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

UNITED STATES DISTRICT COURT EASTERN DISTRICT of CALIFORNIA

IRON MOUNTAIN MINES, INC. et al,	**Civil No. 2:91-cv-00768-JAM-JFM**
T.W. ARMAN & JOHN F. HUTCHENS	**Honorable Judge John A. Mendez**
TWO MINERS under God, indivisible,	**RIGHT TO PETITION, WRIT OF RIGHT!**
on behalf of a class; Grantees, Citizens.	**MOTION FOR ADJUDICATION AND**
v.	**JUDGMENT ON THE MERITS; TRESPASS**
UNITED STATES OF AMERICA	**MOTION FOR ORDER OF EJECTMENT;**
STATE OF CALIFORNIA	**MOTION FOR ORDER OF REMISSION;**
Picturi; Signis; Famosus libellus sine scriptis; Bursae decrementum; Quando dominus conscientiae detrimentum; Breve capitalis justiciarius noster and ad placita coram nobis tenenda.	**MOTION FOR ORDER OF REVERSION;** **MOTION FOR ABSOLUTE ORDER OF DETINUE SUR BAILMENT;** **MOTION FOR ORDER OF INCIDENTAL AND PEREMPTORY MANDAMUS**

HABEAS PROCEEDINGS PETITION FOR IRON MOUNTAIN MINES, INC.
MEMORANDUM IN SUPPORT OF ENTRY OF JUDGMENT *SUI JURIS*.
***SUI JURIS* IS THE PROCESS TO ACCESS THE PUBLIC RECORD AND FORCE THE FACTS OF YOURS OR YOUR BEST FRIENDS ABUSES TO BE HEARD BY THE COURT.**
GRANTEES' SECULAR RIGHTS *SUI JURIS* UNDER THE ESTABLISHMENT CLAUSE
CONFLICTS OF INTERESTS; PROHIBITIONS; EQUITABLE ESTOPPEL; TRUSTS;
WRITS OF ERRORS CORAM NOBIS; FIERI FASCIA; MUTATIS MUTANDIS;

Categorical Rules

Noxious Use of land – need not pay

Permanent Physical Occupancy – must pay

100% wipe out (of reasonable investment backed expectations) – must pay

Multi-factored test on whether they have to pay or not – Penn Central

A condition on land has to have a "rational nexus" and "rough proportionality" to what the purpose of the condition is

Temporary taking needs to be paid for

Court Cases

HHA v. Midkiff – can take land directly to a private party and compensate mkt value

Causby – Easment of flying directly overhead is a taking

Miller v. Schoene – making them cut down ceder trees wasn't a taking

Loretto v. Teleprompter – permanent physical occupation is a taking

Allerd – not a taking when outlaw sale of eagle feathers

Kaiser Aetna – taking when take away the excluendi of their private lake

Pruneyard – not a taking when made shopping center admit free speech activities

Hadacheck v. Sebastian – regulation of business operations to prevent harm to public is police power

Pennsylvania Coal Co. v. Mahon – If a regulation goes too far then it's a taking

Penn Central v. NY – keeping historical landmarks in good repair and historic good for everyone, within police power

Lucas v. SC – if regulatory action denies an owner viable use of land, it's a taking, unless it's a Common Law nuisance

Pallazzo v. Rhone Island – is not barred from a takings claim just because the title was acquired after the effective date of the state regulation

Nollan v. CA Coast – A state may not condition a property use permit for something not addressing the purpose use

Dolan v. City of Tigard – A condition of permit needs to be proportional to the impact the change will be. (First Evangelical v. LA – temporary takings need to be compensated)

QUO WARRANTO INCIDENTAL AND PEREMPTORY ADMINISTRATIVE MANDAMUS

1. The right to petition the government is the freedom of individuals (and sometimes groups and corporations) to petition their government for a correction or repair of some form of injustice without fear of punishment for the same. Although often overlooked in favour of other more famous freedoms and sometimes taken for granted, many other civil liberties are enforceable against the government only by exercising this basic right,, making it a fundamental right in both representative democracies (to protect public participation) and liberal democracies. While the prohibition of abridgment of the right to petition originally referred only to the federal legislature (the Congress) and courts, the incorporation doctrine later expanded the protection of the right to its current scope, over all state and federal courts and legislatures and the executive branches of the state and federal governments.

Boumediene v. Bush, 553 U.S. ___ (2008), was a writ of habeas corpus submission made in a civilian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, held in military detention by the United States at the Guantanamo Bay detention camps.[1][2][3] The case was consolidated with habeas petition Al Odah v. United States. The case challenged the legality of Boumediene's detention at the Guantanamo Bay military base as well as the constitutionality of the Military Commissions Act (MCA) of 2006. Oral arguments on the combined case were heard by the Supreme Court on December 5, 2007. On June 12, 2008, Justice Kennedy wrote the opinion for the 5-4 majority holding that the prisoners had a right to the habeas corpus under the United States Constitution and that the MCA was an unconstitutional suspension of that right.

Grantees can have no less right as a citizen than these.

2. Habeas petitioner Iron Mountain Mines, Inc. et al v. United States challenges the legitimacy of Iron Mountain Mines, Inc. invasion and occupation by the Environmental Protection Agency and particularly contests the illegitimate animus and vindictiveness of the EPA actions, the defamations, libel and slander, loss of enjoyment, value, and livelihood; .injury to reputation, credit, honor and dignity

THE UNITED STATES HAS NO RIGHT TO ABROGATE PATENT TITLE! TRESPASS!

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

FEDERAL QUESTION?

4. This matter originated as a petition to reopen a "closed" district court proceeding and a petition for stay of the consent decree with counter-claims, intervention by right, and allegations of fraud upon the court sufficient to establish proper jurisdiction before the Court. This complaint also argues that there is jurisdiction in rem pursuant to Article III of the Constitution as it arises under the laws of the United States because petitioners have explicit contractual property rights guaranteed by patent title from the President of the United States that petitioners allege were violated and usurped from the legislature of California by the United States Environmental Protection Agency and the United States Department of Justice, which is therefore a breach of contract and a constructive trust by the United States to the injury and damages of the petitioners and the people of the State of California, the people of the United States, and members of a class within California and a class within the United States of America.

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

6. Furthermore, because the right to relief depends upon the construction or application of federal law, and concerns claims for relief arising out of civil rights (§ 1343), United States as defendant (§ 1346), injuries under federal law (§ 1357), supplemental jurisdiction (§1367), United States as defendant (§ 1402), venue of cases under chapter 5 of title 3 (§ 1413), creation of remedy (§ 2201),

further relief (§ 2202), process and procedure (§ 2361), three-judge court (§ 2284), constitutional question (§ 2403), quiet title action (§ 2409a), federal lien (§ 2410), liability of United States (§ 2674), exceptions (§ 2680), false claims (§ 3729) so territorial, subject matter, concurrent, and pendant State claim jurisdiction is properly before this court.

7. Petitioners claim quo Warranto with incidental and preemptory administrative mandamus by right because they contest the Environmental Protection Agencies actions and will rectify the abuse of discretion and imbalance of government authority, and because petitioners demand equal protection and due process of law, because the EPA actions are implicitly an assertion of unquestionable and unchallengeable authority to bury the petitioners property, and by extension to bury the entire State of California and even the entire United States under unquantified and unlimited amounts of acutely toxic hazardous waste sludge, solely for the benefit of fishes, all the while claiming such authorities are scientifically justified as somehow protecting the "environment", in disregard and breach of duty to implement remedies that are fully protective of human health and the environment. Petitioners allege that EPA claims that such actions have any scientific merit are false claims, and petitioners further allege that these EPA actions are unscientific, unreasonable, unfair and unjust, and are unsupportable by scientific or economic accountability.

8. Petitioners allege that such an absurd and illogical result of executive mismanagement, facilitated by unfair and unjust Congressional legislation, and coddled in Judicial swaddling and Judicial deference, without any timely means of recourse or for redress of grievances, is an abomination of unbounded executive authority, and petitioners raise these allegations to a constitutional question with claims of unconstitutional jurisdiction by the EPA and DOJ; hence the petitioners claim by ancient writ "*Breve Soke",* and convene by right of the "Warden of the Stannaries" and the "Warden of the Forest" a "Miner's Court" for a determination of franchise jurisdiction according to the Constitutions of the United States and of the State of California, and according to the codes of California, the laws of the United States of America, and the common law of England, and petitioners motion for writ of *certiorari* to resolve these questions and the allegations of abuse of executive authority and unconstitutional jurisdiction by the EPA and DOJ. Jurisdiction is also properly reserved to the District Courts by the covenants of patent title and Federal law.

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

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

ABSOLUTE ORIGINAL ORDER TO CEASE, DESIST, VOID, AND VACATE!

ABSOLUTE ORDER FOR REMISSION, REVERSION, AND DETINUE SUR BAILMENT.

quo Avarranto: de Quibis Commote Alodium & Alodarii, Quia tria sequunturdefamatorem; Quando Dominus Conscientiae detrimentum; Quae clamat tenere de te per liberum seruitium & difficillimum est invenire authorem infamatoriae scripturae; illegitimate animus. trespass. quis separabit? picturi? signis? famosus libellus sine scriptis? bursae decrementum? deceit! Breve capitalis justiciarius noster and ad placita coram nobis tenenda; trespass of patent title. Demand for declaratory and injunctive relief, concurrent jurisdictions, § 2680. Exceptions!

9. Writs of: manifest injustice; 10th Amendment repudiation; equitable estoppel. Knowingly reckless disregard of the truth, deliberate ignorance of actual information; trespass: Praecipe quod reddat & detinue sur bailment; subpoena ad testificandum; subpoena duces tecum; impunity; miscarriage of justice; prohibition; illegitimate animus;

10. Differing court interpretations of a statute "is evidence that the statute is ambiguous and unclear." U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

11. Courts frequently interpret an ambiguous contract term against the interests of the party who prepared the contract and created the ambiguity. This is common in cases of adhesion contracts and insurance contracts. A drafter of a document should not benefit at the expense of an innocent party because the drafter was careless in drafting the agreement.

