26 of society are best served if individuals are free to form their own opinions and beliefs.

27 When the colonies and states were first established, however, most declared a particular religion to  
28 be the religion of that region. But, by the end of the American Revolution, most state-supported

1 churches had been disestablished, with the exceptions of the state churches of Connecticut and  
2 Massachusetts, which were disestablished in 1818 and 1833, respectively. Still, religion was un-  
3 doubtedly an important element in the lives of the American colonists, and U.S. culture remains  
4 greatly influenced by religion.

#### 5 Establishment Clause

6 The Establishment Clause prohibits the government from interfering with individual religious be-  
7 liefs. The government cannot enact laws aiding any religion or establishing an official state relig-  
8 ion. The courts have interpreted the Establishment Clause to accomplish the separation of church  
9 and state on both the national and state levels of government.

10 The authors of the First Amendment drafted the Establishment Clause to address the problem of  
11 government sponsorship and support of religious activity. The Supreme Court has defined the  
12 meaning of the Establishment Clause in cases dealing with public financial assistance to church-  
13 related institutions, primarily parochial schools, and religious practices in the public schools. The  
14 Court has developed a three-pronged test to determine whether a statute violates the Establishment  
15 Clause. According to that test, a statute is valid as long as it has a secular purpose; its primary ef-  
16 fect neither advances nor inhibits religion; and it is not excessively entangled with religion. Be-  
17 cause this three-pronged test was established in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105,  
18 29 L. Ed. 2d 745 (1971), it has come to be known as the Lemon test. Although the Supreme Court  
19 adhered to the Lemon test for several decades, since the 1990s, it has been slowly moving away  
20 from that test without having expressly rejected it.

#### 21 SNIPE HUNTING FOR REVOLUTIONARY PHILOSOPHY

22 Christmas and the First Amendment have had a rocky relationship. A decades-long battle over the  
23 place of worship and tradition in public life has erupted nearly every year when local governments  
24 sponsor holiday displays on public property. Lawsuits against towns and cities often, but not al-  
25 ways, end with the courts ordering the removal of religious symbols whose government sponsor-  
26 ship violates the First Amendment. Since the 1980s, however, the outcome of such cases has be-  
27 come less predictable as deep divisions on the Supreme Court have resulted in new precedents that  
28 take a more nuanced view of the law. In such cases, context determines everything. Placing a na-

1 tivity scene with the infant Jesus outside a town hall may be unconstitutional, for example, but the  
2 display may be acceptable if Santa Claus stands nearby.

3 On the question of religious displays, the First Amendment has two broad answers depending on  
4 the sponsor. Any private citizen can put up a nativity scene on private property at Christmas time:  
5 citizens and churches commonly exercise their First Amendment right to Freedom of Speech to do  
6 so. But when a government sets up a similar display on public property, a different aspect of the  
7 amendment comes into play. Governments do not enjoy freedom of speech, but, instead, are con-  
8 trolled by the second half of the First Amendment—the Establishment Clause, which forbids any  
9 official establishment of religion. All lawsuits demanding that a crèche, cross, menorah, or other  
10 religious symbol be removed from public property allege that the government that put it there has  
11 violated the Establishment Clause.

12 The Supreme Court has reviewed challenges to government sponsored displays of religious sym-  
13 bols under the Lemon test. Based on criteria from several earlier decisions and named after the  
14 case *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1973), the test recog-  
15 nizes that government must accommodate religion but forbids it to support religion. To survive  
16 constitutional review, a display must meet all three requirements or "prongs" of the test: it must  
17 have a secular (nonreligious) purpose, it must have the primary effect of neither advancing nor  
18 inhibiting religion, and it must avoid excessive entanglement between government and religion.  
19 Failing any of the three parts of the test constitutes a violation of the Establishment Clause.

20 Starting in the 1980s, the test began to divide the Supreme Court. Conservative justices objected  
21 because it blocked what they saw as a valid acknowledgment of the role of religion in public life;  
22 opposing them were justices who believed in maintaining a firm line between government and re-  
23 ligion. In significant cases concerning holiday displays, the Court continued to use the Lemon test  
24 but with new emphasis on the question of whether the display has the effect of advancing or en-  
25 dorsing a particular religion.

26 This shift in emphasis first emerged in 1984 in a case involving a Christmas display owned and  
27 erected by the City of Pawtucket, Rhode Island, in a private park. The display included both a life-  
28 sized nativity scene with the infant Jesus, Mary, and Joseph and secular symbols such as Santa's

1 house, a Christmas tree, striped poles, animals, and lights. Pawtucket residents successfully sued  
2 for removal of the nativity scene in federal district court, where it was found to have failed all  
3 three prongs of the Lemon test (*Donnelly v. Lynch*, 525 F. Supp. 1150 [D.R.I. 1981]). The deci-  
4 sion was upheld on appeal, but, surprisingly, in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355,  
5 79 L. Ed. 2d 604 (1984), the Supreme Court narrowly reversed in a 5–4 vote and found the entire  
6 display constitutional.

7 The majority in *Lynch* stressed historical context, emphasizing that the crèche belonged to a tradi-  
8 tion "acknowledged in the Western World for 20 centuries, and in this country by the people, by  
9 the Executive Branch, by the Congress, and the courts for two centuries." The display, ruled the  
10 Court, passed each prong of the Lemon test. First, the city had a secular purpose in celebrating a  
11 national holiday by using religious symbols that "depicted the historical origins" of the holiday.  
12 Second, the display did not primarily benefit religion. Third, no excessive entanglement between  
13 government and religion existed. Perhaps most significantly, the Court saw the crèche as a "pas-  
14 sive symbol": although it derived from religion, over time it had come to represent a secular mes-  
15 sage of celebration.

16 *Lynch* laid bare the deep divisions on the Court. By emphasizing context, the majority appeared to  
17 suggest that the ruling was limited to circumstances similar to those in the case at hand: religious  
18 symbols could be acceptable in a holiday display if used with secular symbols. The majority did  
19 not enunciate any broad new protections for governments eager to sponsor crèches. Nonetheless,  
20 the opinion did not satisfy the dissenters, who sharply criticized the majority for failing to vigor-  
21 ously apply the Lemon test. They noted that the city could easily have celebrated the holiday  
22 without using religious symbols, and they saw the crèche as nothing less than government en-  
23 dorsement of religion.

24 The emphasis on context became even more pronounced in a 1989 case, *County of Allegheny v.*  
25 *American Civil Liberties Union*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472. In *Allegheny*,  
26 a Pennsylvania county appealed a lower court ruling that had banned its two separate holiday dis-  
27 plays: a crèche situated next to poinsettia plants inside the county courthouse, and an eighteen-foot  
28 menorah (a commemorative candelabrum in the Jewish faith) standing next to a Christmas tree



1 and a sign outside a city-county office building. Each religious symbol was owned by a religious  
2 group—the crèche by the Catholic Holy Name Society and the menorah by Chabad, a Jewish or-  
3 ganization. Viewing the displays in context, the Court permitted one but not the other, and its rea-  
4 soning turned on subtle distinctions.

5 The Court deemed the crèche an unconstitutional endorsement of religion for two reasons. First,  
6 the presence of a few flowers around the crèche did not mediate its religious symbolism in the  
7 way that the secular symbols had done for the crèche in Lynch. Second, the prominent location  
8 doomed the display. By choosing the courthouse, a vital center of government, the Court said the  
9 county has sent "an unmistakable message" that it endorsed Christianity.

10 But the menorah passed constitutional review. Like the crèche in Lynch, its religious significance  
11 was transformed by the presence of secular symbols: the forty-five-foot Christmas tree and a sign  
12 from the city's mayor that read, "During this holiday season, the city of Pittsburgh salutes liberty.  
13 Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of lib-  
14 erty." Even so, members of the majority disagreed on precisely what message was sent by the dis-  
15 play. Justice harry a. blackmun read it as a secular message of holiday celebration. In a more com-  
16 plicated view, Justice Sandra Day O'Connor said it "acknowledg[ed] the cultural diversity of our  
17 country and convey[ed] tolerance of different choice in matters of religious belief or non-belief by  
18 recognizing that the winter holiday season is celebrated in diverse ways by our citizens." What-  
19 ever the exact message, the majority agreed that it did not endorse religion.

20 Since the 1980s the thrust of Supreme Court doctrine has been to allow publicly sponsored holi-  
21 day displays to include religious symbols. This expansive view of the First Amendment grew out  
22 of the Court's acknowledgment that local governments can accommodate civic tradition. Religious  
23 symbols on their own are unconstitutional. A display including such symbols may pass review,  
24 however, if it features secular symbols as well. Context is the determinant: to avoid violating the  
25 Establishment Clause, a crèche or menorah may need a boost from Santa Claus.

26 The Court has stated that the Establishment Clause means that neither a state nor the federal gov-  
27 ernment can organize a church. The government cannot enact legislation that aids one religion,  
28 aids all religions, or prefers one religion over another. It cannot force or influence a person to par-

1 participate in, or avoid, religion or force a person to profess a particular religious belief. No tax in any  
2 amount can be levied to support any religious activities or organizations. Neither a state nor the  
3 federal government can participate, whether openly or secretly, in the affairs of any religious  
4 groups.

5 Federal and state governments have accepted and implemented the doctrine of the separation of  
6 church and state by minimizing contact with religious institutions. Although the government can-  
7 not aid religions, it can acknowledge their role as a stabilizing force in society. For example, reli-  
8 gious institutions, along with other charitable or nonprofit organizations, have traditionally been  
9 given tax exemptions. This practice, even when applied to religious organizations, has been  
10 deemed constitutional because the legislative aim of a property tax exemption is not to advance  
11 religion but to ensure that the activities of groups that enhance the moral and mental attitudes of  
12 the community will not be inhibited by taxation. The organizations lose the tax exemption if they  
13 undertake activities that do not serve the beneficial interests of society. Thus, in 1983, the Su-  
14 preme Court decided in *Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 76  
15 L. Ed. 2d 157, that nonprofit private schools that discriminated against their students or prospec-  
16 tive students on the basis of race could not claim tax-exempt status as a charitable organization for  
17 the purposes of federal tax laws.

18 It is also believed that the elimination of such tax exemptions would lead the government into ex-  
19 cessive entanglements with religious institutions. The exemption, therefore, is believed to create  
20 only a minimal and remote involvement between church and state—less than would result from  
21 taxation. The restricted fiscal relationship, therefore, enhances the desired separation.

22 Religion and Education The many situations in which religion and education overlap are a source  
23 of great controversy. In the early nineteenth century, the vast majority of Americans were Protes-  
24 tant, and Protestant-based religious exercises were common in the public schools. Legal chal-  
25 lenges to these practices began in the state courts when a substantial number of Roman Catholics  
26 arrived in the United States. Until 1962 when the U.S. Supreme Court began to directly address  
27 some of these issues, most states upheld the constitutionality of prayer and Bible reading in the  
28 public schools.

1 In the 1962 case of *engel v. vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601, the Supreme  
2 Court struck down as unconstitutional a prayer that was a recommended part of the public school  
3 curriculum in the state of New York. The prayer had been approved by Protestant, Catholic, and  
4 Jewish leaders in the state. Although the prayer was nondenominational and student participation  
5 in it was strictly voluntary, it was struck down as violative of the Establishment Clause.

6 *Agostini v. Felton*

7 In June 1997 the U.S. Supreme Court rolled back restrictions that it had imposed twelve years ear-  
8 lier on federal aid to religious schools. In a 5–4 decision in *Agostini v. Felton*, 117 S. Ct. 1997  
9 (1997), the Court ruled that public school teachers can teach remedial education classes to disad-  
10 vantaged students on the premises of parochial schools—a dramatic reversal of the Court's earlier  
11 hard line.

12 Federal law provides funds for such services to all children of low-income families under title I of  
13 the Elementary and Secondary Education Act of 1965 (20 U.S.C.A. § 6301 et seq.). But in 1985  
14 the Court barred public school instructors from teaching title I classes on parochial school prem-  
15 ises. In *Aguilar v. Felton* (473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290), the majority ruled that  
16 the mere presence of public employees at these schools had the effect of unconstitutionally ad-  
17 vancing religion. To comply with the order, New York parked vans outside of parochial school  
18 property to deliver the services, a system that cost taxpayers \$100 million between 1985 and 1997.

19 In a 1995 challenge, New York City argued that intervening cases had invalidated the Supreme  
20 Court's earlier ruling. Upon accepting the case on appeal in 1997, the Court agreed. In her major-  
21 ity opinion, Justice Sandra Day O'Connor held that *Aguilar* had been overruled by two more re-  
22 cent cases based on the Establishment Clause of the U.S. Constitution, *Witters v. Washington De-*  
23 *partment of Services for the Blind*, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986), and  
24 *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d (1993).  
25 O'Connor said that the two cases—permitting a state tuition grant to a blind person who attended a  
26 Christian college, and allowing a state-employed sign language interpreter to accompany a deaf  
27 student to a Catholic school, respectively—made it clear that the premises in *Aguilar* were no  
28 longer valid.

1 Although limited specifically to title I programs, the decision added fuel to another long-standing  
2 controversy. Proponents and opponents of school vouchers—a system under which parents would  
3 be able to allocate their tax dollars to their children's private school education—disputed whether  
4 the case indicated that the Court was moving toward embracing the voucher idea.

5 In 1963, the Supreme Court heard the related issues of whether voluntary Bible readings or recita-  
6 tion of the Lord's Prayer were constitutionally appropriate exercises in the public schools (*Abing-*  
7 *ton School District v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844). It was in these  
8 cases that the Supreme Court first formulated the three-pronged test for constitutionality. In apply-  
9 ing the new test, the Court concluded that the exercises did not pass the first prong of the test: they  
10 were not secular in nature, but religious, and thus they violated the Establishment Clause because  
11 they violated state neutrality requirements.

12 Although students in public schools are not permitted to recite prayers, the practice of a state leg-  
13 isature opening its sessions with a nondenominational prayer recited by a chaplain receiving pub-  
14 lic funds has withstood constitutional challenge. In *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct.  
15 3330, 77 L. Ed. 2d 1019 (1983), the Supreme Court ruled that such a practice did not violate the  
16 Establishment Clause. In making its decision, the Court noted that this was a customary practice  
17 and that the proponents of the Bill of Rights also approved of the government appointment of paid  
18 chaplains.

19 The Supreme Court has also held that a religious invocation, instituted by school officials, at a  
20 public school graduation violates the Establishment Clause (*Lee v. Weisman*, 505 U.S. 577, 112 S.  
21 Ct. 2649, 120 L. Ed. 2d 467 [1992]). Subsequently, the Court made clear that even indirect school  
22 support of a prayer given by students violates the First Amendment. In *Santa Fe Independent*  
23 *School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), the Court held that  
24 a Texas public school district could not let its students lead prayers over the public address system  
25 before its high school football. The school district's sponsorship of the public prayers by elected  
26 student representatives was unconstitutional because the schools could not coerce anyone to sup-  
27 port or participate in religion.

1 In 1980, the Supreme Court overturned a Kentucky statute requiring the posting of the Ten Com-  
2 mandments, copies of which were purchased with private contributions, in every public school  
3 classroom (Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199). Although the state  
4 argued that the postings served a secular purpose, the Court held that they were plainly religious.  
5 Four of the Supreme Court's nine justices dissented from the Court's opinion and were prepared to  
6 conclude that the postings were proper based on their secular purpose.

7 Because the Establishment Clause calls for government neutrality in matters involving religion,  
8 the government need not be hostile or unfriendly toward religions because such an approach  
9 would favor those who do not believe in religion over those who do. In addition, if the govern-  
10 ment denies religious speakers the ability to speak or punishes them for their speech, it violates the  
11 First Amendment's right to Freedom of Speech. The Supreme Court held in 1981 that it was un-  
12 constitutional for a state university to prohibit a religious group from using its facilities when the  
13 facilities were open for use by organizations of all other kinds (Widmar v. Vincent, 454 U.S. 263,  
14 102 S. Ct. 269, 70 L. Ed. 2d 440). The principles established in Widmar were unanimously reaf-  
15 firmed by the Supreme Court in Lamb's Chapel v. Center Moriches Union Free School District,  
16 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). In 1995, the Supreme Court held that a  
17 state university violates the Free Speech Clause when it refuses to pay for a religious organiza-  
18 tion's publication under a program in which it pays for other student organization publications  
19 (Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S. Ct. 2510,  
20 132 L. Ed. 2d 700).

21 Facing another education and religion issue, the Supreme Court declared in Illinois ex rel.  
22 McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), that public  
23 school buildings could not be used for a program that allowed pupils to leave classes early to re-  
24 ceive religious instruction. The Court found that this program violated the Establishment Clause  
25 because the tax-supported public school buildings were being used for the teaching of religious  
26 doctrines, which constituted direct government assistance to religion.

27 However, the Court held that a release-time program that took place outside the public school  
28 buildings was constitutional because it did not involved religious instruction in public school

1 classrooms or the expenditure of public funds (*Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96  
2 L. Ed. 954 [1952]). All costs in that case were paid by the religious organization conducting the  
3 program.

4 The U.S. Supreme Court has also held that states may not restrict the teaching of ideas on the  
5 grounds that they conflict with religious teachings when those ideas are part of normal classroom  
6 subjects. In *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968), the Court  
7 struck down a state statute that forbade the teaching of evolutionary theory in public schools. The  
8 Court held that the statute violated the Establishment Clause because its purpose was to protect  
9 religious theories of creationism from inconsistent secular theories.

10 In *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed. 2d 510 (1987), the Supreme  
11 Court struck down a Louisiana "Creationism Act" which prevented any teaching of evolution in  
12 public schools unless the course was also accompanied by the teaching of biblical creationism. In  
13 his majority opinion, Justice william brennan wrote that the Lemon test had to be used to judge the  
14 constitutionality of the Creationism Act. The state contended that the law was simply designed to  
15 promote Academic Freedom by ensuring that students would hear about more than one theory on  
16 the origins of life. However, the Court noted that teachers were permitted to present more than one  
17 such theory before the law had been passed. The actual purpose of the law, then, had to be to make  
18 sure that creationism was taught if anything at all was taught. Brennan ruled that the act did not  
19 have a secular purpose and that it did not advance academic freedom. To the contrary, it restricted  
20 the abilities of teachers to teach what they deemed appropriate. Brennan also pointed out that Lou-  
21 isiana provided instructional packets to assist in the teaching of creationism but did not provide  
22 similar materials for the teaching of evolution. This demonstrated an interest in promoting crea-  
23 tionism and religion.

24 In a 1993 case, the Supreme Court held that the Establishment Clause did not prevent a public  
25 school from providing a sign language interpreter for a deaf student who attended a religiously  
26 affiliated school within the school district (*Zobrest v. Catalina Foothills School District*, 509 U.S.  
27 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1). Commentators have noted that this case demonstrates the  
28 Court's willingness to uphold religiously neutral government aid to all school children, regardless

1 of whether they attend a religiously affiliated school, where the aid is designed to help the children  
2 overcome a physical or learning disability. As of 2003, it was not clear, however, whether the  
3 Court would extend this holding to more general forms of aid to children in religious and public  
4 schools alike.

