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UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

TWO MINERS & 8000 ACRES OF LAND (T.W. ARMAN and IRON MOUNTAIN MINES, INC. et al)
and on behalf of all others similarly situated under GOD

Defendants

v.

UNITED STATES OF AMERICA et al

Plaintiffs

TWO MINERS & 8000 ACRES OF LAND (T.W. ARMAN and IRON MOUNTAIN MINES, INC. et al)
and on behalf of all others similarly situated under GOD

Defendants

v.

(STATE OF CALIFORNIA, On behalf of the California Department of Toxic Substances Control and the California Regional Water Quality Control Board for the Central Valley Region)

Plaintiffs

Civil No. 2:91-cv-00768- Circuit No. 09-70047

FILED UNDER SEAL, CIRCUIT RULE 27-3

PETITION FOR EMERGENCY REVIEW

MOTION FOR RECONSIDERATION

INTERVENTION AND CITIZEN SUIT;

WRITS OF RIGHT AND b ™ u £ „„ jf- ERROR;

WRITS OF QUO WARRANTO & TRESPASS;

WRIT OF INCIDENTAL MANDAMUS;

WRIT OF DETINUE SUR BAILMENT;

JUDICIAL REVIEW; QUESTIONS OF

PRESERVATION & PERFECTION; LEGAL

DEFINITION FOR OUR SAFETY AND OUR

LIVES AND OUR CHILDRENS FUTURE;

PETITIONS FOR INJUNCTIVE RELIEF,

WITH VERIFICATION BY AFFIDAVIT

Petitioner incorporates prior pleadings
as though fully set forth herein.
Fraudulent *delectus personae, perfect title*
§ 3729. False claims, *qui tam*
811, 1085, and 1160 Code of Civil Procedure.
Motion to remain under Seal pending review

NOTICE OF ENDANGERMENT!

Iron Mountain Mines, Inc. Brick Flat pit mine. (Mountain Copper, Richmond Quartz, etc.) is collapsing under the 500,000 ton sludge disposal cell, (EPA Superfund) An imminent and substantial endangerment exists. The center of the mountain is disintegrating along the Camden faults, and the entire mine, approximately 327 acres, is collapsing; the disposal cell has failed.

INTERVENTION BY RIGHT

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

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

3. The Office of Warden of the Forest Prosecutes Trespassers at Iron Mountain Mines, Inc.

4. Petitioner is the Warden of the Forest at and for Iron Mountain Mines, Inc.

5. Artesian Mineral Development & Consolidated Sludge, Inc. (AMD&CSI.) recycles wastes at Iron Mountain.Mines, Inc. and Petitioner is President, Chairman, and CEO of AMD&CSI, and is also contracted to perform all reclamation and restoration, with rights of agency and factor.

6. Iron Mountain Mines, Inc. Charges the U.S Environmental Protection Agency with Trespass.

7. Iron Mountain Mines, Inc. demands just compensation for the taking of private property.

ADDITIONAL GROUNDS FOR INTERVENTION, CERCLA 113

8. i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C. 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the dis-

position of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

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

9. (a) In general

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

(1)

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

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

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

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has con-

tributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928 (a) and (g) of this title.

VERIFICATION AND DECLARATION OF NOTICE

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

11. No Judicial Deference is required if Judges are adequately informed.

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

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

14. ..the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Fed.R.Civ.P. 24(a)(2). The courts have interpreted Rule 24(a)(2) to entitle an applicant to intervention of right if the applicant can dem-

onstrate: (1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by existing parties to the litigation. Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir.1976). Applying this standard, Petitioner's motion to intervene of right complied with the rule and it should have been granted.

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

16. Petitioner has met the third requirement for Rule 24(a)(2) intervention by demonstrating that the present litigants fail adequately to represent their interests. While some Courts may holds that a presumption of adequate representation arises in some cases, Petitioner has pre-

sented facts concerning a lack of adequate representation and informed counsel causing unspeakable and manifest errors of impunity and miscarriage of justice and fraud upon the court. The circuit court has failed to heed the Supreme Court's determination that the burden on the applicant of demonstrating a lack of adequate representation "should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972). It is undisputed that the petitioner and defendants in this case have limited financial resources. At the time of the petitioner s' motion to intervene, defendants property was being held in EPA federal preservation and perfection, with no significant source of income, and Petitioner did not retain counsel to prosecute this action. Defendant's property was and is still in EPA federal preservation and perfection, and Defendant said publicly that he was "without any income." Defendant T.W. Arman, while represented by counsel in this case, describes himself in the class action as "of quite modest means". Given the financial constraints on the Defendant's ability to pay to prosecute this action, there is a significant chance that they might be less vigorous than the Petitioner in prosecuting their claim or for the Petitioner to be joined under the existing case. Petitioner therefore submits that the circuit court erred in ruling that the interests of the Petitioner are adequately represented by the present litigants in this action.