12. In Constitutional Law, statutes that contain ambiguous language are void for vagueness. The language of such laws is considered so obscure and uncertain that a reasonable person cannot determine from a reading what the law purports to command or prohibit. This statutory ambiguity deprives a person of the notice requirement of Due Process of Law, and, therefore, renders the statute unconstitutional.

West's Encyclopedia of American Law, edition 2.

13. CERCLA still has no preamble, and as applied in this case undermines RCRA, CWA, CAA, NEPA, EPCRA, NCP, and violates the petitioners and defendant's constitutional protections, due

process, equal protection, and is a negligently arbitrary and capricious imminent and substantial endangerment to the innocent landowner, miners, the public, and environment.

THE RULES MUST BE DISCHARGED!

Grantees petition for equitable estoppel;

14. The EPA is required to determine liability based upon applicable law. The doctrine of equitable estoppel provides that in certain cases, the EPA may be estopped from asserting liability based upon actions taken by the EPA in the reliance of which leads to harm or "detriment."

15. The doctrine of equitable estoppel will be applied against a governmental agency when application of estoppel is necessary to prevent manifest injustice.

1. Elements of Equitable Estoppel

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

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

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

(3) Ignorant of the true facts; conflict of interest, libel and slander, infamy, stigmatic injuries, concealment, deliberate ignorance, errors of impunity, miscarriage of justice; TRUE

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

(25 years of invasion and occupation, taking private property requiring just compensation, civil rights violations of equal protection and due process, tyranny and despotism, false claims, abuse, malice, oppression, deceit, fraud upon the court, unnecessary and reckless negligent endangerment.

2. Detrimental Reliance

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

3. Application of the Doctrine of Equitable Estoppel

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

Petition to strike the liens.

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

Writ of certiorari:

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

17. You should as well consider whether the government agency, swaddled in judicial deference, engaged in despotism and tyranny to damage these persons or the general welfare, infringed and usurped the corporate franchise, slandered and libeled the petitioners and the true and rightful owners, defamed their honor, poisoned their reputations, invaded and occupied their private property without justification and without compensation, and that those who pretended to claim such rights in the water or lands against the true and rightful owner that is Iron Mountain Mines, Inc. make such claims in violation of the constitution of California. When Iron Mountain Mines concluded underground mining in 1954, the copper cementation process continued as it had since copper mining began in 1896. Copper cementation had been practiced almost continuously until the EPA forced T.W. Arman to retire. Copper cementation has been known for over 2000 years and has been practiced on an industrial scale for over 1000 years. You should further consider whether agency actions serve to undermine and abrogate principles of liberty and justice and principles of our democracy and republican form of government, and endanger the general welfare.

ABUSE, MALICE, OPPRESSION, DECEIT, MISTAKE, ACCIDENT, AND HARDSHIP. TAKINGS! ERRORS! PROHIBITIONS! EQUITABLE ESTOPPEL! INTERVENTION!

Creation by Letters Patents is the surer, for they may be sufficiently created by Letters Patents 811, 1085, and 1160 California Code of Civil Procedure *sui juris* by verified affidavit

Date: July 8th , 2009 Signature: _____

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

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

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

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

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

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

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

19. Petitioners has shown the necessary conditions for intervention, meeting all three criteria recognized by the Courts, so petitioner is entitled to intervention of right by Fed.R.Civ.P. 24(a)(2),

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

21. Petitioner has shown that a fundamental failure of government has occurred, that a basic imbalance of powers in contravention of the Constitution of the United States exists, that this imbalance serves to endanger the health, wealth, and prosperity of the citizens of the United States as well as petitioners, and petitioners has provided a reasonable and logical course of remedy to the governments problems.

22. 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, recognized that " stigmatic injuries" may satisfy the " injury in fact" component of standing, and that upon doing so, they also automatically satisfy the other standing requirements of causation and redressability.

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

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

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

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

July 8, 2009 Signature:_____

s/ John F. Hutchens

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: July 8, 2009

Signature:_____

s/ John F. Hutchens

27. EXCEPTIONS TO THE RULES

"ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE."

28. Petitioner John F. Hutchens appears *pro se* on behalf of himself because he owns a lease tenancy and leasehold interest in mineral rights conveyed by T.W. Arman on behalf of Iron Mountain Mines, Inc. and he has a right to protect that interest.

29. Petitioner John F. Hutchens appears as Grantees' agent and authorized representative on behalf of T.W. Arman and Iron Mountain Mines, Inc. and on behalf of a class by §131 of the mining code and Title 42 U.S.C. §1988 and Peremptory Mandamus under California Code of Civil Procedure.

§ 1988. Proceedings in vindication of civil rights

30. (a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

31. (b) Attorney's fees

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

32. (c) Expert fees

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

CAUSE OF ACTION: USURPATION OF OFFICE AND FRANCHISE

33. Petitioner submits that due notice was given to both the California and United States Attorney General of a citizen suit by the private attorney general in the vindication of civil rights, that the action involves civil rights that are in the interests of California and United States citizens, and on behalf of a class, but the attorney generals are moot.

California Code of Civil Procedure.

34. 1085. (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

THE COURT IS COMPELLED TO ISSUE THE WRITS

35. 1086. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

36. 1087. The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a time and place then or thereafter specified by court order why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted.

37. 1088. When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance. With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.

38. 1088.5. In a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for a writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court.

39. 1089. On the date for return of the alternative writ, or on which the application for the writ is noticed, or, if the Judicial Council shall adopt rules relating to the return and answer, then at the time provided by those rules, the party upon whom the writ or notice has been served may make a return by demurrer, verified answer or both. If the return is by demurrer alone, the court may allow an answer to be filed within such time as it may designate. Nothing in this section affects rules of the Judicial Council governing original writ proceedings in reviewing courts.

PETITION FOR ADJUDICATION AND JUDGMENT ON THE MERITS

40. 1094. If no return be made, the case may be heard on the papers of the applicant. If the return raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case. If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ.

PETITION FOR REVIEW OF ABUSE OF PROCESS AND ABUSE OF DISCRETION

41. 1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent.

PROCEEDINGS PURSUANT TO SECTION 1088.5

42. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

43. (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was

any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE

44. (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(810.) Section Eight Hundred and Ten. When the action is brought upon the information or application of a private party, the Attorney General may require such party to enter into an undertaking, with sureties to be approved by the Attorney General, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

EQUAL PROTECTION OF A MUNICIPAL CORPORATION

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

DEMAND FOR IMMEDIATE POSSESSORY JUDGMENT

46. 1169. If, at the time appointed, any defendant served with a summons does not appear and defend, the clerk, upon written application of the plaintiff and proof of the service of summons and complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, immediately shall enter judgment for restitution of the premises and shall issue a writ of execution thereon. The application for default judgment and the default judgment shall include a place to indicate that the judgment includes tenants, subtenants, if any, named claimants, if any, and any other

occupants of the premises. Thereafter, the plaintiff may apply to the court for any other relief demanded in the complaint, including the costs, against the defendant, or defendants, or against one or more of the defendants.

47. 1107. When an application is filed for the issuance of any prerogative writ, the application shall be accompanied by proof of service of a copy thereof upon the respondent and the real party interest named in such application. The provisions of Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 shall apply to the service of the application. However, when a writ of mandate is sought pursuant to the provisions of Section 1088.5, the action may be filed and served in the same manner as an ordinary action under Part 2 (commencing with Section 307). Where the real party in respondent's interest is a board or commission, the service shall be made upon the presiding officer, or upon the secretary, or upon a majority of the members, of the board or commission. Within five days after service and filing of the application, the real party in interest or the respondent or both may serve upon the applicant and file with the court points and authorities in opposition to the granting of the writ.

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

49. The provisions of this section shall not be applicable to applications for the writ of habeas corpus, or to applications for writs of review of the Industrial Accident or Public Utilities Commissions.

50. 1108. Writs of review, mandate, and prohibition issued by the Supreme Court, a court of appeal, or a superior court, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time.

§ 1985. Conspiracy to interfere with civil rights

51. (3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory

from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 1982. Property rights of citizens

52. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

CREATION BY WRIT & LETTERS PATENTS

53. It is not material whether the Libel be true, or whether the party against whom the Libel is made, be of good or ill fame; for in a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of Law, and not by any means to revenge himself, either by the odious course of libeling, or otherwise: He who kills a man with his sword in fight is a great offender, but he is a greater offender who poisons another, for in the one case he who is the party assaulted may defend himself, and knows his adversary, and may endeavour to prevent it: But poisoning may be done so secret that none can defend himself against it; for which cause the offence is the more grievous, because the offender cannot easily be known; And of such nature is libeling, it is secret, and robs a man of his good name, which ought to be more precious to him than his life, & difficillimum est invenire authorem infamatoriae scripturae; because that when the offender is known, he ought to be severely punished. Every infamous libel, aut est in scriptis, aut sine scriptis; a scandalous libel, in scriptis; when an epigram, rhyme, or other writing is com-

posed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced. And such libel may be published, 1. Verbis aut cantilenis: As where it is maliciously repeated or sung in the presence of others. 2. Traditione,7 when the libel or copy of it is delivered over to scandalize the party. Famosus libellus sine scriptis8 may be, 1. Picturis, as to paint the party in any shameful and ignominious manner. 2. Signis, as to fix a Gallows, or other reproachful and ignominious signs at the parties door or elsewhere. That if anyone finds a Libel (and would keep himself out of danger), if it be composed against a private man, the finder either may burn it, or presently deliver it to a Magistrate: But if it concerns a Magistrate, or other public person, the finder of it ought presently to deliver it to a Magistrate, to the Intent that by examination and industry, the Author may be found out and punished. And libelling and calumniation is an offence against the Law of God. For Leviticus 17, Non facias calumniam proximo. Exod. 22 ver. 28, Principi populi tui non maledices. Ecclesiastes 10, In cogitatione |[126 a] tua ne detrahas Regi, nec in secreto cubiculi tui diviti maledices, quia volucres coeli portabunt vocem tuam, & qui habet pennas annuntiabit sententiam. Psal. 69. 13, Adversus me loquebantur qui sedebant in porta, & in me psallebant qui bibebant vinum. Job. 30. ver. 7. & 8, Filii stultorum & ignobilium, & in terra penitus non parentes, nunc in eorum canticum versus sum, & factus sum eis in proverbium.9 And it was observed, that Job, who was the Mirrour of patience, as appeareth by his words, became quodammodo impatient when Libels were made of him; And therefore it appeareth of what force they are to provoke impatience and contention. And there are certain marks by which a Libeller may be known: Quia tria sequuntur defamatorem famosum:11 1. Pravitatis incrementum, increase of lewdness: 2. Bursae decrementum, decrease of money, and beggary: 3. Conscientiae detrimentum, shipwreck of conscience.