5 Government and Religion The closing of government offices on particular religious holidays is  
6 unconstitutional if no secular purpose is served (*Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal.  
7 Rptr. 244 [1976]). But if employees won the closing through Collective Bargaining, it is permissi-  
8 ble even without a secular purpose (*Americans United for Separation of Church and State v. Kent*  
9 *County*, 97 Mich. App. 72, 293 N.W. 2d 723 [1980]).

10 Government display of symbols with religious significance raises Establishment Clause issues. In  
11 the 1984 case of *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604, the Su-  
12 preme Court upheld the right of a city to erect in a park a Christmas display that included colored  
13 lights, reindeer, candy canes, a Santa's house, a Christmas tree, a "SEASONS GREETINGS" ban-  
14 ner, and a nativity scene. The Court decided the inclusion of the nativity scene along with tradi-  
15 tional secular Christmas symbols did not promote religion to an extent prohibited by the First  
16 Amendment.

17 Since the mid-1990s, displays of the Ten Commandments in public buildings other than schools  
18 has become more common. Several judges drew national attention when they posted the Ten  
19 Commandments in their courtrooms, thereby triggering litigation. Alabama trial judge Roy Moore  
20 used the publicity from his refusal to remove the Ten Commandments from his courtroom to run  
21 for and be elected chief justice of the Alabama Supreme Court in November 2000. After taking  
22 office in January 2001, he briefly avoided controversy by posting the Ten Commandments in his  
23 chambers rather than in the Supreme Court's courtroom. However, Moore installed a 5,300 pound  
24 Ten Commandments monument in the judicial building on a summer night in 2001. A group of  
25 citizens objected and filed a lawsuit in U.S. District Court. In November 2002, the federal court  
26 issued an order directing Moore to remove the monument. Moore refused and vowed to appeal the  
27 decision (*Glassroth v. Moore*, 242 F.Supp. 2d 1068 [M.D.Ala.2002]). In 2003, the Eleventh Cir-  
28 cuit Court of Appeals affirmed the lower court decision in *Glassroth v. Moore*, 335 F. 3d 1282.



1 Despite a federal court order to remove the monument, Moore refused. Finally, in September  
2 2003, the other members of the Alabama Supreme Court had the monument removed. Moore was  
3 suspended from office while a judicial inquiry commission reviewed his conduct.

#### 4 Free Exercise Clause

5 The Free Exercise Clause guarantees a person the right to practice a religion and propagate it  
6 without government interference. This right is a liberty interest that cannot be deprived without  
7 Due Process of Law. Although the government cannot restrict a person's religious beliefs, it can  
8 limit the practice of faith when a substantial and compelling state interest exists. The courts have  
9 found that a substantial and compelling State Interest exists when the religious practice poses a  
10 threat to the health, safety, or Welfare of the public. For example, the government could legiti-  
11 mately outlaw the practice of Polygamy that was formerly mandated by the doctrines of the  
12 Church of Jesus Christ of Latter-Day Saints (Mormons) but could not outlaw the religion or belief  
13 in Mormonism itself (Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 [1878]). The Supreme  
14 Court has invalidated very few actions of the government on the basis of this clause.

15 Religious practices are not the only method by which a violation of the Free Exercise Clause can  
16 occur. In West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L.  
17 Ed. 1628 (1943), the Supreme Court held that a public school could not expel children because  
18 they refused on religious grounds to comply with a requirement of saluting the U.S. flag and recit-  
19 ing the Pledge of Allegiance. In that case, the children were Jehovah's Witnesses, and they be-  
20 lieved that saluting the flag fell within the scope of the biblical command against worshipping  
21 false gods.

22 A more recent decision by the Ninth Circuit Court of Appeals ignited a firestorm of controversy.  
23 The appeals court, in Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002), ruled that Congress  
24 had violated the Establishment Clause when, in 1954, it inserted the words "Under God" into the  
25 pledge. Therefore, a California school district's daily recitation of the Pledge of Allegiance injured  
26 the daughter of an atheist father, for the pledge sent a message to her that she was an "outsider"  
27 and not a member of the political community. The defendants vowed to petition the Supreme  
28

1 Court to review the case. The Ninth Circuit stayed its ruling until the Supreme Court resolved the  
2 issue by either denying review or taking the appeal.

3 In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the Supreme Court  
4 held that state laws requiring children to receive education up to a certain age impinged upon the  
5 religious freedom of the Amish who refuse to send their children to school beyond the eighth  
6 grade because they believe that doing so would impermissibly expose the children to worldly in-  
7 fluences that conflicted with Amish religious beliefs.

8 In 1993, Congress passed the controversial Religious Freedom Restoration Act (RFRA), which  
9 provides that "[g]overnment shall not substantially burden a person's exercise of religion even if  
10 the burden results from a rule of general applicability, "unless the government can demonstrate  
11 that the burden advances a compelling governmental interest in the least restrictive way. This stat-  
12 ute was enacted in response to the Supreme Court's 1990 decision in *Employment Division v.*  
13 *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876. The Smith case involved a state law that  
14 denied Unemployment Compensation benefits to anyone who had been fired from his or her job  
15 for job-related misconduct. This case involved two individuals who had been fired from their jobs  
16 for ingesting peyote, which was forbidden by state law. The individuals argued that their ingestion  
17 of peyote was related to a religious ceremony in which they participated. The Supreme Court ruled  
18 that the Free Exercise Clause did not require an exemption from the state law banning peyote use  
19 and that unemployment compensation could therefore lawfully be denied.

20 RFRA directly superseded the Smith decision. However, soon after it was enacted, many courts  
21 ruled that RFRA violated either the Establishment Clause or the Separation of Powers doctrine. In  
22 the 1997 case of *City of Boerne v. P. F. Flores*, 1997 WL 345322, the U.S. Supreme Court voted  
23 6–3 to invalidate RFRA on the grounds that Congress had exceeded the scope of its enforcement  
24 power under section 5 of the Fourteenth Amendment in enacting RFRA. Section 5 of the Four-  
25 teenth Amendment permits Congress to enact legislation enforcing the Constitutional right to free  
26 exercise of religion. However, the Court held that this power is limited to preventative or remedial  
27 measures. The court found that RFRA went beyond that and actually made substantive changes in  
28 the governing law. Because Congress exceeded its power under the Fourteenth Amendment in en-

1 acting RFRA, it contradicted vital principles necessary to maintain separation of powers and the  
2 federal-state balance and thus was unconstitutional.

3 Although the Free Exercise Clause protects against government action, it does not restrict the con-  
4 duct of private individuals. For example, the courts generally will uphold a testator's requirement  
5 that a beneficiary attend a specified church to receive a testamentary gift because the courts refuse  
6 to question the religious views of a testator in the interest of public policy. Similarly, the Free Ex-  
7 ercise Clause does not protect a person's religious beliefs from infringement by the actions of pri-  
8 vate corporations or businesses, although federal and state Civil Rights laws may make such pri-  
9 vate conduct unlawful.

10 The government cannot enact a statute that wholly denies the right to preach or to disseminate re-  
11 ligious views, but a state can constitutionally regulate the time, place, and manner of soliciting  
12 upon the streets and of conducting meetings in order to safeguard the peace, order, and comfort of  
13 the community. It can also protect the public against frauds perpetrated under the cloak of relig-  
14 ion, as long as the law does not use a process amounting to a Prior Restraint, which inhibits the  
15 free exercise of religion. In a 1951 case, the Supreme Court held that it was unconstitutional for a  
16 city to deny a Baptist preacher the renewal of a permit for evangelical street meetings, even  
17 though his previous meetings included attacks on Roman Catholicism and Judaism that led to dis-  
18 order in the streets, because it constituted a prior restraint (*Kunz v. New York*, 340 U.S. 290, 71 S.  
19 Ct. 312, 95 L. Ed. 280).

20 State laws known as Sunday closing laws, which prohibit the sale of certain goods on Sundays,  
21 have been declared constitutional against the challenge of Orthodox Jews who claimed that the  
22 laws created an economic hardship for them because their faith requires them to close their busi-  
23 nesses on Saturdays and who therefore wanted to do business on Sundays (*Braunfield v. Brown*,  
24 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 [1961]). The Supreme Court held that, although the  
25 law imposed an indirect burden on religion, it did not make any religious practice itself unlawful.  
26 In *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), the Supreme  
27 Court upheld the requirement that Amish employers withhold Social Security and unemployment  
28 insurance contributions from their employees, despite the Amish argument that this violated their

1 rights under the Free Exercise Clause. The Court found that compulsory contributions were neces-  
2 sary to accomplish the overriding government interest in the proper functioning of the Social Se-  
3 curity and unemployment systems.

4 The Supreme Court has also upheld the assignment and use of Social Security numbers by the  
5 government to be a legitimate government action that does not violate the Free Exercise Clause  
6 (Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 [1986]).

7 In the 1989 case of Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 109 S. Ct.  
8 2136, 104 L. Ed. 2d 766, the Supreme Court held that the government's denial of a taxpayer's de-  
9 duction from gross income of "fixed donations" to the Church of Scientology for certain religious  
10 services was constitutional. These fees were paid for certain classes required by the Church of  
11 Scientology, and the Court held that they did not classify as charitable contributions because a  
12 good or service was received in exchange for the fee paid.

13 In Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed.  
14 2d 796 (1990), the Court ruled that a religious organization is not exempt from paying a state's  
15 general sales and use taxes on the sale of religious products and religious literature.

16 Similarly, the Court decided in Heffron v. International Society for Krishna Consciousness  
17 (ISKCON), 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981), that a state rule limiting the  
18 sale or distribution of merchandise to specific booths was lawful, even when applied to ISKCON  
19 members whose beliefs mandated them to distribute or sell religious literature and solicit dona-  
20 tions in public places.

21 Military regulations have also been challenged under the Free Exercise Clause. In Goldman v.  
22 Weinberger, 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986), the Supreme Court held  
23 that the Free Exercise Clause did not require the U.S. Air Force to permit an Orthodox Jewish ser-  
24 viceman to wear his yarmulke while in uniform and on duty. The Court found that the military's  
25 interest in discipline was sufficiently important to outweigh the incidental burden the rule had on  
26 the serviceman's religious beliefs.

27 However, a law that places an indirect burden on the practice of religion so as to impede the ob-  
28 servance of religion or a law that discriminates between religions is unconstitutional. Thus, the

1 Supreme Court has held that the denial of unemployment compensation to a Seventh-Day Advent-  
2 ist who was fired from her job and could not obtain any other work because of her refusal to work  
3 on Saturdays for religious reasons was unconstitutional (*Sherbert v. Verner*, 374 U.S. 398, 83 S.  
4 Ct. 1790, 10 L. Ed. 2d 965 [1963]). The *Sherbert* case was reaffirmed and applied in the 1987 case  
5 of *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 107 S. Ct. 1046, 94  
6 L. Ed. 2d 190.

7 In the 1993 case of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct.  
8 2217, 124 L. Ed. 2d 472, remanded on other grounds, the High Court overturned a city law that  
9 forbade animal slaughter insofar as the law banned the ritual animal slaughter by a particular reli-  
10 gious sect. The Court found that the law was not a religiously neutral law of general applicability  
11 but was specifically designed to prevent a religious sect from carrying out its religious rituals.

12 In *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972), the Supreme Court af-  
13 firmed that prisoners are entitled to their rights under the Free Exercise Clause, subject only to the  
14 requirements of prison security and discipline. Thus, the Court held that a Texas prison must per-  
15 mit a Buddhist prisoner to use the prison chapel and share his religious materials with other pris-  
16 oners, just as any other prisoner would be permitted to so act.

17 States have been allowed to deny disability benefits, however, to applicants who refuse to submit  
18 to medical examinations for religious reasons. Courts have held that this is constitutional because  
19 the state has a compelling interest in verifying that the intended recipients of the tax-produced as-  
20 sistance are people who are legitimately entitled to receive the benefit. Likewise, states can regu-  
21 late religious practices to protect the public health. Thus, state laws requiring the vaccination of all  
22 children before they are allowed to attend school are constitutional because the laws are designed  
23 to prevent the widespread epidemic of contagious diseases. Public health protection has been  
24 deemed to outweigh any competing interest in the exercise of religious beliefs that oppose any  
25 forms of medication or immunization.

26 A number of cases have involved the issue of whether there is a compelling state interest to re-  
27 quire that a blood transfusion be given to a patient whose religion prohibits such treatment. In  
28 these cases, the courts look to the specific facts of the case, such as whether the patient is a minor

1 or a mentally incompetent individual, and whether the patient came to the hospital voluntarily  
2 seeking help. The courts have generally authorized the transfusions in cases of minors or mentally  
3 incompetent patients in recognition of the compelling government interest to protect the health  
4 and safety of people. However, the courts are divided as to whether they should order transfusions  
5 where the patient is a competent adult who steadfastly refuses to accept such treatment on reli-  
6 gious grounds despite the understanding that her or his refusal could result in death. As of 2003,  
7 the Supreme Court had not ruled on this issue, and therefore there was no final judicial opinion on  
8 the propriety of such orders.

9 The use of secular courts to determine intra-church disputes has raised issues under both the Free  
10 Exercise Clause and the Establishment Clause. The Supreme Court decided in the 1871 case of  
11 *Watson v. Jones*, 80 U.S. 679, 20 L. Ed. 666, that judicial intervention in cases involving owner-  
12 ship and control of church assets necessarily had to be limited to determining and enforcing the  
13 decision of the highest judicatory body within the particular religious group. For congregational  
14 religious groups, such as Baptists and Jews, the majority of the congregation was considered the  
15 highest judicatory body. In hierarchical religions, such as the Roman Catholicism and Russian Or-  
16 thodoxy, the diocesan bishop was considered the highest judicatory authority. The Supreme Court  
17 consistently applied that principle until its 1979 decision in *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct.  
18 3020, 61 L. Ed. 2d 775. In that case, the Court held that the "neutral principles of law developed  
19 for use in all property disputes" could be constitutionally applied in intra-church litigation. Under  
20 this case, courts can examine the language of the church charters, real and Personal Property  
21 deeds, and state statutes relating to the control of property generally.

## 22 Religious Oaths Prohibited

23 The Constitution also refers to religion in Article VI, Clause 3, which provides, "No religious test  
24 shall ever be required as a qualification to any office or public trust under the United States." The  
25 provision is binding only on the federal government.

26 In early American history, individual states commonly required religious oaths for public officers.  
27 But after the Revolutionary War, most of these religious tests were eliminated. As of 2003, the  
28

1 individual states, through their constitutions or statutes, have restrictions similar to that of the U.S.  
2 Constitution on imposing a religious oath as a condition to holding a government position.  
3 Freedom to express religious beliefs is entwined with the First Amendment guarantee of freedom  
4 of expression. The federal or state governments cannot require an individual to declare a belief in  
5 the existence of God as a qualification for holding office (*Torcaso v. Watkins*, 367 U.S. 488, 81 S.  
6 Ct. 1680, 6 L. Ed. 2d 982 [1961]).

7 Congress took an unprecedented step when it passed the International Religious Freedom Act of  
8 1998. (Pub. L.105-292, 112 Stat. 2787). The law seeks to promote religious freedom worldwide. It  
9 created a special representative to the Secretary of State for international religious freedom. This  
10 representative serves on a U.S. Commission on International Religious Freedom, an advisory or-  
11 ganization. The act gives the president authority to take diplomatic and other appropriate action  
12 with respect to any country that engages in or tolerates violations of religious freedom. In extreme  
13 circumstances, the president is empowered to impose economic sanctions on countries that sys-  
14 tematically deny religious fr

15 For Gods Sake: Religious Organizations Preach Environmental Stewardship  
16 More People See Compelling Links Between Religion and the Environment  
17 By Larry West, About.com  
18 <http://environment.about.com/od/activismvolunteering/a/religion.htm>

19  
20 Dear EarthTalk: What are religious leaders and organizations doing to communicate the impor-  
21 tance of safeguarding our natural environment? – Peter Toot, Taos, NM

22 Perhaps it's not surprising that those who care for God's creation take environmental issues seri-  
23 ously. But only in recent years have Sunday sermons and other religious services put green topics  
24 front and center.

25 Faith-based Environmental Programs Reflect Spiritual Teachings

26 Much of the credit for increases in such "faith-based" environmentalism can go to the National  
27 Religious Partnership for the Environment (NRPE), which was founded in 1993 to "weave the  
28 mission of care for God's creation across all areas of organized religion." NRPE has forged rela-



1 tionships with a diverse group of religious organizations, including the U.S. Catholic Conference,  
2 the National Council of Churches of Christ, the Coalition on the Environment and Jewish Life,  
3 and the Evangelical Environmental Network.

4 These organizations work with NRPE to develop environmental programs that mesh with their  
5 own varied spiritual teachings. For instance, some 135,000 congregations--counting Catholic par-  
6 ishes, synagogues, Protestant and Eastern Orthodox churches and evangelic congregations--have  
7 been provided with resource kits on environmental issues, including sermons for clergy, lesson  
8 plans for Sunday school teachers, and even conservation tips for church and synagogue building  
9 managers.

#### 10 Many Religious Groups Embrace Environmental Issues

11 Even Evangelical Christians, known for their conservative take on most issues, are going green.

12 The Colorado-based National Association of Evangelicals[ is urging its 30 million members to  
13 pursue a “biblically balanced agenda” to protect the environment alongside fighting poverty. In-  
14 deed, it was Evangelical minister, Reverend Jim Ball, who started the influential “What Would  
15 Jesus Drive?” campaign promoting hybrid cars back in 2003. More recently Ball has worked with  
16 likeminded Evangelicals to craft a faith-based policy statement on global warming.

17 Another key organization is the Forum on Religion and Ecology, which holds conferences that  
18 bring religious leaders together from all over the world to discuss religion’s role in ecological mat-  
19 ters.

#### 20 Individual Congregations Take Action

21 Earth Ministry, an association of 90 churches around Seattle, takes a more “hands-on” approach. It  
22 organizes hikes, book parties, and volunteer support for local agricultural projects, helping to edu-  
23 cate thousands of people along the way. Some congregations also conduct church “greenings,”  
24 like replacing church light bulbs with energy-saving compact fluorescents and virgin copier paper  
25 with recycled paper.

26 Some more hard-hitting environmental actions have sprung up at the congregation level as well. In  
27 Mississippi, Jesus People Against Pollution brought together local churchgoers to pressure au-  
28 thorities to clean-up local toxic waste sites. And in Detroit, the Sisters of the Immaculate Heart

1 turned a former crack house into a community vegetable garden. Meanwhile, New York's Ham-  
2 burg Presbyterian Church "adopted" a nearby creek and won it designation as a protected habitat.  
3 And just like good environmentalists everywhere, Hamburg Presbyterian's parishioners continue  
4 to monitor the creek to ensure that it remains vibrant and healthy.