CONCLUSION

17. For the foregoing reasons, the court should reconsider the motions and claims and hold that the Petitioner is entitled to intervention of right pursuant to Rule 24(a)(2).

EQUAL PROTECTION OF THE *WARDEN OF THE FOREST*

18. Petitioner first addresses the theory that state law is controlling. Section 6125 of California Code provides that: “No person shall practice law in California unless the person is an active member of the State Bar.” Cal. Bus. & Prof. Code § 6125 (2003). This “prohibition against unauthorized law practice is . . . designed to ensure that those performing legal services do so competently.” Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1, 5 (Cal. 1998).2 Accordingly, a violation of section 6125 is considered a misdemeanor, and “[n]o one may recover compensation for services as an attorney at law in [California] unless the person was at the time the services were performed a member of The State Bar.” Id. (quoting Hardy v.

San Fernando Valley Chamber of Commerce, 222 P.2d 314, 317 (Cal. Ct. App. 1950)) (alterations omitted).

19. California courts have yet to fully articulate the scope of what constitutes "practicing law in California" under section 6125. They have made clear that section 6125 covers representation before California courts. Birbrower, 949 P.2d at 5. On the other hand, section 6125 "does not regulate 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 870, 872-73 (Cal. Ct. App. 1964). In Z.A. v. San Bruno Park School District, 165 F.3d 1273 (9th Cir. 1999), the Ninth Circuit determined that section 6125 covered practice before state agencies even when the state agencies are enforcing federal law. Id. at 1276.

20. 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 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 California indicated that the bar at least does not view section 6125 as covering federal administrative proceedings:

21. 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 individual is not engaged in the unauthorized practice of law while performing activities before such federal courts or agencies in California.

22. 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 practice before a federal administrative agency would be invalid. It is long established that any 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, 352 U.S. 187, 189-90 (1956); Johnson v. Maryland, 254 U.S. 51, 57 (1920); McCulloch v. Maryland, 17 U.S. 316, 429-430 (1819); Mount Olivet Cemetery Ass'n. v. Salt

Lake City, 164 F.3d 480, 486 (10th Cir. 1998); Don't Tear It Down, Inc. v. Pa. Ave. Dev. Corp., 642 F.2d 527, 534-35 (D.C. Cir. 1980).3

23. As a consequence, the Supreme Court and the courts of appeals have frequently invalidated state licensing requirements for federal employees and federal contractors. See Leslie Miller Inc., 352 U.S. at 190 (holding that the United States Air Force alone has the authority to determine the type of license that is required of its independent contractors); Johnson, 254 U.S. at 57 (holding that a state could not require the driver of a United States Postal truck to obtain a state driver's license before performing his duties); United States v. Virginia, 139 F.3d 984, 987-88 (4th Cir. 1998) (holding that the Virginia Criminal Justice Services Board could not require private investigators under contract with the FBI to obtain state private investigator licenses); Taylor v. United

24. While there is no bright line rule regarding what constitutes a "federal instrumentality," the Supreme Court has looked to several factors, including: whether the entity was created by the government; whether it was established to pursue governmental objectives; whether government officials handle and control its operations; and whether the officers of the entity are appointed by the government. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397-98 (1995) (considering these factors to find that Amtrak was an instrumentality of the United States). States, 821 F.2d 1428, 1431-32 (9th Cir. 1987) (noting that California could not require an army hospital or its health care providers to be licensed under state law).

25. So too state licensing requirements which purport to regulate private individuals who appear before a federal agency are invalid. In Sperry v. Florida, 373 U.S. 379 (1963), the Florida Bar attempted to enjoin a non-attorney from performing services in the state relating to a patent prosecution occurring before the United States Patent and Trademark Office ("PTO"). Id. at 381. The Florida Bar argued that the non-attorney was engaged in the "unauthorized practice of law" because the Florida Bar had not licensed him. Id. at 382. The Supreme Court held that a "State may not enforce licensing requirements which . . . give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions," and found that the state's licensing requirements could

not govern practice before the PTO. Id. at 385, 388 (quoting Leslie Miller, Inc., 352 U.S. at 190).