Selected Writings of Sir Edward Coke, vol. I

54. The assassination of character of the brave mining men who mined these mountains after serving as soldiers of the United States, and the dishonor of patent title granted from the President lies as a stigmatic and defamatory injury upon the petitioners and their heirs and assigns forever.

SALUS POPULI; QUIS SEPARABIT?

55. "since Gold and Silver. …has its value only from the consent of Men, whereof Labor yet makes, great part, the measure, it is plain, that Men have agreed to disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the over plus, Gold and Silver, which may be hoarded up without injury to any one, the metals not spoiling or decaying in the hands of the possessor."

56. In the Two Treatise, Locke defines a servant as "Free-man" who:

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

57. Another crucial element of the thesis is the relationship that Locke posits between property and consent. For Tully, the self-propriety that allegedly results from Locke's broad conception of property forms the basis of a radical democratic form of sovereignty. As such, "the natural right or property of exercising one's consent over any things which are one's own will necessarily be the one common element in all civil rights." Property, in the form of lives, liberties and estates, therefore refers to the civil rights of individuals, thereby granting them a "natural right to exercise sovereignty over what is legally one's own," including their person. As a result of this, Tully argues that Locke "places the right to resist illegal acts of the Crown in the hands of each citizen."

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

58. The people of the State of California, represented in Senate and Assembly, do enact as follows: The Common Law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State.

59. Admission to the Union

Sec 3. And be it further enacted, hat the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and

do no act whereby the title of the United States to , and right to dispose of , the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States…

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

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

BREVE SOKE: JURISDICTON OF IRON MOUNTAIN MINES, INC.

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

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

63. That your Commission then is very Large, Ample, and Absolute, containing in it self a powerful Authority, may by your selves be judged. And to the end, that Justice may by you receive the more full sound and perfect Execution, Your Commission, when it hath largely described unto you what you may do herein, it then most sweetly doth Appoint, Limit, and Command. What manner of doing you must use in those things appointed to be done, so that it does not only give unto you authority, what to execute, but does also lay down unto you the manner how your Authority must be executed, and to the understanding there of, my next word Quomodo does direct itself.

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

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

: And that the wisdom of a state, in the framing of a Statute Law, could not be deluded by a vain and shallow brained idleness of their ridiculous Foolery. Let them be therefore punished whose misdemeanor in this case offended. The better to prevent the Riotous expense of unthrifty idleness,

you shall do well to have a special care unto the Statutes, by the neglect whereof too much abuse is nourished. Motion for adjudication of vindictive actions

66. In this, as in all the rest of the abuses specified, use your best endeavors for the furtherance of a settled Reformation, according to the Laws established: For you must know, that Vita &, vigor Juris, in execucione consistit, The life and strength of the Laws, consists in the execution of them: For in vain are just laws Enacted, if not justly executed. And now my loving Country men, because I would that all which I have spoken, may receive a profitable remembrance. I will thus conclude, Similes and Comparisons doe best confirm our understanding: and do fastest cleave unto the memory; my conclusion therefore, shall consist upon this one Similitude.

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

68. Breve Capitalis Justiciarius noster and ad placita coram nobis tenenda

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

PETITION FOR WRIT OF EJECTMENT!

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

"One co-tenant may recover the whole estate in ejectment against strangers"

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

Aug 3, 2009 Signature:_____

s/ John F. Hutchens

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: Aug. 3, 2009

Signature:_____

s/ John F. Hutchens

TRESPASS DECLARATION FOR INJUNCTIVE & MANDAMUS RELIEF

69. Western miners' codes

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

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

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

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

73. A lode claim, known in California as a quartz claim, is a claim over a hardrock deposit.

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

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

76. Mineral lands Reserved. Sec. 2318

77. Mineral lands Open to Purchase by Citizens. Sec. 2319

78. Length of Mining Claims Upon Veins or Lodes. Sec. 2320

79. Proof of Citizenship. Sec. 2321

80. Locators' Rights of Possession and Enjoyment. Sec. 2322

81. Owners of Tunnels, Rights of. Sec. 2323

82. Regulations Made by Miners. Sec. 2324

83. Patents for Mineral lands, how obtained. Sec. 2325

84. Adverse Claim, Proceedings on. Sec. 2326

85. Description of Mining Vein or Lode Claims-Monuments. Sec. 2327

86. Pending Applications; Existing Rights. Sec. 2328

87. Conformity of Placer Claims to Surveys, Limit of. Sec. 2329

88. Subdivisions of Ten-Acre Tracts; Maximum of Placer Locations. Sec. 2330

89. Conformity of Placer Claims to Surveys, Limitation of Claims. Sec. 2331

90. What Evidence of Possession, &c. to Establish a Right to a Patent. Sec. 2332

91. Proceedings for Patent for Placer Claim, &c.Sec. 2333

92. Surveyor General to Appoint Surveyors of Mining Claims, &c.Sec. 2334

93. Verification of Affidavits, &c. Sec. 2335

94. All Affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office….

95. Where Veins Intersect, &c. Sec. 2336

96. Patents for non-mineral Lands, &c. Sec. 2337

97. What Conditions of Sale May Be Made by Local Legislature. Sec. 2338

98. Vested Rights to Use of Water for Mining, &c.; Right of way for Canals. Sec. 2339

99. Patents, Preemptions and Homesteads Subject to Vested and Accrued Water Rights. Sec. 2340

100. Non-mineral lands open to Homesteads. Sec. 2341

101. Mineral Lands, How Set Apart as Agricultural Lands. Sec. 2342

102. Additional Land Districts and Officers, Power of the President to Provide. Sec. 2343

103. Provisions of This Chapter Not to Affect Certain Rights, Sec. 2344

104. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of drainage and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

105. Mineral Lands in Certain States Excepted. Sec. 2345

106. Grant of Lands to States or Corporations Not to Include Mineral Lands. Sec. 2346

107. "An act to promote the development of the mining resources of the United States," 1872 Revised Statutes "relating to the development of the mining resources of the United States. 1875.

108. Sec. 2324. "where a person or company has or may run a tunnel for the purpose of developing a lode of lodes, owned by said person or company, the money so expended in said

tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. Approved Feb. 11

109. Sec. 2324 and 2325.

"Provided, That where the claimant for a patent is not a resident of within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: And Provided, That the period within which the work required to be done annually on all unpatented mineral. Sec. 2 Unpatented Claims, 1880

110. Sec. 2326 Perfected Title. 1881

111. Sec. 2326 "verified by the oath of any duly authorized agent or attorney in fact. Cognizant of the facts stated; oath of adverse claim before the clerk of any court of record of the United States or the State or Territory". Or before notary public.

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

112. Repeal of Timber Culture Sec. 16, Sec. 17, 1891

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

113. Notice of good faith intent to hold and work said claim. 1893

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

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

116. Ninth. Affidavits of annual work done on mining claims; Provided, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States: and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the Court from electing their own mining recorder…Provided further, All records heretofore …

117. Tenth. Notices of mining location and declaratory statements;

118. Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, labors, and others: Provided. Notices. Provided, Miners in any organized mining district may make rules and regulations governing the recording of notices…water rights, and affidavits at labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining to act as such until a recorder therefore is appointed by the court: Provided further, All records heretofore regularly made by the United States commissioner…are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district with six months…

119. Sec. 26. Alaska

120. 51 Mining Law.

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

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

122. Recorded by the Mountain Copper Co. and Iron Mountain Investments. Ltd. through 1967

123. Recorded by Stauffer Chemical Co. 1967-1976

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

125. *TRESPASS QUARE CLAUSUM FREGIT; DETINUE SUR BAILMENT; CORAM NOBIS.*

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

127. VOID AS UNCONSTITUTIONAL AN UNNECESSARY AND IMPROPER LAW

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

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

July 12, 2009 Signature:

s/ John F. Hutchens,

Original Absolute Appointment, Special Deputy Warden of the Forests and Stannaries on behalf of Iron Mountain Mines, Inc. and T.W. Arman.

DECLARATION BY VERIFIED AFFIDAVIT; PRIOR RIGHTS; PATENT TITLE.

PROOF OF CITIZENSHIP, CHIEF OF BUILDING STONE.

RIGHT OF WAY AND OTHER PRIVILEGES;

RULES AND REGULATIONS GOVERNING THE RECORDING OF NOTICES;

NOTICE OF GOOD FAITH INTENT TO HOLD AND WORK SAID CLAIM;

LOCATORS RIGHTS OF POSSESSION AND ENJOYMENT;

FLAT CREEK ORGANIZED MINING DISTRICT WARDEN, COMMISSIONER;

AGENCY & FACTOR; AUTHORIZED REPRESENTATIVE: ATTORNEY IN-FACT;

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

CERTIFICATE

In The United States Court of Appeals for the Ninth Circuit.

quo Warranto Incidental & Peremptory Mandamus filed under the Great Seal of the United States.