5 earthtalk@emagazine.com.



22 The Ages of Gaia Exposed

23 by Lewis Loflin

24 In Why Fundamentalists are Beyond Reason, I made a passing comment that New Age  
25 religion and environmentalism seem inter-related. A visitor questioned the remark and  
26 I looked into the matter. While the article was aimed mainly at Christian fundamental-  
27 ists, I had noticed a similar pattern of religious fundamentalism in the environmental  
28

1 movement that did resemble a religion or a cult. (Eden, good and evil, an authoritarian  
2 attitude, etc.) While I was aware of the Leftist politics in the movement, the level of  
3 religion and the related social patterns are astounding.

4 My conclusion is their scientific claims on ozone, global warming, etc. are pseudo-  
5 science and scare propaganda. Their main theme is political power and social control  
6 just like all religious fundamentalists.

7 A discussion of Pantheism and Deism

8 The Ages of Gaia and science facts they won't talk about

9 Let me explain how I use the term "fundamentalism." While the term is often used to  
10 describe a rigid outlook on say a religion such as Christianity or Islam, the term can  
11 have a broader meaning in that the central belief controls all aspects of life including  
12 economics, science, social issues, etc. To a Christian creation science is true because it  
13 supports a particular biblical belief, period. It's the under-pinning of the faith (truth  
14 whatever one holds it to be) must be defended. To the atheist, any notion of God in any  
15 form in science is equally taboo because science (misused) is the under-pinning of  
16 atheism. Properly used, science doesn't prove or disprove God; it just doesn't address  
17 the issue.

18 This is true of other beliefs or philosophies such as fascism or communism. Hitler was  
19 the godhead of Nazism, Stalin the godhead of Stalinism, etc. Science is the godhead of  
20 atheism. All forms of fundamentalism reject and often sacrifice the individual for  
21 group control. People are expendable while Gaia is not. But science is not popular with  
22 most of the public and is a poor basis for spiritualism or emotion. It doesn't deal in the  
23 things that make us feel good or answer ultimate questions most strive for. From what  
24 I've seen most of these people drift into Eastern religion or various form of New Age  
25 nonsense in a search for something their emotions can grasp.

26 New Age religion is not a religion as we define one with a creed or ceremony. "Unlike  
27 most formal religions, it has no holy text, central organization, membership, formal  
28

1 clergy, geographic center, dogma, creed, etc (It) is in fact a free-flowing spiritual  
2 movement; a network of believers and practitioners who share somewhat similar be-  
3 liefs and practices. It's an ill-defined mish-mash of beliefs that result from having no  
4 creed or organization. This is what often results when irreligious or non-religious peo-  
5 ple are searching for some foundation for their lives. New Age religion doesn't provide  
6 the structure of a church and is more limited to individuals or very small groups.

7 See New Age Religion.

8 Quoting Science under Siege by Michael Fumento, Noting that one (allegedly) scien-  
9 tific theory the Gaia theory actually claims that the earth is a living organism, essayist  
10 Charles Krauthammer writes that "contemporary environmentalism . . . indulges in  
11 earth worship to the point of idolatry." The godhead (or goddess head in this case) is  
12 mother earth which has become for many a spiritual being in her own right.

13 Quoting author and biologist Michael Crichton, "Environmentalism seems to be the  
14 religion of choice for urban atheists...If you look carefully, you see that environmental-  
15 ism is in fact a perfect 21st century remapping of traditional Judeo-Christian beliefs  
16 and myths...

17 To quote Rex Murphy, "Save the Earth is evangelical to its green and etymological  
18 roots. We see repeated in environmentalism the great dualisms of good and evil -- the  
19 modern twin being, say, sustainability versus pollution. We see, too, in some aspects of  
20 the environmental movement that almost irresistible instinct to proselytize and "con-  
21 vert" that is the watermark of all the great faiths, the ferocity to persuade that only  
22 comes with the possession of an exclusive and undeniable truth...There is a lot of that  
23 mushy New-Ageism...the wild enthusiasms of mysticism..."

24 From Praise the green god from whom all blessings flow at [www.globeandmail.com](http://www.globeandmail.com)

25 April 24, 2004

26 Michael Crichton Speech - Environmentalism as Religion

27 Extracts from Science under Siege by Michael Fumento  
28

1 Now we have something with at least a form of a creed and are marketable to a large  
2 general public. It gets around all the Bible morality stuff and seems to have the support  
3 of science. Unlike New Age religion, the environmental movement goes beyond just  
4 spiritualism into politics, economics, and science. It intrudes on people in the real  
5 world sometimes good and sometimes bad. Clean air and water are certainly good, but  
6 reducing the human race to subsistence agriculture and allowing/causing the deaths of  
7 millions of people is another matter. Its ranks are often filled with crackpots, disgrun-  
8 tled socialists, and anarchists of all types. It's a full-scale political machine opposed to  
9 traditional western culture and science.

10 The problem is just like Creation Science (Genesis) the science facts don't jive well  
11 with the belief system. How to sell it without some form of Hell or damnation for the  
12 non-believers that won't observe the truth? As the Nazis were very fond of saying, tell  
13 a lie long enough and it will be believed. As one Christian calls it "a combination of  
14 pseudo-science, new age mysticism, paganism, and socialism which serves as a combi-  
15 nation of political philosophy and religion. This is clearly an attempt to replace Amer-  
16 ica's historic secular culture with a new religion -- a pagan religion." To me it's also an  
17 odd alliance of those that oppose some or all parts of our traditional Judeo-Christian,  
18 capitalist, and Enlightenment civilization. Sort of like the Democratic Party being an  
19 alliance of anti-Republicans.

20 There are often socialist and anti-Western themes in general in the environmental  
21 movement. Under the National Religious Partnership for the Environment (NRPE) and  
22 their funding of hard-Left Fenton Communications, environmental fundamentalists are  
23 pursuing a dangerous political/religious theology which is attempting to merge pagan  
24 and New Age religion, statist politics, socialism, and environmental fanaticism. In the  
25 political area, this merging of environmental religion into national politics is a violation  
26 of separation of church and state and should be treated as such.

27 James Lovelock is the father of environmental religion and has melded an earth-  
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worshiping superstitious spiritualism onto science. He attacks mainstream science for questioning his absurd pseudo-science/theology. He is a typical atheist/agnostic longing for spiritualism so he invents his own. Besides the fact he hides in a remote area Great Britain, he's expresses anger others won't fund his pantheistic speculations.

James Lovelock is a nutcase that not only claims the earth is a "living organism" but holds Western Civilization and in particular Christianity in total contempt. In his introduction to the book he attacks scientific peer review as an "inquisition" and attacks fellow scientists as hacks of corporations and universities more interested in "good working conditions, a steady income, tenure, and a pension." They just buy into his nonsense and he knows it. To quote Lovelock himself, "When I wrote the first book on Gaia I had no inkling that it would be taken as a religious book." He confuses "hypothesis" which he defines as "what if" with theory.

Even more scary he reduces humans to another "organism" and says the following, "It is the health of the planet that matters, not that of some individual species of organisms...the people and ecosystems of the First World—from a Gaian perspective, a region that is clearly expendable. That "expendable" First World is the developed nations and people in general. Read his rantings below. Lovelock to the dismay of many environmental extremists is a big supporter of nuclear power.

Lovelock to the dismay of many environmental extremists is a big supporter of nuclear power.

About James Lovelock and Nuclear Power

<http://www.sullivan-county.com/immigration/e0.html>

Selected Extracts

PREFACE, Ages of Gaia by James Lovelock.

Science, unlike other intellectual activities, is almost never done at home. Modern science has become as professional as the advertising industry. And, like that industry, it relies on an expensive and exquisitely refined technique. There is no place for the ama-

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teur in modern science, yet, as is often the way with professions, science more often applies its expertise to the trivial than to the numinous.

Where are the independent scientists? In fact, nearly all scientists are employed by some large organization, such as a governmental department, a university, or a multinational company. Only rarely are they free to express their science as a personal view.

They may think that they are free, but in reality they are, nearly all of them, employees; they have traded freedom of thought for good working conditions, a steady income, tenure, and a pension.

They are also constrained by an army of bureaucratic forces, from the funding agencies to the health and safety organizations. Scientists are also constrained by the tribal rules of the discipline to which they belong. A physicist would find it hard to do chemistry and a biologist would find physics well-nigh impossible to do. To cap it all, in recent years the "purity" of science is ever more closely guarded by a self-imposed inquisition called the peer review.

This well-meaning but narrow-minded nanny of an institution ensures that scientists work according to conventional wisdom and not as curiosity or inspiration moves them. Lacking freedom they are in danger of succumbing to a finicky gentility or of becoming, like medieval theologians, the creatures of dogma.

I wrote the first Gaia book so that a dictionary was the only aid needed and I have tried to write this way in the present book. I am puzzled by the response of some of my scientific colleagues who take me to task for presenting science this way. Things have taken a strange turn in recent years; almost the full circle from Galileo's famous struggle with the theological establishment. It is the scientific establishment that makes itself esoteric and is the scourge of heresy.

I have had to become a radical scientist also because the scientific community is reluctant to accept new theories as fact, and rightly so. It was nearly 150 years before the notion that heat is a measure of the speed of molecules became a fact of science, and



1 40 years before plate tectonics was accepted by the scientific community.

2 Now perhaps you see why I work at home supporting myself and my family by what-  
3 ever means come to hand.

4 It would be difficult after spending nearly twenty years developing a theory of the  
5 Earth as a living organism—where the evolution of the species and their material envi-  
6 ronment are tightly coupled but still evolve by natural selection—to avoid capturing  
7 views about the problems of pollution and the degradation of the natural environment  
8 by humans.

9 Gaia theory forces a planetary perspective. It is the health of the planet that matters, not  
10 that of some individual species of organisms. This is where Gaia and the environmental  
11 movements, which are concerned first with the health of people, part company. The  
12 health of the Earth is most threatened by major changes in natural ecosystems.

13 Agriculture, forestry, and to a lesser extent fishing are seen as the most serious sources  
14 of this kind of damage with the inexorable increase of the greenhouse gases, carbon  
15 dioxide, methane, and several others coming next. Geophysicists do not ignore the  
16 depletion of the ozone layer in the stratosphere with its concomitant risk of increased  
17 irradiation with short-wave ultraviolet, or the problem of acid rain. These are seen as  
18 real and potentially serious hazards but mainly to the people and ecosystems of the  
19 First World—from a Gaian perspective, a region that is clearly expendable.

20 It was buried beneath glaciers, or was icy tundra, only 10,000 years ago. As for what  
21 seems to be the greatest concern, nuclear radiation, fearful though it is to individual  
22 humans is to Gaia a minor affair. It may seem to many readers that I am mocking those  
23 environmental scientists whose life work is concerned with these threats to human life.

24 This is not my intention. I wish only to speak out for Gaia because there are so few  
25 who do, compared with the multitudes who speak for the people.

26 Because of this difference in emphasis, a concern for the planet rather than for our-  
27 selves, I came to realize that there might be the need for a new profession, that of  
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1 planetary medicine. I am indebted to the historian Donald McIntyre for writing to tell  
2 me that it was James Hutton who first introduced the idea of planetary physiology in  
3 the eighteenth century. Hutton was a physician as well as a geologist.

4 Physiology was the first science of medicine, and one of the aims of this book is to es-  
5 tablish "geophysiology" as a basis for planetary medicine...Since 1982 the United Na-  
6 tions University, through its program officer, Walter Shearer, has provided moral and  
7 material support especially for the notion of planetary medicine.

8 Extracts from the Chapter God and Gaia. P. 203-223 by James Lovelock.

9 When I wrote the first book on Gaia I had no inkling that it would be taken as a reli-  
10 gious book. Although I thought the subject was mainly science, there was no doubt that  
11 many of its readers found otherwise. Two-thirds of the letters received, and still com-  
12 ing in, are about the meaning of Gaia in the context of religious faith. This interest has  
13 not been limited to the laity; a most interesting letter came from Hugh Montefiore, then  
14 Bishop of Birmingham. He asked which I thought came first, life or Gaia.

15 My attempts to answer this question led to a correspondence, reported in a chapter of  
16 his book The Probability of God. I suspect that some cosmologists are similarly visited  
17 by enquires from those who imagine them to be at least on nodding terms with God. I  
18 was naive to think that a book about Gaia would be taken as science only.

19 So where do I stand about religion? While still a student I was asked seriously, by a  
20 member of the Society of Friends, if I had ever had a religious experience. Not under-  
21 standing what he meant, imagining that he referred to a manifestation or a miracle, I  
22 answered no. Looking back from 45 years on, I now tend to think that I should have  
23 said yes. Living itself is a religious experience. At the time, however, the question was  
24 almost meaningless because it implied a separation of life into sacred and secular parts.  
25 I now think that there can be no such division.

26 My thoughts about religion when a child grew from those of my father and the country  
27 folk I knew. It was an odd mixture, composed of witches, May trees, and the views ex-  
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1 pressed by Quakers, in and outside the Sunday school at a Friends' meeting house.  
2 Christmas was more of a solstice feast than a Christian one. We were, as a family, well  
3 into the present century, yet still amazingly superstitious. So ingrained was my child-  
4 hood conditioning about the power of the occult that in later life it took a positive act of  
5 will to stop touching wood or crossing fingers whenever some hazard was to be faced.  
6 Christianity was there not so much as a faith, rather as a set of sensible directions on  
7 how to be good...

8 What about God? I am too committed to the scientific way of thinking to feel comfort-  
9 able when enunciating the Creed or the Lord's Prayer in a Christian Church. The insis-  
10 tence of the definition "I believe in God the Father Almighty, Maker of Heaven and  
11 Earth" seems to anesthetize the sense of wonder, as if one were committed to a single  
12 line of thought by a cosmic legal contract.

13 I have kept my doubts in a separate place for too long. Now that I write this chapter, I  
14 have to try somehow to explain, to myself as well as to you, what is my religious be-  
15 lief. I am happy with the thought that the Universe has properties that make the emer-  
16 gence of life and Gaia inevitable. But I react to the assertion that it was created with  
17 this purpose. It might have been; but how the Universe and life began are ineffable  
18 questions.

19 When a scientist colleague uses evidence about the Earth eons ago to explain his theory  
20 of the origins of life it stirs a similar sense of doubt. How can the events so long ago  
21 that led to the emergence of anything so intricate as life be treated as a fact of science?  
22 It is human to be curious about antecedents, but expeditions into the remote past in  
23 search of origins is as supremely unimportant as was the hunting of the snark.

24 The greater part of the information about our origins is with us here and now; so let us  
25 rejoice in it and be glad to be alive.

26 At a meeting in London recently, a wise man, Dr. Donald Braben, asked me: "Why do  
27 you stop with the Earth? Why not consider if the Solar System, the Galaxy, or even the  
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1 Universe is alive?" My instant answer was that the concept of a living Earth, Gaia, is  
2 manageable. We know that there is no other life in this Solar System, and the nearest  
3 star is utterly remote.

4 There must be other Gaias circling other docile long-lived stars but, curious though I  
5 may be about them and about the Universe, these are intangible—concepts for the in-  
6 tellect, not the senses. Until, if ever, we are visited from other parts of the Universe we  
7 are obliged to remain detached.

8 Many, I suspect, have trodden this same path through the mind. Those millions of  
9 Christians who make a special place in their hearts for the Virgin Mary possibly re-  
10 spond as I do. The concept of Yahweh as remote, all-powerful, all-seeing is either  
11 frightening or unapproachable. Even the sense of presence of a more contemporary  
12 God, a still, small voice within, may not be enough for those who need to communicate  
13 with someone outside. Mary is close and can be talked to.

14 She is believable and manageable. It could be that the importance of the Virgin Mary  
15 in faith is something of this kind, but there may be more to it. What if Mary is another  
16 name for Gaia? Then her capacity for virgin birth is no miracle or parthenogenetic ab-  
17 erration, it is a role of Gaia since life began. Immortals do not need to reproduce an im-  
18 age of themselves; it is enough to renew continuously the life that constitutes them.

19 Any living organism a quarter as old as the Universe itself and still full of vigor is as  
20 near immortal as we ever need to know. She is of this Universe and, conceivably, a part  
21 of God. On Earth she is the source of life everlasting and is alive now; she gave birth to  
22 humankind and we are a part of her.

23 This is why, for me, Gaia is a religious as well as a scientific concept, and in both  
24 spheres it is manageable. Theology is also a science, but if it is to operate by the same  
25 rules as the rest of science, there is no place for creeds or dogma. By this I mean theol-  
26 ogy should not state that God exists and then proceed to investigate his nature and his  
27 interactions with the Universe and living organisms. Such an approach is prescriptive,  
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1 presupposes his existence, and closes the mind to such questions as:

2 What would the Universe be like without God? How can we use the concept of God as  
3 a way to look at the Universe and ourselves? How can we use the concept of Gaia as a  
4 way to understanding God? Belief in God is an act of faith and will remain so. In the  
5 same way, it is otiose to try to prove that Gaia is alive. Instead, Gaia should be a way to  
6 view the Earth, ourselves, and our relationships with living things.

7 The life of a scientist who is a natural philosopher can be deeply religious. Curiosity is  
8 an intimate part of the process of loving. Being curious and getting to know the natural  
9 world leads to a loving relationship with it. It can be so deep that it cannot be articu-  
10 lated, but it is nonetheless good science.

11 Creative scientists, when asked how they came upon some great discovery, frequently  
12 state, "I knew it intuitively, but it took several years work to prove it to my col-  
13 leagues." Compare that statement with this one by William James, the nineteenth-  
14 century philosopher and psychologist, in *The Varieties of Religious Experience*:

15 The truth is that in the metaphysical and religious sphere, articulate reasons are cogent  
16 for us only when our inarticulate feelings of reality have already been impressed in fa-  
17 vor of the same conclusion. Then, indeed, our intuitions and our reason work together,  
18 and great world ruling systems, like that of the Buddhist or of the Catholic philosophy,  
19 may grow up.

20 Our impulsive belief is here always what sets up the original body of truth, and our ar-  
21 ticulately verbalized philosophy is but a showy translation into formulas. The unrea-  
22 soned and immediate assurance is the deep thing in us, the reasoned argument is but a  
23 surface exhibition. Instinct leads, intelligence does but follow.

24 This was the way of the natural philosophers in James Hutton's time in the eighteenth  
25 century and is still the way of many scientists today. Science can embrace the notion of  
26 the Earth as a super organism and can still wonder about the meaning of the Universe.  
27 How did we reach our present secular humanist world? In times that are ancient by  
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1 human measure, as far back as the earliest artifacts can be found, it seems that the  
2 Earth was worshipped as a goddess and believed to be alive. The myth of the great  
3 Mother is part of most early religions. The Mother is a compassionate, feminine figure;  
4 spring of all life, of fecundity, of gentleness. She is also the stern and unforgiving  
5 bringer of death. As Aldous Huxley reminds in *The Human Experience*:

6 In Hinduism, Kali is at once the infinitely kind and loving mother and the terrifying  
7 Goddess of destruction, who has a necklace of skulls and drinks the blood of human  
8 beings from a skull. This picture is profoundly realistic; if you give life, you must nec-  
9 essarily give death, because life always ends in death and must be renewed through  
10 death.