26. Just as the states cannot regulate practice before the PTO, they cannot regulate practice before the EPA and DOJ. Allowing state control would plainly impede the conduct of federal proceedings even though the EPA does not have procedures for admitting counsel to practice before it. The EPA "is an independent Government agency that operates like a court." 5 C.F.R. § 1200.1 (2004). California has no authority to require that attorneys practicing before the Board obtain a state license or to regulate the award of fees for work before federal agencies. To the extent that the EPA holds otherwise, that decision cannot stand.

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

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

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

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

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

31. 28 U.S.C. § 530B(a) (2000). But nothing in section 530B suggests that government attorneys must abide by state licensing requirements. To the contrary, 28 C.F.R. § 77.2 (which is referred to by section 530B(c) for the definition of "attorney for the Government") explicitly rejects the proposition that government attorneys must comply with state licensing requirements. The regulation states that the "phrase state laws and rules and local federal court rules governing attorneys . . . . does not include . . . [a] statute, rule, or regulation requiring licensure or membership in a particular state bar." 28 C.F.R. § 77.2(h) (2004). Thus, while government attorneys must abide by the ethical codes of conduct of each state in which they perform their services, they do not have to be licensed by those states to practice law.

32. In Collins v. Department of Justice, 94 M.S.P.R. 62 (2003), the Board held that private attorneys appearing before it will also be expected to conform to applicable state rules governing attorney conduct but did not suggest that they must abide by state licensing requirements. The issue in Collins was whether a particular attorney should be disqualified to serve as a representative under 5 C.F.R. § 1201.31(b). Although the regulation allows a party to choose "any representative as long as that person is willing representative had previously established an attorney-client relationship with a witness opposing Collins and therefore had a potential conflict of interest. Collins, 94 M.S.P.R. at 63-64. The Board reasoned that private attorneys should follow the same state ethics rules as government attorneys, referring to section 530B. Id. at 68-69. It found that under California's ethics rules, Collins' attorney was disqualified. Id. But Collins and available to serve," the regulation provides that "[t]he other party or parties may challenge

the designation, however, on the ground that it involves a conflict of interest or a conflict of position." 5 C.F.R. § 1201.31(b). In Collins, Collins' designated attorney did not suggest that private attorneys should be subject to state licensing requirements.

33. It would indeed adversely affect proceedings before federal administrative agencies if state licensing rules were applied, since the pool of available attorney representatives would be severely impaired. In addition to finding an attorney who is accessible and familiar with Board practice, the private party would also have to find an attorney who is licensed in the state in which services are to be rendered. In a similar situation, the Supreme Court in Sperry, while not directly addressing the incorporation issue, concluded that applying state licensing requirements to practitioners appearing before the PTO would have a "disruptive effect," given that one-quarter of the attorney practitioners before the PTO would have been disqualified because they were not licensed in the state in which they were practicing. 373 U.S. at 401. Moreover, the various state bar rules governing unauthorized practice are not uniform. See generally ABA Section of Legal Educ. and Admissions to the Bar & Nat'l Conference of Bar Examiners, Comprehensive Guide to Bar Admissions Requirements (2005). To require the federal agency and those practicing before it to determine in every case whether a representative was authorized to perform particular services within the state as an attorney would burden both the bar and the agencies themselves. We thus conclude that the federal statute here does not incorporate state law and that an attorney licensed in any state or federal jurisdiction is authorized to practice as an attorney before the EPA.

34. The government will nonetheless argue that even if petitioner could properly prosecute before the Circuit Court as a private attorney general, his entitlement to fees is determined by state law, and that no federal interest is undermined in determining fees in accordance with state law. As with the first issue regarding the right to prosecute before the Circuit Court, there is nothing in the text of the fee-shifting statute to suggest incorporation of state law. Here, the fee-shifting provision of the VEOA states: "A preference eligible who prevails in an action under section 3330a or 3330b shall be awarded reasonable attorney fees, expert witness fees, and other litigation expenses." 5 U.S.C. § 3330c(b) (2000). The Board's regulation governing attor-

ney's fees merely states that the fee application must show why the applicant is "entitled to an award under the applicable statutory standard," and must show "an established attorney-client relationship." 5 C.F.R. § 1201.203 (2004). Given the statutory and regulatory silence, the presumption here again is that federal law does not incorporate state standards. There is also no legislative history suggesting an intent to incorporate state law.