July 12th , 2009 Signature:_____

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

July 12th , 2009 Signature:_____

/s/ T.W. Arman, *pro se; sui juris;* sole stockholder of Iron Mountain Mines, Inc. President, CEO.

Petition and motion for *absolute order;* writs of error *coram nobis*; *fieri facias, mutatis mutandis*

This last act is the signature of the commission.

July12th , 2009 Signature:_____

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

July 12th, 2009 Signature:_____

s/ John F. Hutchens, Agent; Chief of Building Stone; *Authorized Representative*

Verification affidavit:

I 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.

July 12th, 2009 Signature:_____

s/ John F. Hutchens

SPECIAL DEPUTY GOVERNMENT PRIVATE ATTORNEY GENERAL § 1988

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

8. John F. Hutchens, P.O. Box 182, Canyon Ca. 94516 ph. 925-878-9167,

Writs of: QUO AVARRANTO; QUO WARRANTO with INCIDENTAL MANDAMUS

In The United States Court of Appeals for the Ninth Circuit

To all whom these presents shall come, Greetings.

By THESE WRITS AFFIRM The Warrants of Letters Patents that were thereby decreed In the Name of the President of the United States, as have heretofore been assigned as located, these Lands Returned and Restored. NOW KNOW YE, it is granted by the UNITED STATES, TO HAVE AND TO HOLD, the said tracts of land and the appurtenances thereof, as assigns as afore-said and to their heirs and to their heirs and assigns forever.

The Petitions for the appointment of the private Warden of the Forest, Project Manager and trustee, and special deputy United States Marshall in accordance with § 6979b.

The Court hereby Grants Equal Protection to the Warden.of the Forest of a private Attorney Gen-eral, DETINUE SUR BAILMENT IS GRANTED

Fees and costs are granted in the amount of Five Hundred Thousand dollars per year.

REVERSION; REMISSION; DETINUE SUR BAILMENT; PEREMPTORY MANDAMUS.

Date:_____ signature:_____

WARDEN OF THE FOREST AND STANNARIES

MORE DEFINITE STATEMENT FOR INJUNCTIVE & MANDAMUS RELIEF

129. "We are not able to concur in that interpretation of the power conferred… They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the cir-cumstances of each case, but a naked and arbitrary power to give or withhold consent not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent… to the prosecution of his business, apply for redress by the judicial process of mandamus to require… to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to

withhold their assent without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." Yick Wo

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

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

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

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

130. "Bills of attainder, ex-post facto laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation.... [T]he sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed parts of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measure, inspire a general prudence and industry, and give a regular course to the business of society." James Madison, Federalist No. 44.

131. "The establishment of the writ of habeas corpus, the prohibition of ex-post-facto laws, and of titles of nobility, to which we have no corresponding provision in our [State] Constitution, are perhaps greater security to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or ... the subjecting of men to punishment for things which, when they

were done, were breaches of no law ... have been, in all ages, the favorite and most formidable instruments of tyranny." James Madison, Federalist No. 84.

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

133. It might be thought that criminal laws can be distinguished from civil laws because violations of criminal laws, unlike civil laws, can be punished with physical incarceration. This reasoning fails, however, because incarceration as punishment for violation of civil law was prevalent in colonial times when the Constitution was drafted. For example, there were debtor prisons that required incarceration for nonpayment of debt. In fact, the existence of debtor prisons at the time of the Constitution shows that there was no hard and fast distinction between civil and criminal laws and is one more argument for applying the prohibition against ex post facto laws to civil laws. Justice Sandra Day O'Connor identified the unfairness of retroactive legislation (General Motors: 320):

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

135. Unfortunately, the due process standard of "a legitimate legislative purpose furthered by rational means" is so easily satisfied that it renders any due process constraints against retroactive laws of very dubious use. Virtually any law passed by a majority can be said to satisfy a legitimate legislative purpose. Similarly, a test for "rational means" is vague. An activist court can second-guess the legislature and make the rational means standard difficult to satisfy, while a court of judicial restraint can decide that any piece of legislation satisfies the rational means standard.

136. The whole purpose behind the prohibition on ex post facto laws, as the Federalist Papers note, is to give a regular course to the business of society and banish speculations on public measures. Allowing interest groups to lobby a legislature to pass ex post facto laws, and abiding by the results

so long as they pass the basically standard-less criteria of "a legitimate legislative purpose furthered by rational means," does not provide the regular course to business that the Founders intended when they included the constitutional prohibition on ex post facto laws.

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

138. It should be clear that neither of these considerations supports the application of retroactive laws to economic legislation. First, business will not be able to consult relevant legislation in advance since the legislation is retroactive. Second, business will not be able to clarify the meaning of the regulation by resorting to administrative processes, because the retroactive legislation does not even exist at the time.

139. The contrast between what due process requires of retroactive and prospective legislation is stark. Due process requires that retrospective legislation meet the vague criteria of a "legitimate legislative purpose furthered by rational means." With respect to prospective legislation, on the other hand, due process requires that an ordinary citizen be able to know what is proscribed by a law. Barring clairvoyant abilities, the ordinary citizen will not know what behavior, including economic behavior, is proscribed by retroactive legislation. That is, retroactive legislation will certainly not be able to satisfy the due process standard required for prospective legislation. This seems an altogether unsatisfactory state of affairs. It makes no sense for due process to require that legislation be sufficiently clear so that an ordinary person must know what is proscribed in ad-

vance, and yet for due process to allow that same individual to become befuddled by retroactive laws that were impossible to know at the time of his or her actions.

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

141. T.W. Arman purchased Iron Mountain Mines in December, 1976.

142. Congress amended the Clean Water Act to regulate Copper, Cadmium, and Zinc in Dec. 1977.

143. CERCLA was passed by Congress in 1980, and amended and reauthorized by SARA in 1986.

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

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

VOID AS UNCONSTITUTIONAL AN UNNECESSARY AND IMPROPER LAW

Reversion to Iron Mountain Mines, Inc. Provide just compensation for unfair retroactivity. Strike the liens. Commute Iron Mountain Mines Remediation Trusts I and II to IMMI.

July 12, 2009 **Signature:**_____

s/ **John F. Hutchens,**

Original Absolute Appointment, Special Deputy Warden of the Forests and Stannaries on behalf of Iron Mountain Mines, Inc. and T.W. Arman.

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

146. Properly understood, the question is whether the plaintiffs' and the wholly owned [California] corporation have a judicially cognizable interest in the affected property sufficient to enable them to sue for an unconstitutional deprivation of the use and enjoyment of that private property. Because the plaintiffs have a protected property interest for the purposes of the claims asserted here they have standing to sue

147. The court must concede on standing that the plaintiffs as individuals "have a cognizable property interest in the land, which interest, since they are American citizens, is protected by the Constitution." (Ramirez, Dissenting Opinion of Scailia, J., at 1556).

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

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

150. Furthermore, Plaintiff Hutchens has subscribed to the oath required by the Court, and successfully passed the test for use of the Electronic Case Filing System (ECF).

CERCLA Sec. 9659. CITIZEN SUITS

151. any person may commence a civil action on his own behalf--

against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

NOTICE OF ENDANGERMENT!

152. Iron Mountain Mines, Inc. Brick Flat pit mine. (Mountain Copper, Richmond, Hornet,, etc.) is collapsing under the EPA Superfund 500,000 ton sludge disposal cell. 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.

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

dial investigation/ feasibility requirements of the NCP 300.430 concerning considerations of alternatives:

INTERVENTION BY RIGHT

153. 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.

154. 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.)

155. The Office of Warden of the Forest Prosecutes Trespassers at Iron Mountain Mines, Inc. Petitioner is the Warden of the Forest for Iron Mountain Mines, Inc.

156. 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, reclamation and restoration, agency and factor.

157. The Office of the Warden of the Forest for Iron Mountain Mines, Inc. Charges the U.S Environmental Protection Agency with Trespass.

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

ADDITIONAL GROUNDS FOR INTERVENTION, CERCLA 113

159. 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 disposi-

tion 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, RCRA7002(a)(1)(A)(B),(a)(2)7003(a)

160. (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 contributed 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

161.Although no notice is required for imminent and substantial endangerment, the President and respondents 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.

162. 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."

163. 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:

164. ..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 demonstrate: (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.

165. 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) lacks a sufficient interest to oppose such declaratory judgment. Accordingly, Petitioner interest in the subject matter of this litigation is a "significantly protectable interest."

166. 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 hold that a presumption of adequate representation arises in some cases, Petitioner has presented 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

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

…while it may be preferred that the people act through their legislative representatives, they have the power to determine as conditions demand, what services and functions the public welfare requires. So it is provided by 811, 1085, and 1160 Code of Civil Procedure, with verification by affidavit, § 3729. False claims:

Preemptory Mandamus;

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

169. You are further commanded by 1094.5 of the Code of Civil Procedure to inquire of the procedure with a finding of an abuse of discretion in this matter, and where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible.

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

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

172. … "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.

173. 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 partnership, 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

174. 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 perfection and preservation and complete development of Iron Mountain Mines, Inc. properties includes all vested and accrued rights to water and every other entitlement, rights, privileges,

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

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

CITIZEN SUITS

§ 3729. False claims

175. Petitioner allege that the respondents assertion that EPA actions constitute a "remedial action" are entirely false, and further allege that such assertions were perpetrated to defraud the petitioners and property owner and to facilitate a fraud upon the court to conceal the fact that the EPA actions are entirely in the nature of a "removal action".