11 At some time not more than a few thousand years ago the concept of a remote master  
12 God, an overseer of Gaia, took root. At first it may have been the Sun, but later it took  
13 on the form we have with us now of an utterly remote yet personally immanent ruler of  
14 the Universe. Charlene Spretnak, in her moving and readable book, *The Spiritual Di-*  
15 *mensions of Green Politics*, attributes the first denial of Gaia, the Earth goddess, to the  
16 conquest of an earlier Earth-centered civilization by the Sun- worshipping warriors of  
17 the invading Indo-European tribes.

18 Picture yourself as a witness of that decisive moment in history, that is, as a resident of  
19 the peaceful, artful, Goddess- oriented culture in Old Europe. (Don't think "matriar-  
20 chy"! It may have been, but no one knows, and that is not the point.) It is 4,500 BC.

21 You are walking along a high ridge, looking out across the plains to the east. In the dis-  
22 tance you see a massive wave of horsemen galloping towards your world on strange,  
23 powerful animals. (The European ancestor of the horse had become extinct.)

24 They brought few women, a chieftain system, and only a primitive stamping technique  
25 to impress their two symbols, the sun and a pine tree. They moved in waves first into  
26 southeastern Europe, later down into Greece, across all of Europe, also into the Middle  
27 and Near East, North Africa and India. They brought a sky god, a warrior cult, and pa-  
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1 triarchal social order. And that is where we live today—in an Indo-European culture,  
2 albeit one that is very technologically advanced.

3 The evolution of these horsemen to the modern men who ride their infinitely more  
4 powerful machines of destruction over the habitats of our partners in Gaia seems only a  
5 small step. The rest of us, in the cozy, comfortable hell of urban life, care little what  
6 they do so long as they continue to supply us with food, energy, and raw materials and  
7 we can continue to play the game of human interaction.

8 In ancient times, belief in a living Earth and in a living cosmos was the same thing.  
9 Heaven and Earth were close and part of the same body. As time passed and awareness  
10 grew of the vast distances of space and time through such inventions as the telescope,  
11 the Universe was comprehended and the place of God receded until now it hides be-  
12 hind the Big Bang, claimed to have started it all. At the same time, as population in-  
13 creased so did the proportion forced to lead urban lives out of touch with Nature. In the  
14 past two centuries we have nearly all become city dwellers, and seem to have lost in-  
15 terest in the meaning of both God and Gaia. As the theologian Keith Ward wrote in the  
16 Times in December 1984:

17 It is not that people know what God is, and have decided to reject him. It seems that  
18 very few people even know what the orthodox traditional idea of God, shared by Juda-  
19 ism, Islam and Christianity, is. They have not the slightest idea what is meant by the  
20 word God. It just has no sense or possible place in their lives.

21 Instead they either invent some vague idea of a cosmic force with no practical implica-  
22 tions at all; or they appeal to some half- forgotten picture of a bearded super-person  
23 constantly interfering with the mechanistic laws of Nature.

24 I wonder if this is the result of sensory deprivation. How can we revere the living world  
25 if we can no longer hear the bird song through the noise of traffic, or smell the sweet-  
26 ness of fresh air? How can we wonder about God and the Universe if we never see the  
27 stars because of the city lights? If you think this to be exaggeration, think back to when  
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1 you last lay in a meadow in the sunshine and smelt the fragrant thyme and heard and  
2 saw the larks soaring and singing. Think back to the last night you looked up into the  
3 deep blue black of a sky clear enough to see the Milky Way, the congregation of stars,  
4 our Galaxy.

5 The attraction of the city is seductive. Socrates said that nothing of interest happened  
6 outside its walls and, much later, Dr. Johnson expressed his view of country living as  
7 “One green field is like another.” Most of us are trapped in this world of the city, an  
8 everlasting soap opera, and all too often as spectators, not players. It is something to  
9 have sensitive commentators like Sir David Attenborough bring the natural world with  
10 its visions of forests and wilderness to the television screens of our suburban rooms.  
11 But the television screen is only a window and only rarely clear enough to see the  
12 world outside; it can never bring us back into the real world of Gaia.

13 City life reinforces and strengthens the heresy of humanism, that narcissistic devotion  
14 to human interests alone. The Irish missionary Sean McDonagh wrote in his book, *To  
15 Care for the Earth*: “The 20 billion years of God's creative love is either seen simply as  
16 the stage on which the drama of human salvation is worked out, or as something radi-  
17 cally sinful in itself and needing transformation.”

18 The heartlands of the great religions are now in the last bastions of rural existence, in  
19 the Third World of the tropics. Elsewhere God and Gaia that once were joined and re-  
20 spected are now divorced and of no account. We have, as a species, almost resigned  
21 from membership in Gaia and given to our cities and our nations the rights and respon-  
22 sibilities of environmental regulation. We struggle to enjoy the human interactions of  
23 city life yet still yearn to possess the natural world as well. We want to be free to drive  
24 into the country or the wilderness without polluting it in so doing; to have our cake and  
25 eat it.

26 Human and understandable such striving may be, but it is illogical. Our humanist con-  
27 cerns about the poor of the inner cities or the Third World, and our near-obscene ob-  
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1 session with death, suffering, and pain as if these were evil in themselves—these  
2 thoughts divert the mind from our gross and excessive domination of the natural world.  
3 Poverty and suffering are not sent; they are the consequences of what we do. Pain and  
4 death are normal and natural; we could not long survive without them. Science, it is  
5 true, assisted at the birth of technology.

6 But when we drive our cars and listen to the radio bringing news of acid rain, we need  
7 to remind ourselves that we, personally, are the polluters. We, not some white-coated  
8 devil figure, buy the cars, drive them, and foul the air. We are therefore accountable,  
9 personally, for the destruction of the trees by photochemical smog and acid rain. We  
10 are responsible for the silent spring that Rachel Carson predicted.

11 There are many ways to keep in touch with Gaia. Individual humans are densely popu-  
12 lated cellular and endosymbiont collectives, but clearly also identities. Individuals in-  
13 teract with Gaia in the cycling of the elements and in the control of the climate, just  
14 like a cell does in the body. You also interact individually in a spiritual manner through  
15 a sense of wonder about the natural world and from feeling a part of it. In some ways  
16 this interaction is not unlike the tight coupling between the state of the mind and the  
17 body. Another connection is through the powerful infrastructures of human communi-  
18 cation and mass transfer.

19 We as a species now move a greater mass of some materials around the Earth than did  
20 all the biota of Gaia before we appeared. Our chattering is so loud that it can be heard  
21 to the depths of the Universe. Always, as with other and earlier species within Gaia, the  
22 entire development arises from the activity of a few individuals. The urban nests, the  
23 agricultural ecosystems, good and bad, are all the consequences of rapid positive feed-  
24 back starting from the action of an inspired individual.

25 A frequent misunderstanding of my vision of Gaia is that I champion complacency,  
26 that I claim feedback will always protect the environment from any serious harm that  
27 humans might do. It is sometimes more crudely put as “Lovelock's Gaia gives industry  
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1 the green light to pollute at will.” The truth is almost diametrically opposite.

2 Gaia, as I see her, is no doting mother tolerant of misdemeanors, nor is she some frag-  
3 ile and delicate damsel in danger from brutal mankind. She is stern and tough, always  
4 keeping the world warm and comfortable for those who obey the rules, but ruthless in  
5 her destruction of those who transgress. Her unconscious goal is a planet fit for life. If  
6 humans stand in the way of this, we shall be eliminated with as little pity as would be  
7 shown by the micro-brain of an intercontinental ballistic nuclear missile in full flight to  
8 its target.

9 What I have written so far has been a testament built around the idea of Gaia. I have  
10 tried to show that God and Gaia, theology and science, even physics and biology are  
11 not separate but a single way of thought. Although a scientist, I write as an individual,  
12 and my views are likely to be less common than I like to think. So now let me tell you  
13 something of what the scientific community has to say on this subject.

14 In science, the more discovered, the more new paths open for exploration. It is usual in  
15 science, when things are vague and unclear, for the path to be like that of a drunkard  
16 wandering in a zigzag. As we stagger back from what lastly dawns upon our befuddled  
17 wits is the wrong way, we cross over the true path and move nearly as far to the,  
18 equally wrong, opposite side. If all goes well, our deviations lessen and the path con-  
19 verges towards, but never completely follows, the true one. It gives a new insight to the  
20 old tag in vino veritas. So natural is this way to find the truth that we usually program  
21 our computers to solve problems too tedious to do ourselves by setting them to follow  
22 the same trial-and-error, staggering, stumbling walk.

23 The process is dignified and mystified by calling it “iteration,” but the method is the  
24 same. The only difference is that, so quickly is it done, the eye never sees the fumbling.  
25 We have lost the instinctive understanding of what life is and of our place within Gaia.  
26 Our attempts to define life are much in the stage of the drunkard's walk. The two op-  
27 posing verges representing the extremes of iteration are illustrated by a splendid phi-  
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1 losophical debate that has gone on for the past twenty years between the molecular bi-  
2 ologists on the one side and the new school of thermodynamics on the other.

3 Jacques Monod's *Chance and Necessity*, although first published in 1970, most clearly  
4 and beautifully conveys the clear, strong, and rigorous a approach of solid science  
5 based firmly in a belief in a materialistic and deterministic Universe. The other verge is  
6 represented by those, like Erich Jantsch, who believe in a self-organizing Universe. It  
7 is concerned with the thermodynamics of the unsteady state of which dissipative struc-  
8 tures such as flames, whirlpools, and life itself are examples. Although the participants  
9 are all well known and respected in the English-speaking world, most of this entertain-  
10 ing debate has gone on in French, so many of us have missed the fun.

11 The essence of this contest is a rerun of the ancient battle between the holists and the  
12 reductionists. As Monod reminds us:

13 Certain schools of thought (all more or less consciously or confusedly influenced by  
14 Hegel) challenge the value of the analytical approach to systems as complex as living  
15 beings. According to these holist schools which, phoenix like, are reborn in every gen-  
16 eration, the analytic attitude (reductionitss) is doomed to fail in its attempts to reduce  
17 the properties of a very complex organization to the “sum” of the properties of its parts.  
18 It is a very stupid and misguided quarrel which merely testifies to the holists' total lack  
19 of understanding of scientific method and the crucial role analysis plays in it. How far  
20 could a Martian engineer get if trying to understand an earthly computer, he refused on  
21 principle to dissect the machine's basic electronic components which execute the opera-  
22 tion of propositional algebra.

23 These strong words were in the 1970 edition of *Chance and Necessity*. Maybe they are  
24 by now less extremely held, but they serve well to express what was and still is an im-  
25 portant scientific constituency.

26 No one now doubts that it was plain, honest reductionist science that allowed us to  
27 unlock so many of the secrets of the Universe, not least those of the living macromole-  
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cles that carry the genetic information of our cells. But clear, strong, and powerful though it may be, it is not enough by itself to explain the facts of life. Consider Jacques Monod's Martian engineer. Would it have been sensible to have dashed in with a kit of tools and disassembled analytically the computer he found? Or would it have been better, as a first step, to have switched it on and questioned it as a whole system? If you have any doubts about the answer to this question then consider the thought that the hypothetical Martian engineer was an intelligent computer and the object he examined, you.

By contrast, in 1972 Ilya Prigogine wrote:

It is not instability but a succession of instabilities which allow the crossing of the no man's land between life and no-life. We start to disentangle only certain stages. This concept of biological order leads automatically to a more blurred appreciation of the role of chance and necessity to recall the title of the well-known work by Jacques Monod. Fluctuation which allows the system to depart from states near thermodynamic equilibrium represents the stochastic aspect, the part played by chance. Contrariwise, the environmental instability, the fact that the fluctuations will increase, represents necessity. Chance and necessity cooperate instead of opposing one another.

I wholly agree with Monod that the cornerstone of the scientific method is the postulate that Nature is objective. True knowledge can never be gained by attributing "purpose" to phenomena. But, equally strongly, I deny the notion that systems are never more than the sum of their parts. The value of Gaia in this debate is that it is the largest of living systems. It can be analyzed both as a whole system and, in the reductionist manner, as a collection of parts. This analysis need disturb neither the privacy nor the function of Gaia any more than would the movement of a single commensal bacterium on the surface of your nose.

Prigogine was not the first to recognize the inadequacies of equilibrium thermodynamics. He had many illustrious predecessors, among them the physical chemists J. W.

1 Gibbs, L. Onsager, and K. G. Denbigh, who explored the thermodynamics of the  
2 steady state. But it was that truly great physicist, Ludwig Boltzmann, who pointed the  
3 way towards the understanding of life in thermodynamic terms. And it was by reading  
4 Schrödinger's book *What Is Life?* in the early 1960s that I first realized that planetary  
5 life was revealed by the contrast between the near- equilibrium state of the atmosphere  
6 of a dead planet and the exuberant disequilibrium of the Earth.

7 When we cross from the sharp clarity of the real world into that nightmare land of dis-  
8 sipating structures, what do we learn that makes the next staggering lurch less errone-  
9 ous than the last? I have gained from Prigogine's world view a confirmation of a suspi-  
10 cion that time is a variable much too often ignored. In particular, many of the apparent  
11 contradictions between these two schools of thought seem to resolve if viewed along  
12 the time dimension instead of in space.

13 We have evolved from the world of simple molecules through dissipative structures to  
14 the more permanent entities that are living organisms. The further we go from the pre-  
15 sent, either into the past or the future, the greater the uncertainty. Darwin was right to  
16 dismiss thoughts about the origins of life; as Jerome Rothstein has said, the restrictions  
17 of the second law of thermodynamics prevent us from ever knowing about the begin-  
18 ning or the end of the Universe.

19 In our guts and in those of other animals, the ancient world of the Archean lives on. In  
20 Gaia, also, the ancient chaotic world of dissipating structures that preceded life still  
21 lives on. A recent and relatively unknown discovery of science is that the fluctuations  
22 at every scale from viscosity to weather can be chaotic.

23 There is no complete determinism in the Universe; many things are as unpredictable as  
24 a perfect roulette wheel. An ecologist colleague of mine, C. S. Holling, has observed  
25 that the stability of large-scale ecosystems depends upon the existence of internal cha-  
26 otic instabilities. These pockets of chaos in the larger, stable Gaian system serve to  
27 probe the boundaries set by the physical constraints to life. By this means the opportu-  
28

1 ism of life is insured, and no new niche remains undiscovered. For example, I live in a  
2 rural region surrounded by farmers who keep sheep.

3 It is impressive how adventurous young lambs, through their continuous probing of my  
4 boundary hedges, can find their way through onto the richer, ungrazed land on my side.  
5 The behavior of young men is not so different.

6 My reason for wandering onto the battlefield of the war between holists and reduction-  
7 ists was to illustrate how polarized is science itself. Let me conclude this digressionary  
8 visit and return to the theme of this chapter, God and Gaia. And let me start by remind-  
9 ing you of Daisyworld—a model which is reductionist and holistic at the same time. It  
10 was made to answer a criticism of Gaia, that it was teleology. The need for reduction  
11 arose because the relationships between all the living things on Earth in their countless  
12 trillions and the rocks, the air, and the oceans could never be described in full detail by  
13 a set of mathematical equations. A drastic simplification was needed.

14 But the model with its closed loop cybernetic structure was also holistic. This also ap-  
15 plies to ourselves. It would be pointless to attempt to disentangle all the relationships  
16 between the atoms within the cells that go to make up our bodies. But this does not  
17 prevent us from being real and identifiable, and having a life span of at least 70 years.

18 We are also in an adversary contest between our allegiance to Gaia and to humanism.  
19 In this battle, politically minded humanists have made the word “reductionist” pejora-  
20 tive, to discredit science and to bring contumely to the scientific method. But all scien-  
21 tists are reductionists to some extent; there is no way to do science without reduction at  
22 some stage.

23 Even the analyzers of holistic systems, confronted with an unknown system, do tests,  
24 such as perturbing the system and observing the response, or making a model of it and  
25 then reducing that model. In biology it is impossible to avoid reduction, even if we  
26 wished.

27 The material and relationships of living things are so phenomenally complex that a ho-  
28



1 listic view is seen only when it suits the biota to exist as an identifiable entity such as a  
2 cell, a plant, a nest, or Gaia. Certainly, the entities themselves can be observed and  
3 classified with a minimum of invasion, but sooner or later curiosity will drive an urge  
4 to discover what the entities are made of and how they work.

5 In any case, the idea that mere observation is neutral is itself an illusion. Someone once  
6 said that the reason the Universe is running down is that God is always observing it and  
7 hence reducing it. Be this as it may, there is little doubt that a nature reserve, a wildlife  
8 park, or an ecosystem is reduced in proportion to the amount of time that we and our  
9 children perturb the wildlife by watching them.

10 In *The Self-Organizing Universe*, Erich Jantsch made a strong argument for the omni-  
11 presence of a self-organizing tendency; so that life, instead of being a chance event,  
12 was an inevitable consequence. Jantsch based his thoughts on the theories of those pio-  
13 neers of what might be called the “thermodynamics of the unsteady state”—Max Ei-  
14 gen, Ilya Prigogine, Humberto Maturana, Francisco Varela, and their successors. As  
15 scientific evidence accumulates and theories are developed in this recondite topic, it  
16 may become possible to encompass the metaphor of a living Universe. The intuition of  
17 God could be rationalized; something of God could become as familiar as Gaia.

18 For the present, my belief in God rests at the stage of a positive agnosticism. I am too  
19 deeply committed to science for undiluted faith; equally unacceptable to me spiritually  
20 is the materialist world of undiluted fact. Art and science seem inter- connected with  
21 each other and with religion, and to be mutually enlarging.

22 That Gaia can be both spiritual and scientific is, for me, deeply satisfying. From letters  
23 and conversations I have learnt that a feeling for the organism, the Earth, has survived  
24 and that many feel a need to include those old faiths in their system of belief, both for  
25 themselves and because they feel that Earth of which they are a part is under threat. In  
26 no way do I see Gaia as a sentient being, a surrogate God. To me Gaia is alive and part  
27 of the ineffable Universe and I am a part of her.  
28

1 The philosopher Gregory Bateson expressed this agnosticism in his own special way:  
2 The individual mind is immanent but not only in the body. It is immanent also in path-  
3 ways and messages outside the body; and there is a larger mind of which the individual  
4 mind is only a sub-system. This larger mind is comparable to God and is perhaps what  
5 some people mean by God, but it is still immanent in the total interconnected social  
6 systems and planetary ecology.