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

36. It seems axiomatic that the denial of fees to attorneys practicing before federal agencies would discourage such representation by attorneys. To allow attorneys to practice before federal agencies, while barring them from collecting fees under the attorney's fees statute, would, as a practical matter, bar such private representation entirely in many cases and limit representation to the few attorneys willing to serve without compensation. Under the government's theory it might even be impermissible for the attorney to receive compensation out of the client's own monetary recovery. A restrictive reading of the term "attorney" in the fee-shifting statute would thus naturally limit the opportunities that veterans would have in obtaining counsel. Under these circumstances, the purposes of the fee-shifting statute can be served only by allowing fees for representatives.

37. Where a statute's text and legislative history are silent on an issue of statutory construction, the overriding purpose of the provision is highly relevant in resolving the ambiguity. Candle Corp. of Am. v. U.S. Int'l. Trade Comm'n, 374 F.3d 1087, 1093 (Fed. Cir. 2004); Warner-

Lambert Co. v. Apotex Corp., 316 F.3d 1348, 1355 (Fed. Cir. 2003) ("When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give it such a construction as will carry into execution the will of the Legislature.") (quoting Kokoszka v. Belford, 417 U.S. 642, 650 (1974)).

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

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

"Poorunpitiedejected miserable povertie" Lord Coke.

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

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

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

43. Note that when an agency and a hearings officer disagree, the court reviews the decision of the agency, not the hearings officer. *See Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990), *amended by* 932 F.2d 1352 (9th Cir. 1991); *NLRB v. International Bhd. of Elec. Workers, Local*

77, 895 F.2d 1570, 1573 (9th Cir. 1990).8 Thus, the standard of review is not modified when such a disagreement occurs. *See Maka*, 904 F.2d at 1355; *International Bhd.*, 895 F.2d at 1573. When the agency rejects the hearings officer's credibility findings, however, it must state its reasons and those reasons must be based on substantial evidence. *See Maka*, 904 F.2d at 1355; *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986).

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

ENVIRONMENTAL PROTECTION AGENCY REVIEW

45. Final administrative actions of the EPA are reviewed under the standards established by the Administrative Procedures Act. *See Ober v. Whitman*, 243 F.3d 1190, 193 (9th Cir. 2001); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.), *amended by* 197 F.3d 1035 (9th Cir. 1999). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed de novo. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001). The court may reverse the EPA's decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Defenders of Wildlife v. United States Env't Prot. Agency*, 420 F.3d 946, 958-59 (9th Cir. 2005) (discussing what is "arbitrary and capricious"); *Ober*, 243 F.3d at 1193; *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Deference is owed to the EPA's interpretation of its own regulations if those regulations are not unreasonable. *See Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996); *see also Pronsolino v.* standard); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 848-49 (9th Cir. 2001) (noting court may reject a construction inconsistent with statutory mandates or that frustrate the statutory policies that Congress sought to im-

plement). *Nastri*, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference owed to the EPA). _____

1 *See Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Arizona Cattle Growers' Ass'n*, 273 F.3d at 1236; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001); *United States v. Snoring Relief Lab Inc.*, 210 F.3d 1081, 1085 (9th Cir. 2000).

2 *Fry v. DEA*, 353 F.3d 1041, 1043 (9th Cir. 2003); *Environmental Def. Ctr.*, 344 F.3d at 858 n.36; *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1235 (9th Cir. 2001) (noting "narrow scope" of review); *Hells Canyon Alliance*, 227 F.3d at 1177; *Ninilchik Traditional Council*, 227 F.3d at 1194; *Snoring Relief Lab Inc.*, 210 F.3d at 1085.

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

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

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

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

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

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

9. 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."

SUPREME AUTHORITY

46. … "In the mining partnership those occurrences make no dissolution, but the others go on; and, in case a stranger has bought the interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If, death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this *delectus personae* in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority; nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. Charles v. Eshleman, 5 Colo. 107; Shillman v. Lachman, 83 Am Dec. 96, and note; McConnell v. Denver, 35 Cal. 365; Jones v. Clark, 42 Cal. 181; Manville v. Parks, 7 Colo. 128, 2 Pac. 212; Congdon v. Olds, 18 Mont. 487, 46 Pac. 261. 29 S.E. 505. In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as. e.g. a partnership to run a theater or other single enterprise only. Pease v. Cole, 53 Conn. 53, 22 Atl. 681; Deardorf's Adm'r v. Tacher, 78 Mo. 128; Smith, Merc. Law, 82; T Pars. Partn. § 85; Pooley v. Whitmore, 27 Am. Rep. 733. (**e.g. an insurance company or a bank**.) A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business. Bates, Partn. , § 329. Members of a mining part-

nership, holding the major portion of the property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned. Dougherty v. Creary, 89 Am. Dec. 116. These principles settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, 1273. * * * **Justice Brannon**