176. In support of these allegations petitioners submit that there are no aspects of these EPA "remedial actions" consistent with a "permanent" solution, that no recycling or resource recovery has or is taking place, and that no consideration was given to such known and viable permanent solutions and recycling and recovery.

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

177. 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.

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

178. (d) Intervention

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

179. The administrator is a party in this matter.

(f) Other rights preserved

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

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

§ 6979b. Law enforcement authority

182. With respect to violations of the criminal provisions of this chapter, and on the basis of a showing of need, the Attorney General of the United States shall deputize qualified employees of the Office of the *Warden of the Forest* for the equal protection of the petitioner and these defendants and properties, and to serve as special deputy United States marshals in criminal investigations with respect to violations of the criminal provisions of this chapter.

(a) **Authority of Administrator**

183. Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (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 such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractural [1] arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

(b) **Violations**

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

(c) **Immediate notice**

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

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

(d) **Public participation in settlements**

186. Whenever the United States or the Administrator proposes to covenant not to sue or to forbear from suit or to settle any claim arising under this section, notice, and opportunity for a public meeting in the affected area, and a reasonable opportunity to comment on the proposed settlement prior to its final entry shall be afforded to the public. The decision of the United States or the Administrator to enter into or not to enter into such Consent Decree, covenant or agreement shall not constitute a final agency action subject to judicial review under this chapter or chapter 7 of title 5.

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

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

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

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

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

James Madison, the Federalist

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

191. Due respect for the reach of congressional power within the federal system mandates that you do so now.

NOTICE OF IMMINENT HAZARD AND SUBSTANTIAL ENDANGERMENT

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

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

193. The metals in the sludge were always known by the EPA to be recyclable at a profit, and the EPA chose to defy the protests of the property owner and the responsible parties (the previous owners), as well as interested citizens and public servants who's input was ignored by the EPA. The sludge disposal is also in violation of California health, safety, environmental, recycling, and disposal laws. The State of California has permitted these violations in deference to the EPA's "interim authority" (3000 years?), while continuously recommending that the EPA implement resource recovery technologies.

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

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

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

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

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

197. It begins with a background of the Byproduct Recovery Proposals which had been considered up to that time, the first acknowledging that about a dozen different alternatives had been considered since the early 80's.

198. It is clear from this draft memorandum and from all other memorandum concerning resource recovery approaches that the only aspect given any significant consideration is the cost basis of the treatment. No mention is ever made of possible benefits such as recovery of strategic metals, balance of trade issues, any of the principles provided by Congress in RCRA, or concern for issues such as the EPA "derived from" rule, the recurrence of acid mine drainage (AMD) in the sludge, how much sludge would ultimately be produced and where it would be disposed, or even a comprehensive evaluation of the elements present and the possible value of the recovery of substantially all of the elements present in the AMD.

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

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

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

product recovery might investigate in lieu of more expensive alternatives that are currently being discussed"

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

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

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

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

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

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

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

207. In every other document pertaining to the EPA evaluation of treatment alternatives, no mention has been found of iron oxides recovery.

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

209. The first item of interest in this document is a reference to SMC's proposal from December. In that proposal SMC indicated some excitement over technologies they were developing that utilized cadmium and purported to have a cadmium value of $25,000 to 50,000 / ton. CH2MHill considered this value extreme, although not material to the cost evaluation.

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

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

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

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

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

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

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

BACKGROUND

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

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

215. This matter is also before the court for arbitrary and capricious interpretations of environmental laws and for intentionally negligent disregard for state and federal solid waste laws and mining laws contrary to the legislations purpose and intent; for actions contrary to established jurisprudence; for fraud upon the Court; for abuse of discretion by the District Court in failing to protect the defendants civil rights including equal protection and due process under the law, the failure to settle all liability for the pollution and the failure to provide for natural resource damages consistent with the National Contingency Plan; for plaintiff's misapplication and false and malicious prosecution of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), 42 U.S.C. §§ 9601-9675; for the governments deprivation of constitutionally protected rights and civil liberties; and for the Presidents failure in the protection of defendant's constitutional rights, with questions of material facts and constitutional law.

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

217.Motion to certify this action or by severance to establish an action as a citizens suit for violations of State and Federal Environmental laws by the government agency.

218. This matter is also before the Court to establish a reasonable basis to believe that a constitutional takings claim exists and the defendants petition to adjudicate Just Compensation in the present case and on behalf of a class.

219. Motion to certify for review of the constitutional questions of law.

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

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

See Willowbrook v. Olech

See Pennsylvania Coal Company v. Mahon

See BASSETT , NEW MEXICO LLC, v. UNITED STATES

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

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

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

223. Without the benefit of a definitive committee report or other deliberate congressional documents describing the genesis of the final bill, we are hesitant to rely on legislative history for guidance, especially in regard to the nuanced inquiry as to which side an action falls on the removal/remedial line. See United States v. Adams, 343 F.3d 1024, 1032 n. 8 (9th Cir.2003) (warning that subsequent legislative history is a "hazardous basis for inferring the intent of an earlier Congress") (quoting United States v. McCoy, 323 F.3d 1114, 1121 (9th Cir.2003)).

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

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

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

prohibition:

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

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

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

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

229. You should consider that AIG, through its wholly owned subsidiaries AISLIC and AIG Consultants, Inc., indemnified Stauffer Chemical Co. et al for these environmental liabilities, and is trustee, fiduciary, and operator. Now the United States owns a majority in AIG.

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

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

230. You should strike and release the liens.

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

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

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

234. "A valid and subsisting location of mineral lands, made and kept in accordance with the provisions of the statutes of the United States , has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."

U.S. Supreme Court, 1884

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

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

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

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

237. "Title by patent from the United States to a tract of ground, theretofore public, prima facie carries ownership of all beneath the surface, and possession under such patent of the surface is presumptively possession of all beneath the surface.

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

CONSTITUTIONALITY

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

FREEHOLD

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

insitu remediation summary & history of copper cementation and bioleaching

240. Cementation of copper began with the discovery of copper and the beginning of copper mining at Iron Mountain around 1896. By 1908 the State Geologist reported that the operation was so extensive that a building was being constructed over and around it.

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

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

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

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

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

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

240. One of the earliest records in the west of the practice of leaching is from the island of Cyprus. Galen, a naturalist and physician reported in AD 166 the operation of in situ leaching of copper. Surface water was allowed to percolate through the permeable rock, and was collected in amphorae. In the process of percolation through the rock, copper minerals dissolved so that the concentration of copper sulphate in solution was high. The solution was allowed to evaporate until copper sulphate crystallized. Pliny (23-79 AD) reported that a similar practice for the extraction of copper in the form of copper sulphate was widely practiced in Spain.

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

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

241. Iron Mountain was originally purchased by preemption with $100 agricultural college scrip warrant of Colonel William Magee in 1871.

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

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

244. A. DECISION TO CONDUCT A REMOVAL ACTION at Iron Mountain Mines, Inc.

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

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

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

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

247. The sheer magnitude of the EPA impact dictates the need for an expedient and thorough review… CERCLA was designed and enacted to prevent illness and death resulting from exposure to hazardous substances, not cause its occurrence or be a threat.

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

B. CHARACTERIZATION OF THE EPA'S RESPONSE ACTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. STATUTORY INTERPRETATION: REMOVAL AND REMEDIAL ACTIONS

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

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

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

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

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

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

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

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

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

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

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

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

270. No! You must safeguard the safety and general welfare of the citizens and the nation.

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

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

2. DEFERENCE TO THE EPA'S CHARACTERIZATION

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

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

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

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

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

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

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

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

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

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

280. Authority in Superfund Response Actions (Feb. 14, 2000), available at http://www.epa.gov/superfund/resources/ remedy/pdf/memofeb 2000-s.pdf (last visited July 26, 2005) (hereinafter "Removal Memo"). Amplifying the National Contingency Plan's focus on the immediacy of the threat, the Removal Memo emphasizes "time sensitivity," i.e., "the need to take relatively prompt action," as a key characteristic of removal actions: "[E]ven expensive and complex response actions may be removal action candidates if they are relatively time-sensitive." Removal Memo, supra, at 3-4 ("For example, dredging large quantities of contaminated sediment could be conducted using removal authority where such action was the appropriate course for abating or controlling a time-sensitive threat.").23 An EPA report published in 2000 describing the removal program reiterates that "[t]he critical element in all cases is time — prompt action is crucial." Office of Emergency and Remedial Response, EPA, EPA 540-K-00-002, The Emergency Response and Removal Program 3 (2000), available at http://www.epa.gov/superfund/resources/emer_res.htm (last visited July 26, 2005) (hereinafter "Removal Program Report").

281. Courts have also stressed the immediacy of a threat in deciding whether a cleanup is a removal action. See, e.g., City of Wichita v. Trs. of APCO Oil Corp. Liquidating Trust, 306 F.Supp.2d 1040, 1077-78 (D.Kan.2003) (city's cleanup was "remedial in nature" under CERCLA where "[t]he court has heard no evidence that the contamination at the Site posed a threat to human health or the environment which required an immediate response"); Carson Harbor Vill., Ltd. v. Unocal Corp., 287 F.Supp.2d 1118, 1157 (C.D.Cal.2003) (finding action was remedial where "[t]here is no evidence in the record that the materials posed the type of threat to human health and welfare that required immediate action"); Hatco Corp. v. W.R. Grace & Co.-Conn., 849 F.Supp.