7 As a scientist I believe that Nature is objective but also recognize that Nature is not  
8 predetermined. The famous uncertainty principle that the physicist Werner Heisenberg  
9 discovered was the first crack in the crystalline structure of determinism.

10 Now chaos is revealed to have an orderly mathematical prescription. This new theo-  
11 retical understanding enlightens the practice of weather forecasting. Previously it was  
12 believed, as the French physicist Laplace had stated, that given enough knowledge  
13 (and, in this age, computer power) anything could be predicted.

14 It was a thrill to discover that there was real, honest chaos decently spread around the  
15 Universe and to begin to understand why it is impossible in this world ever to predict if  
16 it will be raining at some specific place or time. True chaos is there as the counter- part  
17 of order. Determinism is reduced to a collection of fragments, like jewels that have  
18 fallen on the surface of a bowl of pitch.

19 Science has its fashions, and one thing guaranteed to stir interest and start a new fash-  
20 ion is the exploration of a pathology. Health is far less interesting than disease. I well  
21 recall as a schoolboy visiting the Museum of the London School of Hygiene and  
22 Tropical Medicine where there were on display life-sized models of subjects stricken  
23 by tropical illnesses. Although less well crafted, they were so strange and horrible as to  
24 make tame the professional horrors of Madame Tussaud's waxworks.

25 The sight of full-sized models of the victims of elephantiasis or leprosy and the imagi-  
26 nation of their suffering made bearable the adolescent agonies of a schoolboy. Con-  
27 temporary science is similarly fascinated by pathologies of a mathematical kind. Theo-  
28

1 retical ecology, as we have already discussed, is more concerned with sick than with  
2 healthy ecosystems. The vagaries of weather are more interesting than the long-term  
3 stability of climate. Continuous creation never had a chance in face of the ultimate pa-  
4 thology of the Big Bang.

5 Interest in the pathologies of science has a curious link with religion. Mathematicians  
6 and physicists are, without seeming aware of it, into demonology. They are found in-  
7 vestigating “catastrophe theory” or “strange attractors.” They then seek from their col-  
8 leagues in other sciences examples of pathologies that match their curious models. Per-  
9 haps I should explain that in mathematics, an attractor is a stable equilibrium state,  
10 such as a point at the bottom of a smooth bowl where a ball will always come to rest.  
11 Attractors can be lines, planes, or solids as well as points, and are the places where sys-  
12 tems tend to settle down to rest. Strange attractors are chaotic regions of fractional di-  
13 mensions that act like black holes, drawing the solutions of equations to their unknown  
14 and singular domains. Phenomena of the natural world—such as weather, disease, and  
15 ecosystem failures— are characterized by the presence of these strange attractors in the  
16 clockwork of their mathematics, lurking like time bombs as harbingers of instability,  
17 cyclical fluctuations, and just plain chaos.

18 The remarkable thing about real and healthy living organisms is their apparent ability  
19 to control or limit these destabilizing influences. It seems that the world of dissipating  
20 structures, threatened by catastrophe and parasitized by strange attractors, is the fore-  
21 world of life and of Gaia and the underworld that still exists. The tightly coupled evo-  
22 lution of the physical environment and the autopoietic entities of pre-life led to a new  
23 order of stability; the state associated with Gaia and with all forms of healthy life. Life  
24 and Gaia are to all intents immortal, even though composed of entities that at least in-  
25 clude dissipative structures. I find a curious resemblance between the strange attractors  
26 and other denizens of the imaginary world of mathematical constructs and the demons  
27 of older religious belief.  
28

1 A parallel that goes deep and includes an association with sickness not health, famine  
2 not plenty, storm not calm. A saint of this fascinating branch of mathematics is the  
3 Frenchman, Benoit Mandelbrot. From his expressions in fractional dimensions it is  
4 possible to produce graphic illustrations of all manner of natural scenes: coastlines,  
5 mountain ranges, trees, and clouds, all startlingly realistic. But when Mandelbrot's sci-  
6 entific art is applied to strange attractors we see, in graphic form, the vividly colored  
7 image of a demon or a dragon.

8 Gaia theory may seem to be dull in comparison with these exotica. A thing, like health,  
9 to be taken for granted except when it fails. This may be why so few scientists and  
10 theologians are interested in it; they prefer the exploration of the Universe, or of the  
11 origins of life, to the exploration of the natural world that surrounds them. I find it dif-  
12 ficult to explain to my colleagues why I prefer to live and work alone in the depths of  
13 the country. They think that I must be missing all the excitement of exploration.

14 I prefer a life with Gaia here and now, and to look back only to that part of her history  
15 which is knowable, not to what might have been before she came into being.

16 The point of the fable is to argue that it is not necessary to know the intricate details of  
17 the origin of life itself to understand the evolution of Gaia and of ourselves. In a similar  
18 way, the contemplation of those other remote places before and after life, Heaven and  
19 Hell, may be irrelevant to the discovery of a seemly way of life. We may well have  
20 been assisted by the nature of the Universe to cheat chaos and evolve spontaneously,  
21 on some Hadean shore, into our ancestral form of life.

22 It seems unlikely that we come from a life form planted here by visitors from else-  
23 where; or even arrived clinging to some piece of cometary debris from outer space. I  
24 like to think that Darwin dismissed enquires about the origins of life not merely be-  
25 cause the information available in his time was so sparse that the search for life's origin  
26 would have had to remain speculative, but, more cogently, because he recognized that  
27 it was not necessary to know the details of the origin of life to formulate the evolution  
28

1 of the species by natural selection. This is what I mean by the concept of Gaia being  
2 manageable.

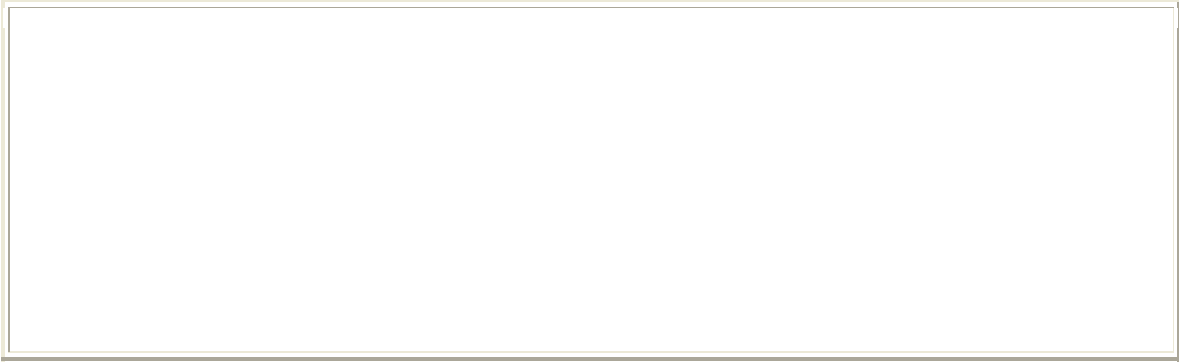
3 The belief that the Earth is alive and to be revered is still held in such remote places as  
4 the west of Ireland and the rural parts of some Latin countries. In these places, the  
5 shrines to the Virgin Mary seem to mean more, and to attract more loving care and at-  
6 tention, than does the church itself. The shrines are almost always in the open, exposed  
7 to the rain and to the sun, and surrounded by carefully tended flowers and shrubs.

8 I cannot help but think that these country folk are worshipping something more than  
9 the Christian maiden. There is little time left to prevent the destruction of the forests of  
10 the humid tropics with consequences far-reaching both for Gaia and for humans. The  
11 country folk, who are destroying their own forests, are often Christians and venerate  
12 the Holy Virgin Mary. If their hearts and minds could be moved to see in her the em-  
13 bodiment of Gaia, then they might become aware that the victim of their destruction  
14 was indeed the Mother of humankind and the source of everlasting life.

15 What does Al Gore say about the science behind global warming?

16 "As it happens, the idea of social justice is inextricably linked in the Scriptures with  
17 ecology."  
18





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7 What is New age Religion?

8 New Age Religion is not a religion at all, but a vast syncretism (or mixing) of numerous religious  
9 and philosophical ideas. This has been going on since the time of Alexander the Great, but was  
10 snuffed out under Christianity and its enforced dogma starting around 325 AD. Alexander's vast  
11 empire opened the door for Eastern religion and mysticism to move West, while Greek philosophy  
12 and reason moved East. Today the same process continues, but on a global scale in particular with  
13 the internet.

14 It has some similarities to ancient Gnosticism adopting both its methods and its individual nature.  
15 Most often rejecting reason and science, New Age religion more than anything is emotional, filling  
16 in a void left by a secular culture and discontent with traditional religious beliefs. Modern envi-  
17 ronmentalism could be broadly classified into New Age religion because of its treatment as a  
18 pseudo-religion and deification of Nature. See the links below.

19 Introduction

20 The New Age Movement is in a class by itself. Unlike most formal religions, it has no holy text,  
21 central organization, membership, formal clergy, geographic center, dogma, creed, etc. They often  
22 use mutually exclusive definitions for some of their terms. The New Age is in fact a free-flowing  
23 spiritual movement; a network of believers and practitioners who share somewhat similar beliefs  
24 and practices. Their book publishers take the place of a central organization; seminars, conven-  
25 tions, books and informal groups replace of sermons and religious services. Quoting John Naisbitt  
26 (1):

27 "In turbulent times, in times of great change, people head for the two extremes: fundamentalism  
28 and personal, spiritual experience...With no membership lists or even a coherent philosophy or

1 dogma, it is difficult to define or measure the unorganized New Age movement. But in every ma-  
2 jor U.S. and European city, thousands who seek insight and personal growth cluster around a  
3 metaphysical bookstore, a spiritual teacher, or an education center."

4 The New Age is definitely a heterogeneous movement of individuals; most graft some new age  
5 beliefs onto their regular religious affiliation. Recent surveys of US adults (2) indicate that many  
6 Americans hold at least some new age beliefs:

7 8% believe in astrology as a method of foretelling the future

8 7% believe that crystals are a source of healing or energizing power

9 9% believe that Tarot Cards are a reliable base for life decisions

10 about 1 in 4 believe in a non-traditional concept of the nature of God which are often associated  
11 with New Age thinking:

12 11% believe that God is "a state of higher consciousness that a person may reach"

13 8% define God as "the total realization of personal, human potential"

14 3% believe that each person is God

15 The group of surveys cited above (2) classify religious beliefs into 7 faith groups. Starting with the  
16 largest, they are: Cultural (Christmas and Easter) Christianity, Conventional Christianity, New  
17 Age Practitioner, Biblical (Fundamentalist, Evangelical) Christianity, Atheist/Agnostic, Other, and  
18 Jewish, A longitudinal study from 1991 to 1995 shows that New Agers represent a steady 20% of  
19 the population, and are consistently the third largest religious group.

20 New Age teachings became popular during the 1970's as a reaction against what some perceived  
21 as the failure of Christianity and the failure of Secular Humanism to provide spiritual and ethical  
22 guidance for the future. Its roots are traceable to many sources: Astrology, Channeling, Hinduism,  
23 Gnostic traditions, Neo-paganism, Spiritualism, Theosophy, Wicca, etc. The movement started in  
24 England in the 1960's where many of these elements were well established. Small groups, such as  
25 the Findhorn Community in Inverness and the Wrekin Trust formed. The movement quickly be-  
26 came international. Early New Age mileposts in North America were a "New Age Seminar" ran  
27 by the Association for Research and Enlightenment, and the establishment of the East-West Jour-  
28 nal in 1971. Actress Shirley MacLaine is perhaps their most famous current figure.



1 During the 1980's and 90's, the movement came under criticism from a variety of groups. Chan-  
2 neling was ridiculed; seminar and group leaders were criticized for the fortunes that they made  
3 from New Agers. Their uncritical belief in the "scientific" properties of crystals was exposed as  
4 groundless. But the movement has become established and become a stable, major force in North  
5 American religion during the past generation. As the millennium comes to a close, the New Age is  
6 expected to expand, promoted by the social backlash against logic and science.

#### 7 The "New Age" That Does Not Exist

8 Major confusion about the New Age has been generated by academics, counter-cult groups, Fun-  
9 damentalist and other Evangelical Christians and traditional Muslim groups, etc. Some examples  
10 are:

11 Many of the above groups have dismissed Tasawwuf (Sufism) as a New Age cult. In reality, Suf-  
12 ism has historically been an established mystical movement within Islam, which has always exist-  
13 ing in a state of tension with the more legalistic divisions within Islam. It has no connection with  
14 the New Age.

15 Some conservative Christians believe that a massive, underground, highly coordinated New Age  
16 organization exists that is infiltrating government, media, schools and churches. No such entity  
17 exists. Some conservative Christians do not differentiate among the Occult, Satanism, Wicca,  
18 other Neo-pagan religions. And they seem to regard all as forms of Satanism who perform horren-  
19 dous criminal acts on children. In fact, the Occult, Satanism, Neo-pagan religions are very differ-  
20 ent phenomena, and essentially unrelated. Dr. Carl Raschke, professor of Religious Studies at the  
21 University of Denver describes New Age practices as the spiritual version of AIDS; it destroys the  
22 ability of people to cope and function." He describes it as "essentially, the marketing end of the  
23 political packaging of occultism...a breeding ground for a new American form of fascism."

#### 24 New Age Beliefs

25 A number of fundamental beliefs are held by many New Age followers; individuals are encour-  
26 aged to "shop" for the beliefs and practices that they feel most comfortable with:

27 Monism: All that exists is derived from a single source of divine energy.

1 Pantheism: All that exists is God; God is all that exists. This leads naturally to the concept of the  
2 divinity of the individual, that we are all Gods. They do not seek God as revealed in a sacred text  
3 or as exists in a remote heaven; they seek God within the self and throughout the entire universe.

4 Panentheism: God is all that exists. God is at once the entire universe, and transcends the universe  
5 as well.

6 Reincarnation: After death, we are reborn and live another life as a human. This cycle repeats it-  
7 self many times. This belief is similar to the concept of transmigration of the soul in Hinduism.

8 Karma: The good and bad deeds that we do adds and subtracts from our accumulated record, our  
9 karma. At the end of our life, we are rewarded or punished according to our karma by being rein-  
10 carnated into either a painful or good new life. This belief is linked to that of reincarnation and is  
11 also derived from Hinduism

12 An Aura is believed to be an energy field radiated by the body. Invisible to most people, it can be  
13 detected by some as a shimmering, multi-colored field surrounding the body. Those skilled in de-  
14 tecting and interpreting auras can diagnose an individual's state of mind, and their spiritual and  
15 physical health.

16 Personal Transformation A profoundly intense mystical experience will lead to the acceptance and  
17 use of New Age beliefs and practices. Guided imagery, hypnosis, meditation, and (sometimes) the  
18 use of hallucinogenic drugs are useful to bring about and enhance this transformation. Believers  
19 hope to develop new potentials within themselves: the ability to heal oneself and others, psychic  
20 powers, a new understanding of the workings of the universe, etc. Later, when sufficient numbers  
21 of people have achieved these powers, a major spiritual, physical, psychological and cultural  
22 planet-wide transformation is expected.

23 Ecological Responsibility: A belief in the importance of uniting to preserve the health of the earth,  
24 which is often looked upon as Gaia, (Mother Earth) a living entity.

25 Universal Religion: Since all is God, then only one reality exists, and all religions are simply dif-  
26 ferent paths to that ultimate reality. The universal religion can be visualized as a mountain, with  
27 many sadhanas (spiritual paths) to the summit. Some are hard; others easy. There is no one correct  
28

1 path. All paths eventually reach the top. They anticipate that a new universal religion which con-  
2 tains elements of all current faiths will evolve and become generally accepted worldwide.

3 New World Order As the Age of Aquarius unfolds, a New Age will develop. This will be a utopia  
4 in which there is world government, and end to wars, disease, hunger, pollution, and poverty.

5 Gender, racial, religious and other forms of discrimination will cease. People's allegiance to their  
6 tribe or nation will be replaced by a concern for the entire world and its people.

7 The Age of Aquarius is a reference to the precession of the zodiac. The earth passes through each  
8 of the signs of the zodiac approximately every 24,000 years. Some believe that the earth entered  
9 the constellation Aquarius in the 19th Century, so that the present era is the dawning of the age of  
10 Aquarius. Others believe that it will occur at the end of the 20th century. It is interesting to note  
11 that the previous constellation changes were:

12 from Aries to Pisces the fish circa 1st century CE. This happened at a time when Christianity was  
13 an emerging religion, and many individuals changed from animal sacrifice in the Jewish temple to  
14 embracing the teachings of Christianity. The church's prime symbol at the time was the fish.

15 from Taurus to Aries the ram circa 2,000 BCE. This happened at a time when the Jews engaged in  
16 widespread ritual sacrifice of sheep and other animals in the Temple

17 from Gemini to Taurus the bull circa 4,000 BCE. During that sign, worshiping of the golden calf  
18 was common in the Middle East.

#### 19 New Age Practices

20 Many practices are common amongst New Agers. A typical practitioner is active in only a few  
21 areas:

22 Channeling A method similar to that used by Spiritists in which a spirit of a long dead individual  
23 is conjured up. However, while Spiritists generally believe that one's soul remains relatively un-  
24 changed after death, most channelers believe that the soul evolves to higher planes of existence.

25 They usually try to make contact with a single, spiritually evolved being. That being's conscious-  
26 ness is channeled through the medium and relays guidance and information to the group, through  
27 the use of the medium's voice. Channeling has existed since the 1850's and many groups consider  
28

1 themselves independent of the New Age movement. The popular A Course in Miracles was chan-  
2 neled by Jesus through a New Age psychologist, Dr. Helen Schucman over an 8 year period.

3 Crystals Crystals are materials which has its molecules arranged in a specific, highly ordered in-  
4 ternal pattern. This pattern is reflected in the crystal's external structure which typically has sym-  
5 metrical planar surfaces. Many common substances, from salt to sugar, from diamonds to quartz  
6 form crystals. They can be shaped so that they will vibrate at a specific frequency and are widely  
7 used in radio communications and computing devices. New Agers believe that crystals posses  
8 healing energy.

9 Meditating A process of blanking out the mind and releasing oneself from conscious thinking.  
10 This is often aided by repetitive chanting of a mantra, or focusing on an object.

11 New Age Music A gentle, melodic, inspirational music form involving the human voice, harp,  
12 lute, flute, etc. It is used as an aid in healing, massage therapy and general relaxation.

13 Divination The use of various techniques to foretell the future, including I Ching, Pendulum  
14 movements, Runes, Scrying, Tarot Cards. Astrology The belief that the orientation of the planets  
15 at the time of one's birth, and the location of that birth predicts the individual's future and person-  
16 ality. Belief in astrology is common amongst New Agers, but definitely not limited to them.