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

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

Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ORDAIN and ESTABLISH this Constitution

for the United States of America." Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

FACTS SHOWING EXISTENCE OF THE CLAIMED EMERGENCY

The real parties in interest, T.W. Arman and John F. Hutchens, two miners in a joint venture to re-mine mining wastes at Iron Mountain Mines, Inc. (EPA Superfund site), have SUBMITTED EVIDENCE AND INFORMATION OF A SUBSTANTIAL NATURE TO INDICATE THAT THEY HAVE BEEN SLANDERED, LIBELLED, DEFRAUDED, AND ROBBED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY OF OVER $500 MILLION DOLLARS IN REVENUES FROM THE SALE OF PRODUCTS RECOVERED FROM ACID MINE DRAINAGE, PRODUCT THAT WAS PREVIOUSLY RECOVERED AND RECYCLED, AND THAT THIS FRAUD CONTINUES BY FALSE CLAIMS AND FRAUD UPON THE COURT WITH NEGLIGENT ENDANGERMENT, TRESPASS, VIOLATIONS OF CONSTITUTIONALLY PROTECTED DUE PROCESS AND EQUAL PROTECTION, THE TAKING OF PRIVATE PROPERTY REQUIRING JUST COMPENSATION, FRAUDULENT DECEIT UNDER COLOR OF LAW, KNOWINGLY RECKLESS DISREGARD OF THE TRUTH, DELIBERATE IGNORANCE OF ACTUAL INFORMATION, AND MALICE, OPPRESSION, DESPOTISM, TYRANNY, ULTERIOR GOVERNMENT MOTIVES, BREACH OF LETTERS PATENTS, CONCEALMENT AND NON-DISCLOSURE, NEGLIGENT MISREPRESENTATION, INTERFERENCE IN THE COMPLETE DEVELOPMENT OF MINERAL PATENTS, CLOUDING TITLE, INTENTIONAL VIOLATION OF CIVIL RIGHTS, ARBITRARY AND CAPRICIOUS THEFT OF NATURAL RESOURCES DEVOID OF A RATIONAL BASIS, ALL TO THE DAMAGE OF THE PETITIONER, THE OWNERS AND OPERATORS, THE PUBLIC WELFARE, THE PUBLIC BENEFIT, AND THE ENVIRONMENT REQUIRING JUDICIAL REVIEW.

THE DEFENDANTS CLAIM THE BIOLOGICAL ARCHAE AND OTHER BACTERIA CULTIVATED WITHIN THE IRON MOUNTAIN MINE AS A NATURAL RESOURCE,

AND DEMAND AN IMMEDIATE INJUNCTION TO HALT ANY ATTEMPT BY THE EPA, THE SITE OPERATOR, OR ANY OTHER PARTY TO DAMAGE OR DISTURB THE BIOTA CULTIVATED WITHIN ANY PORTION OF THE IRON MOUNTAIN MINES.

CONCLUSION

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

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

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

DECLARATIONS OF REMISSION AND REVERSION AND DETINUE SUR BAILMENT.

***audita querela:* JUDICIAL REVIEW**

: We being unwilling that such Collusions, Malice and Deceit Should pass unpunished, command you, that having heard the Complaint of him the said Arman. in this Behalf, and having called before you the aforesaid EPA. and others whom you shall see fit to be called in this Matter, and having heard the Reasons of the several Parties thereupon, you further cause to be done full and speedy Justice to the aforesaid Arman as well upon the Restitution and Recovery, as upon the Collusion, Malice and Deceit aforesaid*.

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

EPA is legally required to comply with the procedural requirements of NEPA for its research and development activities, facilities construction, wastewater treatment construction grants under Title II of the Clean Water Act (CWA), EPA-issued National Pollutant Discharge Elimination System (NPDES) permits for new sources, and for certain projects funded through EPA annual Appropriations Acts.

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

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

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

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

Declared under penalty of perjury under the laws of the State of California.

_____

John F. Hutchens, *sui juris*; Tenant in-Chief, private *Warden of the Forest*

VERIFICATION AFFIDAVIT

I, John F. Hutchens, hereby state that the same is true of my own knowledge, except as to matters which are herein stated on my own information or belief, and as to those matters, I believe them to be true. Affirmed this day.

Date: February 20th, 2009 Signature:_____

John F. Hutchens