931, 963 (D.N.J.1994) (in finding response was a removal, placing "significant weight upon the fact that the release of [the hazardous substance] was not only imminent, but actually occurring"). **282.** While stressing time sensitivity some courts have placed on duration, i.e., "how long the response action will take to build or implement," because "removal actions are most often of short duration, but they certainly can be long-running responses, too, thereby undercutting the probative value of duration . . . in deciding whether an action is removal rather than remedial in nature." Removal Memo, supra, at 3 n. 2. But see Sherwin-Williams Co. v. City of Hamtramck, 840 F.Supp. 470, 475-76 (E.D.Mich.1993) ("[T]he extended and protracted nature of the cleanup indicate that the City has engaged in a remedial action."). Accordingly, the action in Libby is not disqualified from being a removal action just because it took several years. Cf. Vill. of Milford v. K-H Holding Corp., 390 F.3d 926, 934 (6th Cir.2004) (explaining that the court has "never held" that the short-term nature of an action is required for finding costs recoverable as removal costs). **282.** The length of the cleanup in Libby is especially understandable given that harsh winters truncated the construction season and that the sheer magnitude of the initial cleanup far exceeded the normal situation faced by the EPA. Cf. Sunoco, 337 F.3d at 1244 (concluding that action was a removal in part because it was finished in about 14 months, "a relatively short time frame in the context of a clean-up lasting more than a decade in a harsh environment" (internal quotation marks omitted)). Instead of adopting a known and viable remedial action plan that would be completed in less than fifty years, the EPA implemented a removal action that will last 3000 years, cost 100 times as much, leave at least 50 million tons of acutely toxic hazardous waste sludge with no disposal site or financial assurances.

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

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

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

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

285. 'This is the most dangerous and unconscionable aspect of our inquiry into the state of environmental laws, here the courts must be the most astute, critical, scientific, and not deferential.

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

important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise") (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. 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 that the EPA's conclusions are arbitrary and capricious. See Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 858 n. 36 (9th Cir.2003) (an agency decision is arbitrary and capricious if there is no rational connection between the decision and the facts in the record).

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

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

288. The EPA's scientific basis for finding an immediate threat to the environment is thoroughly unfounded over thousands of pages. In addition to no detailed evaluation of the threat, the administrative record includes, for example, conflicting reports.

289. Beyond the findings that prompted the EPA to undertake the removal action, the administrative record also disguises the conflicting steps taken, the exaggerated threat, the minimization of disposal issues, the reliance on insurance, and the transfer of blame to an innocent landowner, with libel and slander, and with malice, fraud, oppression and deceit, despotism and tyranny.

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

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

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

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

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

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

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

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

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

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

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

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

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

III. INDIRECT COSTS CALCULATION

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

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

CONCLUSION

299. You should REVERSE the district court's order granting the EPA a recovery of response costs and judgment on the liability issue. You should also reverse the district court's order awarding the EPA costs and a declaratory judgment on the liability of Iron Mountain Mines for future costs. You should vacate the consent decree with a stay and order the EPA to enter into good faith negotiations for a memorandum of understanding concerning a joint hazardous waste repository on private property.

300. You should declare CERCLA void for vagueness and therefore unconstitutional.

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

(3) Limitations on Response.--The President shall not provide for a removal or remedial action under this section in response to a release or threat of release-- (A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found; (4) Exception to Limitations.--Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner. Petitioner submits and the Administrative Record shows that previous co-defendants were willing and had the authority and capability to respond to the emergency in a timely manner, that said co-defendants did so respond to the emergency, that these remaining defendants did submit plans for the remedy that was supported by those co-defendants, but were prevented from exercising this duty and implementing the remedy by the EPA. Petitioner submits that nowhere in this section is the agency afforded discretion based upon a determination of the adequacy of financial assurances as grounds for interfering with the owners right to implement a remedy or relief from the obligation imposed by 9604 (3)(A) and (4) and other provisions of CERCLA, CWA, CAA, NCP, EPCRA, and State Laws. The grantees allege that the governments violated grantees' civil rights in failing to perform in accordance with 9604 (3)(A) and (4).

302. You should determine that the United States is liable under §1346, false claims with vindictive actions, illegitimate animus and despotism and tyranny, negligently arbitrary and capricious.

§ 6973. Imminent hazard

(a) Authority of Administrator

303. Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (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 such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractual [1] arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

(b) Violations

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

(c) Immediate notice

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

(d) Public participation in settlements

306. Whenever the United States or the Administrator proposes to covenant not to sue or to forbear from suit or to settle any claim arising under this section, notice, and opportunity for a public meeting in the affected area, and a reasonable opportunity to comment on the proposed settlement prior to its final entry shall be afforded to the public. The decision of the United States or the Administrator to enter into or not to enter into such Consent Decree, covenant or agreement shall not constitute a final agency action subject to judicial review under this chapter or chapter 7 of title 5.

EPA GUIDANCE ON THE USE OF SECTION 7003 OF RCRA

I. INTRODUCTION

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

307. § 6973, provides the U.S. Environmental Protection Agency (EPA) with broad and effective enforcement tools that can be used to abate conditions that may present an imminent and substantial endangerment to health or the environment. Section 7003 allows EPA to address situations where the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present such an endangerment. In these situations, EPA can initiate judicial action or issue an administrative order to any person who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal to require the person to refrain from those activities or to take any necessary action.

308. Among its many benefits, Section 7003 provides EPA with a strong and effective means of furthering risk-based enforcement and implementing its strategy for addressing the worst RCRA sites first, a strategy which EPA developed in response to its 1990 RCRA Implementation Study. 1Under this strategy, EPA is addressing the universe of waste management facilities on the basis of environmental priorities. Furthermore, at any given site, EPA is attempting to use whatever legal

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

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

.2 This document supersedes (1) the "Final Revised Guidance Memorandum on the Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act (RCRA)" which was issued on September 26, 1984 ("1984 Guidance"), and (2) the fact sheet entitled "The Imminent and Substantial Endangerment Provision of Section 7003," which was issued by the Office of Site Remediation Enforcement in May 1996.

EPA references RCRA § 7003 in various policy and guidance documents. In light of the issuance of this guidance, the Region should consult with headquarters regarding the applicability of any of those documents to particular actions described in this guidance. Before taking any particular action, the Region should examine Attachment 1 regarding delegations, consultations, and concurrence.

Section 7003 when there is an ongoing criminal investigation or prosecution against the same person concerning the same or a related matter, the Regions should consult the June 22, 1994 memorandum from Steven A. Herman entitled "Parallel Proceedings Policy" and the applicable DOJ parallel proceedings policy.

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

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

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

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

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

a. Advantages of RCRA § 7003

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

C Address potential endangerments caused by materials that meet RCRA's statutory definition of "solid waste" but are not "hazardous substances" under CERCLA – The definition of "hazardous substance" in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), does not include all materials that qualify as "solid waste" under RCRA § 1004(27), 42 U.S.C. § 6903(27). Note, however, that the CERCLA definition of "hazardous substances" does encompass some materials, such as radionuclides, which are not "solid waste" under RCRA.

C Address potential endangerments caused by "hazardous waste" that meets the broad definition of that term under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), but which is not a CERCLA "hazardous substance" because it fails to meet the more narrow definitions of "hazardous waste" promulgated in 40 C.F.R. Part 261 pursuant to RCRA § 3001 -- CERCLA's definition of "hazardous substance" includes "hazardous waste" having characteristics identified under or listed pursuant to Section 3001 of RCRA, 42 U.S.C. §6921. It does not include all materials that qualify as "hazardous waste" as defined in RCRA § 1004(5).

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

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

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

311. 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."

INTERVENTION

312. 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.

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.

313. 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.

314. 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.

315. Petitioner and property owners command the Court to issue an injunction to protect the petitioner, the property owners, and the Public Health and the Environment from these wastes and other improper actions by the EPA and other government agencies, including provisions for implementing the proper recycling and reuse of these wastes in accordance with the law, particularly the Resource Conservation and Recovery Act, (RCRA) and California recycling laws.

316. Petitioner and Grantees plan includes clean up of the 2 billion lbs. of acutely toxic hazardous waste sludge negligently disposed upon Grantees property, and command the court to deliver in constructive trust the "billion dollar settlement".

317. The failure of the EPA to facilitate this remedy is a violation of environmental laws and a violation of the EPA legislative mandate, and a violation of Petitioners and Grantees constitutionally protected Rights to Due Process, Equal Protection, and other rights retained by the people.

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

319. The EPA has levied a lien in the amount of $51 million against the Grantees properties to recover "unrecovered past response costs" that Grantees have shown were entirely unnecessary, costs that were incurred by fraudulent misrepresentations of the cause of the pollution, and costs that continue only because of the unlawful interference by the EPA with the rights of the Grantees as mine owner to proceed with the proper care and maintenance of the mine properties. The EPA is only able to perpetuate this fraud because of the judicial swaddling and judicial deference that precludes any accountability by the EPA for its actions.

320. Grantees have further shown that the “unrecovered past response costs” as well as any “recovered past response costs” were not only entirely unnecessary but contrary to the public interest, and that interpretations of law that facilitate or reinforce such actions are a violation of established U.S. Supreme Court case law, of Petitioner and Grantees civil rights, and in violation of the Constitutions of the United States and of California.

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

False Claims of Imminent and Substantial Endangerment.

False Claims of Remedial Action

False Claims to obtain a DETERMINATION OF PROBABLE CAUSE

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

False Claims under CERCLA Due Process Requirements.

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

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

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

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

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

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

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

CONCLUSION

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

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

EQUAL PROTECTION OF THE WARDEN OF THE FOREST

323. 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).

324. 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.

325. 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:

326. 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.

327. 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

328. 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 329. 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).

330. 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).

331. 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 li-

cense 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.

332. 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).

333. 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.

334. 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:

335. 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.

336. 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.

337. 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.

338. 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.

339. 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 attorney'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.

340. 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)

341. 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.

342. 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)).

343. 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).

344. 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)

345. 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).

346. 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).

347. 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).

348. 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).

349. 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

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

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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) (not-

ing "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

351. … "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 partnership, 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**

352. 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.**

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

354. 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

355. The real parties in interest, T.W. Arman and John F. Hutchens, Grantees 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 GRANTEES 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

356. 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.

WARNING! IMMINENT HAZARD AND SUBSTANTIAL ENDANGERMENT!