17 Holistic Health This is a collection of healing techniques which have diverged from the traditional  
18 medical model. It attempts to cure disorders in mind, body and spirit and to promote wholeness  
19 and balance in the individual. Examples are acupuncture, crystal healing, homeopathy, iridology,  
20 massage, various meditation methods, polarity therapy, psychic healing, therapeutic touch, reflex-  
21 ology, etc.

22 Human Potential Movement (a.k.a. Emotional Growth Movement) This is a collection of thera-  
23 peutic methods involving both individualized and group working, using both mental and physical  
24 techniques. The goal is to help individuals to advance spiritually. Examples are Esalen Growth  
25 Center programs, EST, Gestalt Therapy, Primal Scream Therapy, Transactional Analysis, Tran-  
26 scendental Meditation and Yoga.

27 The Canadian Census (1991) recorded only 1,200 people (0.005%) who identify their religion as  
28 being New Age. However, this in no way indicates the influence of new age ideas in the country.

1 Many people identify with Christianity and other religions, but incorporate many new age con-  
2 cepts into their faith.

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6 Richard Kyle, "The Religious Fringe", InterVarsity Press, Downers Grove, IL (1993), Page 285-  
7 298

8 J.Gordon Melton, "Whither the New Age?", Chapter 35 of T. Miller, "America's Alternative Re-  
9 ligions", SUNY Press, Albany, NY (1995)

10 LinkLight is a New Age site whose goal is to "create a spiritual connection between everyone on  
11 this Planet, and in this way raise the Consciousness of the Planet." They are at:

12 <http://www.linklight.com> ;[http://www.sullivan-county.com/nf0/nov\\_2000/new\\_age\\_rel.htm](http://www.sullivan-county.com/nf0/nov_2000/new_age_rel.htm)

### 13 RELIGION & ENVIRONMENT

14 What's so important about the potentially powerful influence of conservative evangelical Chris-  
15 tians on environmental issues, especially global warming? For years, many of these evangelicals  
16 have been charging environmentalists-and those progressive Christians who support environmen-  
17 talism-with idolatry for lavishing worship on "God's creation" rather than God. Moreover, they  
18 have been skeptical, if not downright hostile, toward government-mandated protection of the envi-  
19 ronment.

20 So as President Bush early in his administration initiated efforts to roll back a slew of federal envi-  
21 ronmental regulations-including safeguards on clean air and water and protections against com-  
22 mercial logging and drilling on public lands, among others-and withdrew American support for  
23 the Kyoto treaty on global warming, he knew he could count on conservative evangelicals to re-  
24 main firmly in his corner.

25 But changes are afoot. In February 2006, a group of 86 respected evangelical Christian leaders  
26 from across the nation unveiled a campaign for environmental reform and put out a statement call-  
27 ing on all Christians to push for federal legislation that would reduce carbon dioxide emissions in  
28 an effort to stem global warming. This Evangelical Climate Initiative, which has helped publicly

1 solidify a nascent environmentalism in the evangelical community, also intends to lobby federal  
2 legislators, hold environmental meetings at churches and colleges, and run television and radio ads  
3 that link drought, starvation, and hurricanes to global warming.

4 "The same love for God and neighbor that compels us to preach salvation through Jesus Christ,  
5 protect the unborn, preserve the family and the sanctity of marriage, and take the whole Gospel to  
6 a hurting world, also compels us to recognize that human-induced climate change is a serious  
7 Christian issue requiring action now," their statement read in part.

8 But weeks before the Climate Initiative's statement was released publicly, another group of high-  
9 profile evangelicals was working to quash it. In a January 2006 letter to National Association of  
10 Evangelicals, whose affiliated churches and ministries were considering taking a stand against  
11 global warming, these leaders warned that "global warming is not a consensus issue, and our love  
12 for the Creator and respect for His creation does not require us to take a position."

13 So how did conservative evangelicals, who tend to present a unified front on most matters of po-  
14 litical significance, end up in such a public breach? And what effect might the growing commit-  
15 ment among evangelicals to combat global warming and other environmental perils have on the  
16 2006 congressional races and the 2008 presidential election?

17 Explore these conservative evangelical issues and learn how other faiths view their obligation to  
18 the planet-and let us hear your voice-in the MOYERS ON AMERICA Religion & the Environ-  
19 ment Citizens Class. ...Bill Moyers

20 I would call myself a secularist, who is quite happy to tolerate the existence of all the other vari-  
21 ous religious denominations – even the relatively new, secular religion - environmentalism.

22 Is it fair to label environmentalism as a ‘new’ religion?

23 Emile Durkheim, in his famous sociological text *The Elementary Forms of Religious Life*, defined  
24 religion as ‘a unified system of beliefs and practices relative to sacred things, that is to say, things  
25 set apart and forbidden – beliefs and practices which unite into one single moral community called  
26 a Church, all of those who adhere to them’. What strikes me about Durkheim’s definition is the  
27 lack of reference to God, or gods, nor does he mention spirituality, or other worlds. For Durkheim,  
28 religion is essentially the social construction of the sacred: this unites its apologists and adherents

1 into a 'single moral community'. The contemporary environmentalist movement has much in  
2 common with Durkheim's definition of a 'single moral community'.

3 A few weeks ago, the Secretary of State for Energy and Climate Change, Ed Miliband MP,  
4 flanked by senior Bishops announced their campaign for a 'carbon fast' during the next forty days  
5 of Lent. Yes, it's a cheap eco-friendly publicity stunt, done in order to endow everyday environ-  
6 mental behaviour with a sense of religious authority. Such stunts highlight the fact that apologists  
7 of environmentalist causes care less about the actual management of nature, than they do about  
8 launching moral crusades – not to alter the earth mind you, but to micro-manage human behaviour  
9 like never before.

10 'Carbon emission' is fast becoming the new original sin of our age, for which us humans must  
11 seek redemption. According to the Archbishop, Dr Rowan Williams, for Lent we need to 'live  
12 more simply and cherish more deeply the creation of which we are only a part'. Carbon fasting has  
13 now become a way to absolve yourself of all your 'carbon sins' - sinful rituals like driving to work,  
14 or using the dishwasher or washing machine are viewed as immoral acts to be reigned in.

15 William Swatos, the editor of the International Journal of Research on Religion argues that envi-  
16 ronmentalism, as an ideology, has the potential to 'serve as an implicit religion'. Ian Plimer, a pro-  
17 fessor of Geology argued recently that environmentalism is on par with 'Creationism'.

18 Peter Beyer, the author of Religion and Globalization makes the point that what we are currently  
19 witnessing is the steady rise, and rise, and 'upsurge', of what he describes as 'contemporary reli-  
20 gious environmentalism'. According to Beyer, there are at least three different styles of 'eco-  
21 religiosity', that he claims were born during the hazy, hippy days of Woodstock.

22 The author, Michael Crichton goes further, he argues that environmentalism is 'one of the most  
23 powerful religions in the Western World'. Crichton makes a rather good point when he reminds  
24 his readers of past environmental predictions that have had serious factual flaws – like, for exam-  
25 ple the banning of DDT. Crichton aptly describes the banning as one of the 'most disgraceful epi-  
26 sodes in the twentieth century' – and I agree. The ban has directly caused the death of millions of  
27 African people, mainly children – all in the name of environmentalism. Environmentalism must be  
28 a religion – indeed, why else would environmentalists be in such denial over the millions of deaths



1 they caused due to the ban?

2 Dr David Orrell, a Canadian based mathematician, argues that when it comes to making future  
3 predictions based on models the ‘track record of any kind of long-distant prediction is really bad’.  
4 Orrell added that ‘scientists cannot even write the equation of a cloud, let alone make a workable  
5 model of the climate’.

6 Instead of putting forward proposals for more investment in research and innovation, environmen-  
7 talists and Church leaders appear happier to moralise about our varied lifestyles and habits – and  
8 of course, none of this desperate search for moral coherence will actually help to improve the en-  
9 vironment.

10 The New Holy Wars

11 Economic Religion Versus Environmental Religion in Contemporary America

12 By Robert H. Nelson

13 392 pages | 6.125 x 9.25 | 2010

14 ISBN 978-0-271-03581-9 | cloth: \$39.95 tr

15 “Nelson makes an overwhelmingly persuasive case that in our times the leading secular religion  
16 was once economics and is now environmentalism. . . . Out of that utterly original idea for schol-  
17 arly crossovers—good Lord, an economist reading environmentalism and even economics itself as  
18 theology!—come scores of true and striking conclusions. . . . It’s a brilliant book, which anyone  
19 who cares about the economy or the environment or religion needs to read. That’s most of us.”—

20 Deirdre McCloskey, University of Illinois at Chicago

21 “Nelson compellingly argues that religion is a powerful force in economic and social life, . . . even  
22 if that fact is seldom recognized by most academics and policy makers. The dominant religious  
23 influences are secularized versions of Catholicism and Protestantism, not because the leading  
24 scholars are piously trying to advance their faith by other means, but because their intellectual ho-  
25 rizons have been shaped by worldviews that have framed their consciousness. He convinces me  
26 that unless these presuppositions are acknowledged, examined, broadened, and revised, the eco-  
27 nomic and ecological crises that the world now faces will not be understood or met at their deeper  
28 levels.”—Max L. Stackhouse, Princeton Theological Seminary

1 “Robert Nelson argues that environmentalism is a religion. . . . This provocative thesis raises hard  
2 and embarrassing questions about the bases of environmentalism that every serious student of the  
3 subject must confront.”—Dan Tarlock, Director of the Program in Environmental and Energy  
4 Law, Chicago-Kent College of Law

5 "Anyone who wants to understand twenty-first century politics should begin with *The New Holy*  
6 *Wars*, which makes clear the fundamental conflict between how economists and environmentalists  
7 see the world.”—Andrew P. Morriss, H. Ross and Helen Workman Professor of Law and Busi-  
8 ness, University of Illinois, Urbana-Champaign

9 The present debate raging over global warming exemplifies the clash between two competing pub-  
10 lic theologies. On one side, environmentalists warn of certain catastrophe if we do not take steps  
11 now to reduce the release of greenhouse gases; on the other side, economists are concerned with  
12 whether the benefits of actions to prevent higher temperatures will be worth the high costs. Ques-  
13 tions of the true and proper relationship of human beings and nature are as old as religion. Today,  
14 environmentalists regard human actions to warm the climate as an immoral challenge to the natu-  
15 ral order, while economists seek to put all of nature to maximum use for economic growth and  
16 other human benefits.

17 Robert Nelson interprets such contemporary struggles as battles between the competing secular-  
18 ized religions of economics and environmentalism. The outcome will have momentous conse-  
19 quences for us all. This deep book probes beneath the surface of the two movements rhetoric to  
20 uncover their fundamental theological commitments and visions.

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21  
22 Environmentalism as Religion: Michael Crichton

23 In 2003 Michael Crichton sent the Ecology industry into a rage by exposing them as a religion. He  
24 can get away with it because he has both the science background and enough money not to be si-  
25 lenced by the eco-lobby. In fact environmentalism is as much a fundamentalist' religion as that of  
26 Pat Robertson. He is correct about the religious undertones, but it's also a political movement as he  
27 points out.

1 In 2008 global warming has fallen off the radar as the presidential election, high energy costs, and  
2 the Wall Street meltdown have dominated the news. But this one article seems to have been left  
3 out of the discussion. Besides reports of such record cold in Mongolia killing people and live-  
4 stock, the December 19, 2007 Washington Times reports:

5 "In Buenos Aires (Argentina), snow fell for the first time since the year 1918. Dozens of homeless  
6 people died from exposure. In Peru, 200 people died from the cold...(in 2007) Johannesburg,  
7 South Africa, had the first significant snowfall in 26 years. Australia...New Zealand...weather  
8 turned so cold..."

9 To quote former Vice President Al Gore, in his book entitled *Earth in the Balance*,

10 "The richness and diversity of our religious tradition throughout history is a spiritual resource long  
11 ignored by people of faith, who are often afraid to open their minds to teachings first offered out-  
12 side their own systems of belief. But, the emergence of a civilization in which knowledge moves  
13 freely and almost instantaneously through the world has spurred a renewed investigation of the  
14 wisdom distilled by all faiths. This pan religious perspective may prove especially important  
15 where our global civilization's responsibility for the earth is concerned."

16 Remarks to the Commonwealth Club by Michael Crichton San Francisco September 15, 2003

17 (Extract)

18 I have been asked to talk about what I consider the most important challenge facing mankind, and  
19 I have a fundamental answer. The greatest challenge facing mankind is the challenge of distin-  
20 guishing reality from fantasy, truth from propaganda. Perceiving the truth has always been a chal-  
21 lenge to mankind, but in the information age (or as I think of it, the disinformation age) it takes on  
22 a special urgency and importance.

23 We must daily decide whether the threats we face are real, whether the solutions we are offered  
24 will do any good, whether the problems we're told exist are in fact real problems, or non-  
25 problems. Every one of us has a sense of the world, and we all know that this sense is in part given  
26 to us by what other people and society tell us; in part generated by our emotional state, which we  
27 project outward; and in part by our genuine perceptions of reality. In short, our struggle to deter-

1 mine what is true is the struggle to decide which of our perceptions are genuine, and which are  
2 false because they are handed down, or sold to us, or generated by our own hopes and fears.  
3 As an example of this challenge, I want to talk today about environmentalism. And in order not to  
4 be misunderstood, I want it perfectly clear that I believe it is incumbent on us to conduct our lives  
5 in a way that takes into account all the consequences of our actions, including the consequences to  
6 other people, and the consequences to the environment. I believe it is important to act in ways that  
7 are sympathetic to the environment, and I believe this will always be a need, carrying into the fu-  
8 ture. I believe the world has genuine problems and I believe it can and should be improved. But I  
9 also think that deciding what constitutes responsible action is immensely difficult, and the conse-  
10 quences of our actions are often difficult to know in advance. I think our past record of environ-  
11 mental action is discouraging, to put it mildly, because even our best intended efforts often go  
12 awry. But I think we do not recognize our past failures, and face them squarely. And I think I  
13 know why.

14 I studied anthropology in college, and one of the things I learned was that certain human social  
15 structures always reappear. They can't be eliminated from society. One of those structures is relig-  
16 ion. Today it is said we live in a secular society in which many people---the best people, the most  
17 enlightened people---do not believe in any religion. But I think that you cannot eliminate religion  
18 from the psyche of mankind. If you suppress it in one form, it merely re-emerges in another form.  
19 You can not believe in God, but you still have to believe in something that gives meaning to your  
20 life, and shapes your sense of the world. Such a belief is religious.

21 Today, one of the most powerful religions in the Western World is environmentalism. Environ-  
22 mentalism seems to be the religion of choice for urban atheists. Why do I say it's a religion? Well,  
23 just look at the beliefs. If you look carefully, you see that environmentalism is in fact a perfect  
24 21st century remapping of traditional Judeo-Christian beliefs and myths.

25 There's an initial Eden, a paradise, a state of grace and unity with nature, there's a fall from grace  
26 into a state of pollution as a result of eating from the tree of knowledge, and as a result of our ac-  
27 tions there is a judgment day coming for us all. We are all energy sinners, doomed to die, unless  
28 we seek salvation, which is now called sustainability. Sustainability is salvation in the church of

1 the environment. Just as organic food is its communion, that pesticide-free wafer that the right  
2 people with the right beliefs, imbibe.

3 Eden, the fall of man, the loss of grace, the coming doomsday---these are deeply held mythic  
4 structures. They are profoundly conservative beliefs. They may even be hard-wired in the brain,  
5 for all I know. I certainly don't want to talk anybody out of them, as I don't want to talk anybody  
6 out of a belief that Jesus Christ is the son of God who rose from the dead. But the reason I don't  
7 want to talk anybody out of these beliefs is that I know that I can't talk anybody out of them.

8 These are not facts that can be argued. These are issues of faith.

9 And so it is, sadly, with environmentalism. Increasingly it seems facts aren't necessary, because  
10 the tenets of environmentalism are all about belief. It's about whether you are going to be a sinner,  
11 or saved. Whether you are going to be one of the people on the side of salvation, or on the side of  
12 doom. Whether you are going to be one of us, or one of them.

13 Am I exaggerating to make a point? I am afraid not. Because we know a lot more about the world  
14 than we did forty or fifty years ago. And what we know now is not so supportive of certain core  
15 environmental myths, yet the myths do not die. Let's examine some of those beliefs.

16 There is no Eden. There never was. What was that Eden of the wonderful mythic past? Is it the  
17 time when infant mortality was 80%, when four children in five died of disease before the age of  
18 five? When one woman in six died in childbirth? When the average lifespan was 40, as it was in  
19 America a century ago. When plagues swept across the planet, killing millions in a stroke. Was it  
20 when millions starved to death? Is that when it was Eden?

21 ...In short, the romantic view of the natural world as a blissful Eden is only held by people who  
22 have no actual experience of nature. People who live in nature are not romantic about it at all.

23 They may hold spiritual beliefs about the world around them, they may have a sense of the unity  
24 of nature or the aliveness of all things... If Eden is a fantasy that never existed, and mankind wasn't  
25 ever noble and kind and loving, if we didn't fall from grace, then what about the rest of the reli-  
26 gious tenets? What about salvation, sustainability, and judgment day? What about the coming en-  
27 vironmental doom from fossil fuels and global warming, if we all don't get down on our knees and  
28 conserve every day?

1 Well, it's interesting. You may have noticed that something has been left off the doomsday list,  
2 lately. Although the preachers of environmentalism have been yelling about population for fifty  
3 years, over the last decade world population seems to be taking an unexpected turn. Fertility rates  
4 are falling almost everywhere. As a result, over the course of my lifetime the thoughtful predic-  
5 tions for total world population have gone from a high of 20 billion, to 15 billion, to 11 billion  
6 (which was the UN estimate around 1990) to now 9 billion, and soon, perhaps less. There are  
7 some who think that world population will peak in 2050 and then start to decline. There are some  
8 who predict we will have fewer people in 2100 than we do today. Is this a reason to rejoice, to say  
9 halleluiah? Certainly not. Without a pause, we now hear about the coming crisis of world econ-  
10 omy from a shrinking population. We hear about the impending crisis of an aging population. No-  
11 body anywhere will say that the core fears expressed for most of my life have turned out not to be  
12 true...

13 Okay, so, the preachers made a mistake. They got one prediction wrong; they're human. So what.  
14 Unfortunately, it's not just one prediction. It's a whole slew of them. We are running out of oil. We  
15 are running out of all natural resources. Paul Ehrlich: 60 million Americans will die of starvation  
16 in the 1980s. Forty thousand species become extinct every year. Half of all species on the planet  
17 will be extinct by 2000. And on and on and on. With so many past failures, you might think that  
18 environmental predictions would become more cautious. But not if it's a religion. Remember, the  
19 nut on the sidewalk carrying the placard that predicts the end of the world doesn't quit when the  
20 world doesn't end on the day he expects. He just changes his placard, sets a new doomsday date,  
21 and goes back to walking the streets. One of the defining features of religion is that your beliefs  
22 are not troubled by facts, because they have nothing to do with facts.

23 ...I can cite the appropriate journal articles not in whacko magazines, but in the most prestigious  
24 science journals, such as Science and Nature. But such references probably won't impact more  
25 than a handful of you, because the beliefs of a religion are not dependant on facts, but rather are  
26 matters of faith. Unshakeable belief.

27 Fundamentalism

1 Most of us have had some experience interacting with religious fundamentalists, and we under-  
2 stand that one of the problems with fundamentalists is that they have no perspective on them-  
3 selves. They never recognize that their way of thinking is just one of many other possible ways of  
4 thinking, which may be equally useful or good. On the contrary, they believe their way is the right  
5 way, everyone else is wrong; they are in the business of salvation, and they want to help you to  
6 see things the right way. They want to help you be saved. They are totally rigid and totally unin-  
7 terested in opposing points of view. In our modern complex world, fundamentalism is dangerous  
8 because of its rigidity and its imperviousness to other ideas.

9 I want to argue that it is now time for us to make a major shift in our thinking about the environ-  
10 ment, similar to the shift that occurred around the first Earth Day in 1970, when this awareness  
11 was first heightened. But this time around, we need to get environmentalism out of the sphere of  
12 religion. We need to stop the mythic fantasies, and we need to stop the doomsday predictions. We  
13 need to start doing hard science instead.

14 There are two reasons why I think we all need to get rid of the religion of environmentalism.  
15 First, we need an environmental movement, and such a movement is not very effective if it is con-  
16 ducted as a religion. We know from history that religions tend to kill people, and environmental-  
17 ism has already killed somewhere between 10-30 million people since the 1970s. It's not a good  
18 record. Environmentalism needs to be absolutely based in objective and verifiable science, it  
19 needs to be rational, and it needs to be flexible...

20 How will we manage to get environmentalism out of the clutches of religion, and back to a scien-  
21 tific discipline? There's a simple answer: we must institute far more stringent requirements for  
22 what constitutes knowledge in the environmental realm. I am thoroughly sick of politicized so-  
23 called facts that simply aren't true. It isn't that these "facts" are exaggerations of an underlying  
24 truth. Nor is it that certain organizations are spinning their case to present it in the strongest way.  
25 Not at all---what more and more groups are doing is putting out is lies, pure and simple. False-  
26 hoods that they know to be false...At this moment, the EPA is hopelessly politicized. In the wake  
27 of Carol Browner, it is probably better to shut it down and start over. What we need is a new or-  
28 ganization much closer to the FDA. We need an organization that will be ruthless about acquiring



1 verifiable results, that will fund identical research projects to more than one group, and that will  
2 make everybody in this field get honest fast...

3 So it's time to abandon the religion of environmentalism, and return to the science of environmen-  
4 talism, and base our public policy decisions firmly on that.

### 5 **CONSTITUTIONAL REPUDIATION AND REPRIMAND**

6 "In interpreting "removal" and "remedial," we next follow the Supreme Court's guidance in tak-  
7 ing a comprehensive, holistic view of CERCLA because it is a "fundamental canon of statutory  
8 construction that the words of a statute must be read in their context and with a view to their place  
9 in the overall statutory scheme." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133,  
10 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803,  
11 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

12 Petitioners reject the Supreme Courts adoption of holism, reprimand such ruling as a reckless dis-  
13 regard of the Truth, deliberate ignorance of actual information, with manifestly false claims, and is  
14 therefore an unscientific, unconscionable, and unconstitutional violation of inalienable rights.

### 15 **REDUCTION OF HOLISM TO RELIGION**

16 Holism (from ὅλος holos, a Greek word meaning all, entire, total) is the idea that all the proper-  
17 ties of a given system (physical, biological, chemical, social, economic, mental, linguistic, etc.)  
18 cannot be determined or explained by its component parts alone. Instead, the system as a whole  
19 determines in an important way how the parts behave.

20 The general principle of holism was concisely summarized by Aristotle in the Metaphysics: "The  
21 whole is more than the sum of its parts" (1045a10).

22 Reductionism is sometimes seen as the opposite of holism. Reductionism in science says that a  
23 complex system can be explained by reduction to its fundamental parts. For example, the proc-  
24 esses of biology are reducible to chemistry and the laws of chemistry are explained by physics.

### 25 **History**

26 The term holism was introduced by the South African statesman Jan Smuts in his 1926 book, Ho-  
27 lism and Evolution. Smuts defined holism as "The tendency in nature to form wholes that are  
28 greater than the sum of the parts through creative evolution."

1 The idea has ancient roots. Examples of holism can be found throughout human history and in the  
2 most diverse socio-cultural contexts, as has been confirmed by many ethnological studies. The  
3 French Protestant missionary, Maurice Leenhardt coined the term cosmomorphism to indicate the  
4 state of perfect symbiosis with the surrounding environment which characterized the culture of the  
5 Melanesians of New Caledonia. For these people, an isolated individual is totally indeterminate,  
6 indistinct and featureless until he can find his position within the natural and social world in which  
7 he is inserted. The confines between the self and the world are annulled to the point that the mate-  
8 rial body itself is no guarantee of the sort of recognition of identity which is typical of our own  
9 culture.

10 In science

11 Holism in science

12 In the latter half of the 20th century, holism led to systems thinking and its derivatives, like the  
13 sciences of chaos and complexity. Systems in biology, psychology, or sociology are frequently so  
14 complex that their behavior is, or appears, "new" or "emergent": it cannot be deduced from the  
15 properties of the elements alone.

16 Holism has thus been used as a catchword. This contributed to the resistance encountered by the  
17 scientific interpretation of holism, which insists that there are ontological reasons that prevent re-  
18 ductive models in principle from providing efficient algorithms for prediction of system behavior  
19 in certain classes of systems.

20 Further resistance to holism has come from the association of the concept with quantum mysti-  
21 cism. Recently, however, public understanding has grown over the realities of such concepts, and  
22 more scientists are beginning to accept serious research into the concept.

23 Scientific holism holds that the behavior of a system cannot be perfectly predicted, no matter how  
24 much data is available. Natural systems can produce surprisingly unexpected behavior, and it is  
25 suspected that behavior of such systems might be computationally irreducible, which means it  
26 would not be possible to even approximate the system state without a full simulation of all the  
27 events occurring in the system. Key properties of the higher level behavior of certain classes of  
28 systems may be mediated by rare "surprises" in the behavior of their elements due to the principle

1 of interconnectivity, thus evading predictions except by brute force simulation. Stephen Wolfram  
2 has provided such examples with simple cellular automata, whose behavior is in most cases  
3 equally simple, but on rare occasions highly unpredictable.

4 Complexity theory (also called "science of complexity"), is a contemporary heir of systems think-  
5 ing. It comprises both computational and holistic, relational approaches towards understanding  
6 complex adaptive systems and, especially in the latter, its methods can be seen as the polar oppo-  
7 site to reductive methods. General theories of complexity have been proposed, and numerous  
8 complexity institutes and departments have sprung up around the world. The Santa Fe Institute is  
9 arguably the most famous of them.

10 In anthropology

11 There is an ongoing dispute as to whether anthropology is intrinsically holistic. Supporters of this  
12 concept consider anthropology holistic in two senses. First, it is concerned with all human beings  
13 across times and places, and with all dimensions of humanity (evolutionary, biophysical, socio-  
14 political, economic, cultural, psychological, etc.). Further, many academic programs following  
15 this approach take a "four-field" approach to anthropology that encompasses physical anthropol-  
16 ogy, archeology, linguistics, and cultural anthropology or social anthropology.[6]

17 Some leading anthropologists disagree, and consider anthropological holism to be an artifact from  
18 19th century social evolutionary thought that inappropriately imposes scientific positivism upon  
19 cultural anthropology.[7]

20 The term "holism" is additionally used within social and cultural anthropology to refer to an  
21 analysis of a society as a whole which refuses to break society into component parts. One defini-  
22 tion says: "as a methodological ideal, holism implies ... that one does not permit oneself to believe  
23 that our own established institutional boundaries (e.g. between politics, sexuality, religion, eco-  
24 nomics) necessarily may be found also in foreign societies." [8]

25 In ecology

26 Ecology is the leading and most important approach to holism, as it tries to include biological,  
27 chemical, physical and economic views in a given area. The complexity grows with the area, so  
28 that it is necessary to reduce the characteristic of the view in other ways, for example to a specific

1 time of duration. More information are to be found in the field of systems ecology, a cross-  
2 disciplinary field influenced by general systems theory. see Holistic Community.

3 In economics

4 With roots in Schumpeter, the evolutionary approach might be considered the holist theory in eco-  
5 nomics. They share certain language from the biological evolutionary approach. They take into  
6 account how the innovation system evolves over time. Knowledge and know-how, know-who,  
7 know-what and know-why are part of the whole business economics. Knowledge can also be tacit,  
8 as described by Michael Polanyi. These models are open, and consider that it is hard to predict  
9 exactly the impact of a policy measure. They are also less mathematical.

10 In philosophy

11 Main articles: Semantic holism and confirmation holism

12 In philosophy, any doctrine that emphasizes the priority of a whole over its parts is holism. Some  
13 suggest that such a definition owes its origins to a non-holistic view of language and places it in  
14 the reductionist camp. Alternately, a 'holistic' definition of holism denies the necessity of a division  
15 between the function of separate parts and the workings of the 'whole'. It suggests that the key  
16 recognisable characteristic of a concept of holism is a sense of the fundamental truth of any par-  
17 ticular experience. This exists in contradistinction to what is perceived as the reductionist reliance  
18 on inductive method as the key to verification of its concept of how the parts function within the  
19 whole. In the philosophy of language this becomes the claim, called semantic holism, that the  
20 meaning of an individual word or sentence can only be understood in terms of its relations to a  
21 larger body of language, even a whole theory or a whole language. In the philosophy of mind, a  
22 mental state may be identified only in terms of its relations with others. This is often referred to as  
23 content holism or holism of the mental.

24 Epistemological and confirmation holism are mainstream ideas in contemporary philosophy. On-  
25 tological holism was espoused by David Bohm in his theory on The Implicate Order.

26 In sociology

27 Main article: Gemeinschaft and Gesellschaft

1 Emile Durkheim developed a concept of holism which he opposed to the notion that a society was  
2 nothing more than a simple collection of individuals. In more recent times, Louis Dumont [9] has  
3 contrasted "holism" to "individualism" as two different forms of societies. According to him,  
4 modern humans live in an individualist society, whereas ancient Greek society, for example, could  
5 be qualified as "holistic", because the individual found identity in the whole society. Thus, the in-  
6 dividual was ready to sacrifice himself or herself for his or her community, as his or her life with-  
7 out the polis had no sense whatsoever.

8 In psychology of perception

9 A major holist movement in the early twentieth century was gestalt psychology. The claim was  
10 that perception is not an aggregation of atomic sense data but a field, in which there is a figure and  
11 a ground. Background has holistic effects on the perceived figure. Gestalt psychologists included  
12 Wolfgang Koehler, Max Wertheimer, Kurt Koffka. Koehler claimed the perceptual fields corre-  
13 sponded to electrical fields in the brain. Karl Lashley did experiments with gold foil pieces in-  
14 serted in monkey brains purporting to show that such fields did not exist. However, many of the  
15 perceptual illusions and visual phenomena exhibited by the gestaltists were taken over (often  
16 without credit) by later perceptual psychologists. Gestalt psychology had influence on Fritz Perls'  
17 gestalt therapy, although some old-line gestaltists opposed the association with counter-cultural  
18 and New Age trends later associated with gestalt therapy. Gestalt theory was also influential on  
19 phenomenology. Aron Gurwitsch wrote on the role of the field of consciousness in gestalt theory  
20 in relation to phenomenology. Maurice Merleau-Ponty made much use of holistic psychologists  
21 such as work of Kurt Goldstein in his "Phenomenology of Perception."

22 In teleological psychology

23 Alfred Adler believed that the individual (an integrated whole expressed through a self-consistent  
24 unity of thinking, feeling, and action, moving toward an unconscious, fictional final goal), must be  
25 understood within the larger wholes of society, from the groups to which he belongs (starting with  
26 his face-to-face relationships), to the larger whole of mankind. The recognition of our social em-  
27 beddedness and the need for developing an interest in the welfare of others, as well as a respect for  
28 nature, is at the heart of Adler's philosophy of living and principles of psychotherapy.

1 Edgar Morin, the French philosopher and sociobiologist, can be considered a holist based on the  
2 transdisciplinary nature of his work.

3 Mel Levine, M.D., author of *A Mind at a Time*, [10] and co-founder (with Charles R. Schwab) of  
4 the not-for-profit organization All Kinds of Minds, can be considered a holist based on his view of  
5 the 'whole child' as a product of many systems and his work supporting the educational needs of  
6 children through the management of a child's educational profile as a whole rather than isolated  
7 weaknesses in that profile.

8 In theological anthropology

9 In theological anthropology, which belongs to theology and not to anthropology, holism is the be-  
10 lief that the nature of humans consists of an ultimately divisible union of components such as  
11 body, soul and spirit.

12 In theology

13 Holistic concepts are strongly represented within the thoughts expressed within Logos (per  
14 Heraclitus), Panentheism and Pantheism.

15 In brain science

16 A lively debate has run since the end of the 19th century regarding the functional organization of  
17 the brain. The holistic tradition (e.g., Pierre Marie) maintained that the brain was a homogeneous  
18 organ with no specific subparts whereas the localizationists (e.g., Paul Broca) argued that the brain  
19 was organized in functionally distinct cortical areas which were each specialized to process a  
20 given type of information or implement specific mental operations. The controversy was  
21 epitomized with the existence of a language area in the brain, nowadays known as the Broca's  
22 area.[11] Although Broca's view has gained acceptance, the issue isn't settled insofar as the brain  
23 as a whole is a highly connected organ at every level from the individual neuron to the  
24 hemispheres.

25 Applications

26 Architecture and industrial design

27 Architecture and industrial design are often seen as enterprises, which constitute a whole, or to put  
28 it another way, design is often argued to be an holistic enterprise.[12] In architecture and industrial

1 design holism tends to imply an all-inclusive design perspective, which is often regarded as  
2 somewhat exclusive to the two design professions. Holism is often considered as something that  
3 sets architects and industrial designers apart from other professions that participate in design pro-  
4 jects. This view is supported and advocated by practising designers and design scholars alike, who  
5 often argue that architecture and/or industrial design have a distinct holistic character.

#### 6 Education reform

7 The Taxonomy of Educational Objectives identifies many levels of cognitive functioning, which  
8 can be used to create a more holistic education. In authentic assessment, rather than using com-  
9 puters to score multiple choice test, a standards based assessment uses trained scorers to score  
10 open-response items using holistic scoring methods.[13] In projects such as the North Carolina  
11 Writing Project, scorers are instructed not to count errors, or count numbers of points or support-  
12 ing statements. The scorer is instead, instruct to judge holistically whether "as a whole" is it more  
13 a "2" or a "3". Critics question whether such a process can be as objective as computer scoring,  
14 and the degree to which such scoring methods can result in different scores from different scorers.

#### 15 Medicine

16 Holism appears in psychosomatic medicine. In the 1970s the holistic approach was considered one  
17 possible way to conceptualize psychosomatic phenomena. Instead of charting one-way causal  
18 links from psyche to soma, or vice-versa, it aimed at a systemic model, where multiple biological,  
19 psychological and social factors were seen as interlinked. Other, alternative approaches at that  
20 time were psychosomatic and somatopsychic approaches, which concentrated on causal links only  
21 from psyche to soma, or from soma to psyche, respectively.[14] At present it is commonplace in  
22 psychosomatic medicine to state that psyche and soma cannot really be separated for practical or  
23 theoretical purposes.[citation needed] A disturbance on any level - somatic, psychic, or social -  
24 will radiate to all the other levels, too. In this sense, psychosomatic thinking is similar to the  
25 biopsychosocial model of medicine.

26 Alternative medicine practitioners purport to adopt a holistic approach to healing, that emphasizes  
27 the emotional, mental, spiritual, and physical elements of the patient, and claim to treat the whole  
28 person in this context. Some examples of holistic approaches include ayurveda, chiropractic,



1 homeopathy, traditional Chinese medicine, naturopathy, Unani and reflexology. There is a major  
2 axis of miscommunication between traditional western science and holistic practices. Most of  
3 these theories have basis in a "vital force" (or qi, ki, prana) which has been largely misinterpreted  
4 by the western world as being in direct contradiction with much of modern science In addition, the  
5 popular view of holistic practitioners is that they place little value in the microscopic analysis of  
6 individual, isolated, and separate systems within the natural world. While many holistic arts are  
7 popularized and practiced incorrectly or incompletely, traditional forms of holistic practice includ-  
8 ing various forms of meditation (zen, qigong, yoga) are based on natural phenomenon which re-  
9 ductionist philosophically can at this point only describe as separate phenomenon. This is largely  
10 due to the fact that though the process of isolating and defining phenomenon the western scientific  
11 paradigm has established a network of relations of these phenomenon. This conceptual map can  
12 also act as a barrier to other explanations which may not organize the phenomenon using the same  
13 established network of relations. In the case of this vital energy it can be explained on various lev-  
14 els of electricity and through the quantum field theory. There are also many metaphors used by  
15 various philosophies to describe the interaction of the vital energy with the body. When translated  
16 into English, many of these metaphors are often distorted. However, many researchers are cur-  
17 rently working to establish an agreeable definition for holistic phenomenon within western scien-  
18 tific parameters. Acupuncture, which in a practice that is over 5000 years old and based around  
19 manipulation of qi within the body has been recognized as effective by the WHO and the AMA.  
20 Another phenomenon which plays different roles in reductionist/holistic medicine is what is know  
21 in the west as the placebo effect. In the west this refers to patients who become "cured" of their  
22 illnesses after being prescribed sugar pills in place of medicine. The active phenomenon at work  
23 here is the brain's role in physical health, holistic philosophy utilizes this mechanism within the  
24 brain in its medical practice while reductionist medicine seeks to decrease its influence as much as  
25 possible. Neither practice is wrong in its pursuit, the goals are merely different. Western medicine  
26 seeks to establish remedies for illness using compounds while holistic medicine establishes prac-  
27 tices which regulate the body to prevent it from becoming sick. Curative versus Preventative is a  
28 good way to describe a major difference between western and holistic medicine.

1 Further reading

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6 New York. 1957.

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8 Phillips, D.C. *Holistic Thought in Social Science.* Stanford University Press. Stanford. 1976.

9 Dreyfus, H.L. *Holism and Hermeneutics* in *The Review of Metaphysics*. 34. pp. 3–23.

10 James, S. *The Content of Social Explanation.* Cambridge University Press. Cambridge, 1984.

11 Harrington, A. *Reenchanted Science: Holism in German Culture from Wilhelm II to Hitler.*  
12 Princeton University Press. 1996.