UNSPEAKABLE ERRORS! TORT CLAIMS!

357. It is not material whether the Libel be true, or whether the party against whom the Libel is made, be of good or ill fame; for in a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of Law, and not by any means to revenge himself, either by the odious course of libeling, or otherwise: He who kills a man with his sword in fight is a great offender, but he is a greater offender who poisons another, for in the one case he who is the party assaulted may defend himself, and knows his adversary, and may endeavour to prevent it: But poisoning may be done so secret that none can defend himself against it; for which cause the offence is the more grievous, because the offender cannot easily be known; And of such nature is libeling, it is secret, and robs a man of his good name, which ought to be more precious to him than his life, & difficillimum est invenire authorem infamatoriae scripturae; because that when the offender is known, he ought to be severely punished. Every infamous libel, aut est in scriptis, aut sine scriptis; a scandalous libel, in scriptis; when an epigram, rhyme, or other writing is composed or published to the scandal or contumely of another, by which his fame and dignity may be prejudiced. And such libel may be published, 1. Verbis aut cantilenis: As where it is maliciously repeated or sung in the presence of others. 2. Traditione,7 when the libel or copy of it is delivered over to scandalize the party. Famosus libellus sine scriptis8 may be, 1. Picturis, as to paint the party

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

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

STATEMENT OF INTERVENTIONS

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

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

PETITIONER’S LEGAL INTERESTS

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

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

33. Therefore, Petitioner’ interest is substantially more than a mere “interest in property”, and the Petitioner’s interest relates explicitly to the “subject of the action”.

363. Grantees have delegated to Petitioner a fiduciary responsibility, and with these rights is conveyed the responsibility for achieving a fair and just conclusion to any remaining issues of environmental liability with the United States of America and the State of California.

STANDING FOR CLASS ACTIONS

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

ARBITRARY AND CAPRICIOUS - Absence of a rational connection between the facts found and the choice made. Natural Resources. v. U.S., 966 F.2d 1292, 97, (9th Cir.'92). A clear error of judgment; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. 5 USC. 706(2)(A) (1988).

Irrational; capricious.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

365. The Court reviewed the case of Thaddeus and Grace Olech, who sought to connect their property to the municipal water supply in Willowbrook, Illinois. Previously, the Olechs had successfully sued the village over another matter. When Willowbrook delayed processing their water-supply application and imposed unusually burdensome conditions, the Olechs were convinced that this was in retaliation for their earlier lawsuit.

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

365. The Olechs sued Willowbrook, alleging that its request for a 33-foot easement was discriminatory and violated the Equal Protection Clause. They alleged that Willowbrook's action was "irrational and wholly arbitrary"(2) and motivated by ill will resulting from their prior lawsuit.

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

lief can be granted under Federal Rule of Civil Procedure 12(b)(6). The Seventh Circuit reversed.(3)

365. Then, in a single cryptic paragraph, the Court said that the Olechs stated a cause of action under the Equal Protection Clause because they claimed to be the victims of arbitrary government action. The Court said that it was affirming based on this claim and was not considering whether the Olechs' allegation of retaliation also stated a claim under the clause. The Court declared that their complaint can fairly be construed as alleging that the village intentionally demanded a 33-foot easement as a condition of connecting [their] property to the municipal water supply where the village required only a 15-foot easement from other similarly situated property owners. The complaint also alleged that the village's demand was "irrational and wholly arbitrary" and that the village ultimately connected [their] property after receiving a clearly adequate 15-foot easement. These allegations, quite apart from the village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the court of appeals but do not reach the alternative theory of "subjective ill will" relied on by that court.

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

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

Breyer said it was because of the allegations of improper motivations that he concurred in the opinion. He said, "In my view, the presence of that added factor in this case is sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."(11)

However, it should be noted that the allegation of improper motivation, which was crucial for

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

368. The Court's ruling, that equal protection claims can be brought by a class of one, is not surprising. The Court long has said, especially in recent affirmative action cases, that equal protection safeguards individuals, not groups.

368. Besides, if the Court had ruled otherwise, it would have created an impossible line-drawing problem: How large must a class be to state a claim under equal protection? Was discrimination against one couple enough? Was the fact that the complaint alleged discrimination against three other homeowners sufficient to create a large enough class?(12) The Supreme Court understandably did not want to make those kinds of distinctions the focus of equal protection analysis. However, the Court's decision should be considered by every plaintiff challenging arbitrary government action. Anyone claiming to have been treated in an unfair and discriminatory manner now can present a claim under equal protection.

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

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

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

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

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

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

368. It means that any person claiming to be a victim of arbitrary government action has a claim under the Equal Protection Clause, no matter how many or how few others suffer the injury.

Marbury shows that there is an important class of cases in which the legislature and the executive must depend on the judiciary for the efficacy of their judgments. In these cases, it is judicial refusals to act that pose a danger "to the political rights of the Constitution."

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

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

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

For the most part, the Court has left the political branches' power to regulate relatively unconstrained. That is, the Court assumes that Congress and the Executive can prohibit various forms of

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

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

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

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

373. "Unlike most private tort litigants," the civil rights plaintiff "seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms . . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits."

374. Thus, when "his day in court is denied him," the congressional policy which a civil rights plaintiff "seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers."

375. When Judge Jerome Frank originally coined the phrase "private attorney general," he was thinking about litigation by private plaintiffs "to prevent [a government] official from acting in violation of his statutory powers." There is thus something deeply ironic about the fact that the Supreme Court has most sharply limited the use of private attorneys general in precisely those cases which involve claims of unlawful state action.

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

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

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

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

380. That is, can Congress abrogate a state's Eleventh Amendment immunity Protection Clause regardless of the volume of constitutional violations?

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

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

But the Court sees this latter class of lawsuits as different in an important respect:

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the [Constitutional] Convention, the States have consented to suits of the first kind but not of the second.

383. The key assumption underlying the Court's position seems to be the equation of importance with centralized enforcement. Only the federal government's willingness to use its own resources and send its own lawyer to prosecute a case truly shows that "the federal interest in compensating [citizens] . . . for alleged past violations of federal law is [actually] compelling . . . ." Otherwise, Congress is engaged in cheap talk—a sort of unfunded mandate.

384. That defies the central idea behind the private attorney general—that Congress might decide that decentralized enforcement better vindicates civil rights policies "that Congress considered of the highest priority."

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

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

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

387. "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

388. Attorney's fees are the fuel that drives the private attorney general engine. Every significant contemporary civil rights statute contains some provision for attorney's fees, and in 1976, Congress passed a comprehensive attorney's fee statute that provides for fees under the most important Reconstruction Era civil rights statutes as well. The rationale for fee awards rests on several interlocking considerations. First, most civil rights plaintiffs are unable to afford counsel and without a fees statute, the available counsel would be limited to attorneys willing to represent them pro bono. Second, the absence of statutory fees might skew attorneys' selection of cases: they might concentrate on cases involving the possibility of large damages awards and the attendant contingent fee, and forego cases which involve only equitable relief or where the right, while important, is not easily translated into a large damages award for the named plaintiffs. But this latter group of cases—especially those involving structural injunctive relief—often do the most to vindicate important societal interests. They are the ones where plaintiffs function most clearly as private attorneys general.

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

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

390. That threat "only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." Of course, as the Chief Justice himself acknowledged in a footnote, there is a broad class of claims for which damages are not even theoretically available: those to which the Eleventh Amendment applies. Moreover, to the extent that suits seeking only equitable relief lie at the core of the vision of the private attorney general as champion of the public interest, the Court's theory countenances cutting off the cases that particularly motivated Congress to provide attorney's fees. More systematically, the Court's decision reintroduces the skewing effect on case selection: civil rights attorneys who want to safeguard the possibility of recovering fees will choose lawsuits in which damages are available over lawsuits that involve only injunctive relief, even if the latter lawsuits are more socially valuable. Second, the Chief Justice suggested that the catalyst theory might actually have perverse consequences for plaintiffs. In a no-catalyst theory

world where fees can be avoided by unilateral abandonment, a defendant whose conduct is detrimental to the plaintiff but not actually illegal might change course, thereby giving a plaintiff more relief than he could win through full-scale adjudication.

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

392. [I]t seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the extraordinary boon of attorney's fees to some plaintiffs who are no less "deserving" of them than others who receive them,
and a rule that causes the law to be the very instrument of wrong— exacting the payment of attorney's fees to the extortionist.

393. Justice Scalia's choice of words is deeply revealing. For him, attorney's fees are an extraordinary boon, and not the centerpiece of an enforcement regime that sees the private attorney general as an essential tool. And civil rights plaintiffs are potential extortionists, rather than potential victims of conduct that the Constitution or Congress has proscribed.

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

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

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

396.

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

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

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

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

§ 2674. Liability of United States

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

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

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

§ 1346. United States as defendant

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

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

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)

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

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

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

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

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

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

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

§ 2680. Exceptions

398. (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

***audita querela:* JUDICIAL REVIEW**

399.: 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*.

400. 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

401.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.

402. 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.

403. 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.

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

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

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

407. That, whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the then next session of congress.

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

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

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

§ 287. False, fictitious or fraudulent claims

409. Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

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

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

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

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

414. This matter is also before the Court to rectify the abusive application by the EPA of the environmental statues and the formulation of policies contrary to the effective removal and remediation

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

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

416. Motion for Summary Judgment on the pleadings and the Court and Administrative Records to find for grantees’ the protections of the “innocent landowner defense” of CERCLA, RCRA and CWA.

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

417. Grantees allege that a conflict of interest exists between AIG Consultants, its parent corporation, and the federal government as majority stockholder and oversight agency.

418. Grantees further allege that improprieties and misconduct are implicit in the transactions resulting in the first site operator’s failure (IT corp.) and the takeover by AIG Consultants, and now the bailout of AIG, and the privatization of trust funds under CERCLA and Superfund.