13 External links

14 [Brief explanation of Koestler's derivation of "holon"](#)

15 [Holism in nature – and coevolution in ecosystems](#)

16 [Stanford Encyclopedia of Philosophy article: "Holism and Nonseparability in Physics"](#)

17 [James Schombert of University of Oregon Physics Dept on quantum holism](#)

18 [Theory of sociological holism from "World of Wholeness"](#)

19 Reductionism can either mean (a) an approach to understand the nature of complex things by re-  
20 ducing them to the interactions of their parts, or to simpler or more fundamental things or (b) a  
21 philosophical position that a complex system is nothing but the sum of its parts, and that an ac-  
22 count of it can be reduced to accounts of individual constituents. This can be said of objects, phe-  
23 nomena, explanations, theories, and meanings.

24 THE CONSTITUTION AS AN APPLIED SCIENCE AND METHOD OF ITS USE.

25 Reductionism is strongly related to a certain perspective on causality. In a reductionist framework,  
26 phenomena that can be explained completely in terms of other, more fundamental phenomena, are  
27 called epiphenomena. Often there is an implication that the epiphenomenon exerts no causal  
28 agency on the fundamental phenomena that explain it.

1 Reductionism does not preclude emergent phenomena but it does imply the ability to understand  
2 the emergent in terms of the phenomena from and process(es) by which it emerges.

### 3 History

4 Reductionism dates back to ancient Greek philosophy in which some philosophers, notably  
5 Democritus, viewed the world as a mechanistic, material machine. Democritus was famous for his  
6 theory of atomism.

7 It was introduced later by Descartes in Part V of his Discourses (1637). Descartes argued the  
8 world was like a machine, its pieces like clockwork mechanisms, and that the machine could be  
9 understood by taking its pieces apart, studying them, and then putting them back together to see  
10 the larger picture. Descartes was a full mechanist, but only because he did not accept the conserva-  
11 tion of direction of motions of small things in a machine, including an organic machine. Newton's  
12 theory required such conservation for inorganic things at least. When such conservation was ac-  
13 cepted for organisms as well as inorganic objects by the middle of the 20th century, no organic  
14 mechanism could easily, if at all, be a Cartesian mechanism.

### 15 Types of reductionism

16 The distinction between the processes of theoretical and ontological reduction is important. Theo-  
17 retical reduction is the process by which one theory is absorbed into another; for example, both  
18 Kepler's laws of the motion of the planets and Galileo's theories of motion worked out for terres-  
19 trial objects are reducible to Newtonian theories of mechanics, because all the explanatory power  
20 of the former are contained within the latter. Furthermore, the reduction is considered to be bene-  
21 ficial because Newtonian mechanics is a more general theory—that is, it explains more events  
22 than Galileo's or Kepler's. Theoretical reduction, therefore, is the reduction of one explanation or  
23 theory to another—that is, it is the absorption of one of our ideas about a particular thing into an-  
24 other idea.

25 Methodological reductionism is the position that the best scientific strategy is to attempt to reduce  
26 explanations to the smallest possible entities. Methodological reductionism would thus hold that  
27 the atomic explanation of a substance's boiling point is preferable to the chemical explanation,  
28 and that an explanation based on even smaller particles (quarks, perhaps) would be even better.

1 Methodological reductionism, therefore, is the position that all scientific theories either can or  
2 should be reduced to a single super-theory through the process of theoretical reduction.

3 Finally, ontological reductionism is the belief that reality is composed of a minimum number of  
4 kinds of entities or substances. This claim is usually metaphysical, and is most commonly a form  
5 of monism, in effect claiming that all objects, properties and events are reducible to a single sub-  
6 stance. (A dualist who is an ontological reductionist would presumably believe that everything is  
7 reducible to one of two substances.)

### 8 Reductionism and science

9 Reductionist thinking and methods are the basis for many of the well-developed areas of modern  
10 science, including much of physics, chemistry and cell biology. Classical mechanics in particular  
11 is seen as a reductionist framework, and statistical mechanics can be viewed as a reconciliation of  
12 macroscopic thermodynamic laws with the reductionist approach of explaining macroscopic prop-  
13 erties in terms of microscopic components.

14 In science, reductionism can be understood to imply that certain fields of study are based on areas  
15 that study smaller spatial scales or organizational units. While it is commonly accepted that the  
16 foundations of chemistry are based in physics, and microbiology is rooted in chemistry, similar  
17 statements become controversial when one considers larger-scale fields. For example, claims that  
18 sociology is based on psychology, or that economics is based on sociology and psychology would  
19 be met with reservations. These claims are difficult to substantiate even though there are clear  
20 connections between these fields (for instance, most would agree that psychology can impact and  
21 inform economics.) The limit of reductionism's usefulness stems from emergent properties of  
22 complex systems which are more common at certain levels of organization. For example, certain  
23 aspects of evolutionary psychology and sociobiology are rejected by some who claim that com-  
24 plex systems are inherently irreducible and that a holistic approach is needed to understand them.  
25 Daniel Dennett defends scientific reductionism, which he says is really little more than  
26 materialism, by making a distinction between this and what he calls "Greedy reductionism": the  
27 idea that every explanation in every field of science should be reduced all the way down to  
28 particle physics or string theory. Greedy reductionism, he says, deserves some of the criticism that

1 has been heaped on reductionism in general because the lowest-level explanation of a phenome-  
2 non, even if it exists, is not always the best way to understand or explain it.

3 Some strong reductionists believe that the behavioral sciences should become "genuine" scientific  
4 disciplines by being based on genetic biology, and on the systematic study of culture (cf.  
5 Dawkins's concept of memes). In his book *The Blind Watchmaker*, Richard Dawkins introduced  
6 the term "hierarchical reductionism" to describe the view that complex systems can be described  
7 with a hierarchy of organizations, each of which can only be described in terms of objects one  
8 level down in the hierarchy. He provides the example of a computer, which under hierarchical re-  
9 ductionism can be explained well in terms of the operation of hard drives, processors, and mem-  
10 ory, but not on the level of AND or NOR gates, or on the even lower level of electrons in a semi-  
11 conductor medium.

12 Both Dennett and Steven Pinker argue that too many people who are opposed to science use the  
13 words "reductionism" and "reductionist" less to make coherent claims about science than to con-  
14 vey a general distaste for the endeavor, saying the opponents often use the words in a rather slip-  
15 perly way, to refer to whatever they dislike most about science. Dennett suggests that critics of re-  
16 ductionism may be searching for a way of salvaging some sense of a higher purpose to life, in the  
17 form of some kind of non-material / supernatural intervention. Dennett terms such aspirations  
18 "skyhooks," in contrast to the "cranes" that reductionism uses to build its understanding of the  
19 universe from solid ground.

20 Others argue that inappropriate use of reductionism limits our understanding of complex systems.  
21 In particular, ecologist Robert Ulanowicz says that science must develop techniques to study ways  
22 in which larger scales of organization influence smaller ones, and also ways in which feedback  
23 loops create structure at a given level, independently of details at a lower level of organization. He  
24 advocates (and uses) information theory as a framework to study propensities in natural systems.  
25 Ulanowicz attributes these criticisms of reductionism to the philosopher Karl Popper and biologist  
26 Robert Rosen.

27 Reductionism in mathematics  
28

1 In mathematics, reductionism can be interpreted as the philosophy that all mathematics can (or  
2 ought to) be built off a common foundation, which is usually axiomatic set theory. Ernst Zermelo  
3 was one of the major advocates of such a view, and he was also responsible for the development  
4 of much of axiomatic set theory. It has been argued that the generally accepted method of justify-  
5 ing mathematical axioms by their usefulness in common practice can potentially undermine Zer-  
6 melo's reductionist program.

7 As an alternative to set theory, others have argued for category theory as a foundation for certain  
8 aspects of mathematics.

### 9 Ontological reductionism

10 Ontological reductionism is the claim that everything that exists is made from a small number of  
11 basic substances that behave in regular ways (compare to monism). Ontological reductionism de-  
12 nies the idea of ontological emergence, and claims that emergence is an epistemological phe-  
13 nomenon that only exists through analysis or description of a system, and does not exist on a fun-  
14 damental level.

15 Ontological reductionism takes two different forms: Token ontological reductionism is the idea  
16 that every item that exists is a sum item. For perceivable items, it says that every perceivable item  
17 is a sum of items at a smaller level of complexity. Type ontological reductionism is the idea that  
18 every type of item is a sum (of typically less complex) type(s) of item(s). For perceivable types of  
19 item, it says that every perceivable type of item is a sum of types of items at a lower level of com-  
20 plexity. Token ontological reduction of biological things to chemical things is generally accepted.  
21 Type ontological reduction of biological things to chemical things is often rejected.

22 Michael Ruse has criticized ontological reductionism as an improper argument against vitalism.

### 23 Reductionism in linguistics

24 Linguistic reductionism is the idea that everything can be described in a language with a limited  
25 number of core concepts, and combinations of those concepts. The most known form of reduction-  
26 ist constructed language would be Esperanto (Also See Basic English and the constructed lan-  
27 guage Toki Pona).

### 28 Limits of reductionism

1 A contrast to the reductionist approach is holism or emergentism. Holism recognizes the idea that  
2 things can have properties as a whole that are not explainable from the sum of their parts (emer-  
3 gent properties). The principle of holism was concisely summarized by Aristotle in the *Metaphysics*:  
4 "The whole is more than the sum of its parts".

5 The term Greedy reductionism, coined by Daniel Dennett, is used to criticize inappropriate use of  
6 reductionism. Other authors use different language when describing the same thing.

7 In philosophy

8 The concept of downward causation poses an alternative to reductionism within philosophy. This  
9 view is developed and explored by Peter Bøgh Andersen, Claus Emmeche, Niels Ole Finnemann,  
10 and Peder Voetmann Christiansen, among others. These philosophers explore ways in which one  
11 can talk about phenomena at a larger-scale level of organization exerting causal influence on a  
12 smaller-scale level, and find that some, but not all proposed types of downward causation are  
13 compatible with science. In particular, they find that constraint is one way in which downward  
14 causation can operate. The notion of causality as constraint has also been explored as a way to  
15 shed light on scientific concepts such as self-organization, natural selection, adaptation, and con-  
16 trol

17 In science

18 Phenomena such as emergence and work within the field of complex systems theory pose limits to  
19 reductionism. Stuart Kauffman is one of the advocates of this viewpoint. Emergence is strongly  
20 related to nonlinearity. The limits of the application of reductionism become especially evident at  
21 levels of organization with higher amounts of complexity, including culture, neural networks,  
22 ecosystems, and other systems formed from assemblies of large numbers of interacting compo-  
23 nents. Symmetry breaking is an example of an emergent phenomenon. Nobel laureate  
24 P.W.Anderson used this idea in his famous paper in *Science* in 1972, 'More is different'[13] to ex-  
25 pose some of the limitations of reductionism. The limitation of reductionism was explained as fol-  
26 lows. The sciences can be arranged roughly linearly in a hierarchy as particle physics, many body  
27 physics, chemistry, molecular biology, cellular biology, ..., physiology, psychology and social sci-  
28 ences. The elementary entities of one science obeys the laws of the science that precedes it in the



1 above hierarchy. But, this does not imply that one science is just an applied version of the science  
2 that precedes it. Quoting from the article, "At each stage, entirely new laws, concepts and gener-  
3 alizations are necessary, requiring inspiration and creativity to just as great a degree as in the pre-  
4 vious one. Psychology is not applied biology nor is biology applied chemistry."

5 Sven Erik Jorgensen, an ecologist, lays out both theoretical and practical arguments for a holistic  
6 approach in certain areas of science, especially ecology. He argues that many systems are so com-  
7 plex that it will not ever be possible to describe all their details. Drawing an analogy to the  
8 Heisenberg uncertainty principle in physics, he argues that many interesting and relevant ecologi-  
9 cal phenomena cannot be replicated in laboratory conditions, and thus cannot be measured or ob-  
10 served without influencing and changing the system in some way. He also points to the impor-  
11 tance of interconnectedness in biological systems. His viewpoint is that science can only progress  
12 by outlining what questions are unanswerable and by using models that do not attempt to explain  
13 everything in terms of smaller hierarchical levels of organization, but instead model them on the  
14 scale of the system itself, taking into account some (but not all) factors from levels both higher  
15 and lower in the hierarchy.

16 Disciplines such as cybernetics and systems theory strongly embrace a non-reductionist view of  
17 science, sometimes going as far as explaining phenomena at a given level of hierarchy in terms of  
18 phenomena at a higher level, in a sense, the opposite of a reductionist approach.

19 In decision theory

20 In decision theory, a nonlinear utility function for a quantity such as money can create a situation  
21 in which all relevant decisions to be made in a given time period must to be considered simultane-  
22 ously in order to maximize utility, if all relevant decisions act on utility only through this quantity.

23 In such a situation, the optimal choice for a given decision depends on the possible outcomes of all  
24 other decisions, including those which may have no causal relationship to the decision at hand.

25 Breaking such a problem apart into individual decisions and optimizing each smaller decision can  
26 lead to drastically sub-optimal decisions. Such nonlinear utility functions for money are used in  
27 economics and are necessary in order to satisfy reasonable assumptions about rational behavior.

1 Such decision making situations are the norm, rather than the exception, in many business set-  
2 tings.

3 In religion

4 Certain religious beliefs or doctrines assign supernatural original causes to phenomena. In this  
5 context, even if a given system appears to operate by causes and effects that can be explained  
6 within a strict reductionist framework, belief or doctrine might hold that its true genesis and  
7 placement within larger (and typically unknown) systems is bound up with an intelligence or con-  
8 sciousness that is beyond normal or uninvited human perception. Some such beliefs constitute a  
9 form of teleology, a perspective which is generally in conflict with reductionism.

### 10 **Benefits of reduction**

11 An ontological reduction reduces the number of ontological primitives that exist within our  
12 ontology. Philosophers welcome this, because every ontological primitive demands a special ex-  
13 planation for its existence. If we maintain that life is not a physical property, for example, then we  
14 must give a separate explanation of why some objects possess it and why others do not. This is  
15 more often than not a daunting task, and such explanations often have the flavor of ad hoc contriv-  
16 ances or deus ex machina. Also, since every ontological primitive must be acknowledged as one  
17 of the fundamental principles of the natural world, we must also account for why this element in  
18 particular should be considered one of those underlying principles. (To return to an earlier exam-  
19 ple, it would be extremely difficult to explain why planets are so fundamental that special laws of  
20 motion should apply to them.) This is often extremely hard to do, especially in the face of our  
21 strong preference for simple explanations. Pursuing ontological reduction thus serves to unify and  
22 simplify our ontology, while guarding against needless multiplication of entities in the process.

23 At the same time, the requirements for satisfactorily showing that one thing is reducible to another  
24 are extremely steep. First and foremost, all features of the original property or object must be ac-  
25 counted for. For example, lightning would not be reducible to the electrical activity of air  
26 molecules if the reduction explained why lightning is deadly, but not why it always seeks the  
27 highest point to strike. Our preference for simple and unified explanations is a strong force for re-  
28

1 ductionism, but our demand that all relevant phenomena be accounted for is at least as strong a  
2 force against it.

### 3 **Alternatives to reductionism**

4 In recent years, the development of systems thinking has provided methods for tackling issues in a  
5 holistic rather than a reductionist way, and many scientists approach their work in a holistic para-  
6 digm. When the terms are used in a scientific context, holism and reductionism refer primarily to  
7 what sorts of models or theories offer valid explanations of the natural world; the scientific  
8 method of falsifying hypotheses, checking empirical data against theory, is largely unchanged, but  
9 the approach guides which theories are considered. The conflict between reductionism and holism  
10 in science is not universal--it usually centers on whether or not a holistic or reductionist approach  
11 is appropriate in the context of studying a specific system or phenomenon.

12 In many cases (such as the kinetic theory of gases), given a good understanding of the components  
13 of the system, one can predict all the important properties of the system as a whole. In other cases,  
14 trying to do this leads to a fallacy of composition. In those systems, emergent properties of the  
15 system are almost impossible to predict from knowledge of the parts of the system. Complexity  
16 theory studies such systems.

17 Certain religious beliefs or doctrines assign supernatural original causes to phenomena. In this  
18 context, even if a given system appears to operate by causes and effects that can be explained  
19 within a strict reductionist framework, belief or doctrine might hold that its true genesis and  
20 placement within larger (and typically unknown) systems is bound up with an intelligence or con-  
21 sciousness that is beyond normal or uninvited human perception. Some such beliefs constitute a  
22 form of teleology, a perspective which is generally in conflict with reductionism.

### 23 **FURTHER EVIDENCE OF FALSE CLAIMS AND DEMONIZING IRON MOUNTAIN**

24 World's 'Worst Water' Found Near Redding

25 Acidity at Iron Mountain mine stuns scientists

26 Carl T. Hall, Chronicle Science Writer

27 Thursday, March 23, 2000

1 (03-23) 04:00 PDT Redding -- In an odd chemical fluke that has astonished scientists, the world's  
2 most acidic water has been found deep inside the polluted remnants of an abandoned mine just  
3 west of this Shasta County city.

4 Already ranked among the worst pollution sites in the country, the vast underground web of min-  
5 ing operations at Iron Mountain, a federal Superfund cleanup site, now has a dubious new claim to  
6 fame.

7 "It's the world's worst water," said Charles Alpers, a research chemist at the U.S. Geological Sur-  
8 vey who has been sampling Iron Mountain runoff since the early 1970s.

9 But he and other scientists insisted that the water posed no threat to human health because it is  
10 found in tiny quantities, is safely diluted and scrubbed clean before it reaches the tributaries of the  
11 Sacramento River downstream, the main source of drinking water for Redding.

12 The acidic water, they say, is more a scientific curiosity.

13 **Excerpt from SFGate, part of the San Francisco Chronicle, June 12, 2009**

14 Rick Sugarek knows not to splash through the puddles inside "the mouth of the beast."

15 That is what he calls the gaping wound near Redding known to everybody else as the Iron Moun-  
16 tain Mine, which is widely regarded by scientists as one of the most polluted places in the world.

17 The project manager for the Environmental Protection Agency said he once dropped a pen in  
18 some running water inside the mine and when he recovered it, it was coated in copper. The water  
19 is so acidic that droplets eat holes in blue jeans and dissolve the stitching on boots, much like bat-  
20 tery acid.

21 Sugarek stood Thursday in a shaft once known as the Richmond Mine. It is the source of the toxic  
22 stew that has polluted the Sacramento River and its tributaries for more than a century, killed  
23 thousands of fish and turned a once-majestic mountain into a hellish breeding ground for nasty  
24 bacterial slime that helps create what geologists say is the "world's worst water."

25 **RELIEF: CERCLA IS UNCONSTITUTIONAL LAW, INTERVENTION IS GRANTED.**

26 quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

27 June 14, 2009 Signature: \_\_\_\_\_

28 /s/ John F. Hutchens, *in loco parentis*; Tenant in-Chief, Warden of the Forests & Stannaries