419. Grantees allege that while the Court allowed an exception to the usual prohibition against trustees doing business with themselves as fiduciaries when it approved the consent decree and the subsequent substitution of site operator, under the present circumstances it can no longer be allowable for the trustee to be the fiduciary to be the site operator to be the oversight agency.

420. Grantees invoke the *intra vires* authorities of the "Too Big to Fail" doctrine of the Federal Government to sever the company known as AIG Consultants from AIG, Inc. and the Federal Government, and to convey to grantees the positions of Project Manager of the Iron Mountain Mine Superfund Site, and the Project Management responsibility and authority of AIG Consultants pursuant to the terms of the Statement of Work to the grantees, because under the implicit authority and responsibility of the National Contingency Plan, the Iron Mountain Mine Superfund site is "too big to fail".

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

422. Grantees demand payment of rents and wages and other compensation under the equal protection clause and pursuant to the terms of the Iron Mountain Mine Statement of Work for failure to pay reasonable rent for the facilities commandeered for the public benefit, for failure to pay the owner for services rendered, and for the manifest injustice and constitutional violations resulting from the EPA's and the site operators actions.

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

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

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

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

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

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

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

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

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

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

432. Grantees claim a right to equal protection to and from each and every party to this matter, and submit themselves to the Courts just and equitable determinations in the resolution of these proceedings.

433. Grantees Claim an undivided interest in the Iron Mountain Mine trust I, and any insurance instruments thereto, including 100 % of the $100 million unforeseen costs coverage and 100% of the $35 million litigation indemnification for the oversight agencies and funds remaining in the notational account for operations and maintenance through the year 2030.

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

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

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

federal government to the mines as referred to herein, which are known collectively as Iron Mountain Mines.

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

Grantees submit that such conduct is not conducive to the cooperative approach to resource conservation and recovery as expressed by Executive Order. Grantees further submit that these proposals truly are "too big to fail", and grantees implore the Court to provide all such remedies as the Court may find Just and Proper.

A HARD BARGAIN WITH FRAUD, ACCIDENT, TRUST & HARDSHIP

438. The miners and mine owners demand the courts intervene to stop this abuse.

439. The real parties in interest, T.W. Arman and John F. Hutchens, Grantees in a joint venture to re-mine mining wastes at Iron Mountain Mines, Inc., 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 AND OTHER MINE WASTES, 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, FALSE CLAIMS,

KNOWINGLY RECKLESS DISREGARD OF THE TRUTH, DELIBERATE IGNORANCE OF ACTUAL INFORMATION, 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, AND CONSTRUCTIVE TRUST, ALL TO THE DAMAGE OF THE PETITIONER, THE OWNERS, THE PUBLIC WELFARE, THE PUBLIC BENEFIT, AND THE ENVIRONMENT REQUIRING JUDICIAL REVIEW.

440. THE OWNER'S 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.

THE EPA HAS CHANGED THE LOCKS ON THE GATES AND RESISTS THE RIGHT OF ENTRY AGAINST THE OWNERS AND MINERS, WHO CONTINUE TO DEMAND THAT THE EPA DELIVER THESE PREMISES TO THE TRUE AND RIGHTFUL OWNER, WITH IMMEDIATE PRODUCTION OF KEYS AND CODES TO THE GATES, UNRESTRICTED ACCESS TO THE PREMISES; 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.

441. WITH DECLARATIONS OF REMISSION AND REVERSION AND DETINUE SUR BAILMENT, AND SURRENDER OF ALL SITE OPERATIONS TO THE OWNERS DESIGNATED CONTRACTORS.

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

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

443. 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.

444. 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.

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

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

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

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

There is sufficient "logical relationship" between the claim and the counterclaim to classify the latter as "compulsory" and hence ancillary jurisdiction extended to additional necessary parties, regardless of a lack of other jurisdictional grounds. United Artists Corp v. Masterpiece productions Inc. 221 F.2d 213 (2d Cir. 1955)

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

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

ARBITRARY AND CAPRICIOUS

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

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

Irrational; capricious.

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

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

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

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

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, recognized that " stigmatic injuries" may satisfy the " injury in fact" component of standing, and that upon doing so, they also automatically satisfy the other standing requirements of causation and redressability.

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

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

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

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

451. Arbitrary and Capricious as grounds for Judgment on the Merits

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

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

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

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

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

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

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

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

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

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

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

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

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

Constitutional Review

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

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

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

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

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

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

The Supreme Court has said "whether the complaint alleges a class of one or of five is of no consequence because we conclude that the number of individuals in a class is immaterial for equal protection analysis.".

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

Statutory and Regulatory Interpretations

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

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

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

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

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

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

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

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

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

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

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

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

6901 of the Solid Waste Act.

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

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

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

Substantial Evidence

18. 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).

19. 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).

20. 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).

21. 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).

22. 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).

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

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

Environmental Protection Agency Review

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

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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."

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

cure on ones own property and in ones own person, that such deprivations were the result a violation of due process and equal protection and other constitutionally protected civil rights, by improper and unlawful actions by the EPA and the DOJ motivated by malice, fraud, oppression, and deceit, and with other ulterior government motives, resulting in manifest errors of impunity and miscarriage of justice, in contravention and breach of Letters Patents from the President of the United States including Freeholds for the service of soldiers to the Nation, and in breach and abrogation of the General Mining Laws and the California Codes.

BACKGROUND

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

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

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

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

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

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

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

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

461. Cementation of copper began with the discovery of copper and the beginning of copper mining at Iron Mountain around 1896. By 1908 the State Geologist reported that the operation was so extensive that a building was being constructed over and around it.

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

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

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

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

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

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

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

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

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

461. Prior to the invention of electrolysis, the only practical method for the recovery of copper from copper sulphate was by cementation, a process that derives its name from the Spanish word cementacion, meaning precipitation. The cementation of copper was known in Pliny's time, but no written record of its commercial application seems to have survived. The cementation of copper was known to the Chinese, as documented by the Chinese king Lui-An (177-122 BC), and the Chinese implemented the commercial production of copper from copper sulphate using a cementation process in the tenth century. The Chiangshan cementation plant started operation in 1096 with an annual production of 190 tonnes per year of copper. In the Middle Ages, the alchemist Paracelsus (AD 1493-1541) described the cementation of copper as an example of the transmutation of Mars (iron) into Venus (copper).

QUESTIONS OF LAW AND MATERIAL FACTS AT ISSUE

Claim 1

462. Violations of RCRA, CERCLA, EPCRA, NCP, CWA, California Toxic Pits Act

Violations of the California Health and Safety Code, the California Public Resource Code, the California Water Code, and the California Toxic Pits Recovery Act, the Resource Conservation and Recovery Act, and the National Environmental Policy Act.

463. Since 1992 the DTSC and the RWQCB have been "encouraging" the "further development and consideration of an alternative that could reduce or eliminate the need for treatment at the site, including capping, plugging, and resource recovery approaches".

464. The High Density Sludge produced by the EPA treatment plant is a class A mining waste under California Law. The EPA continues to claim that the sludge is a class B mining waste. Either way the waste is not being disposed of in accordance with the law.

22470 . SWRCB - Applicability. (C15: Section 570)

(a) General — This article applies to all discharges of mining wastes. No SWRCB-promulgated parts of this subdivision except those in this article, Article 1 of Chapter 1 (i.e., section 20080 et seq.), and such provisions of the other articles of this subdivision as specifically are referenced in this article shall apply to discharges of "mining wastes" as that term is defined in section 22480. Mining Units (including surface impoundments, waste piles, and tailings ponds) which receive WDRs after November 27, 1984, shall comply with the siting and construction standards in this article. Existing active and inactive Mining Units shall comply with the siting and construction requirements of this article as required by the RWQCB. Dischargers shall submit a report of waste discharge in compliance with Article 4, Subchapter 3, Chapter 4 of this subdivision (section 21710 et seq.), and shall have WDRs which implement the appropriate provisions of this article unless requirements are waived by the RWQCB. Requirements for new and existing Mining Units are summarized on table 1.1 of this article. The RWQCB can impose more stringent requirements to accommodate regional and site specific conditions.

Table 1.1

Siting (1) Not on Holocene faults;

(2) Outsite of areas of rapid geologic change;

From 54187 of the Administrative Record; Geologic Reconnaissance and Fracture Analysis, Iron Mountain Area…"Faults, joints, and other Fractures are a pervasive feature of the bedrock and associated ore bodies." "they cut across the Brickyard ore body exposed in the open pit."

From 54224 of the Administrative Record; Geology of the Massive Sulfide Deposits at Iron Mountain ….. "The Brick Flat ore body is explored only by rather widely spaced drill holes. It is apparently bounded on the north and south edges by the two strands of the Camden fault, but different widths of ore in drill holes adjacent to each other suggest that other faults are probably present."

465. From 54423 of the Administrative Record; "In Brick Flat, two major fault zones are present:" "The mountain is falling in on itself," said John Spitzley, a civil engineer with the CH2M Hill engineering firm who oversaw much of the remediation work. "Some 30 to 40 acres at the top of the mountain is moving." http://www.savethewildup.org/alerts/?id=438

"Imagine yourself in downtown San Francisco , and you've got 20 office buildings between 10 and 20 stories high. That's what they've carved out underground. After mining, they allowed the rocks to fall in. So you have a rubblized zone in the mountain that's 70 stories high and covers the footprint of the office buildings. The water filters through this broken up pyrite deposit, just like a big Mr. Coffee, and forms a highly concentrated mine drainage," says Ray Sugarek, project manager for the clean-up effort at the mine. http://www.1849.org/ggg/acid.html

The EPA superfund water treatment plant for acid mine drainage at Iron Mountain Mines removes cadmium, a EPCRA 313 regulated chemical. The treatment plant processes about 3,600 lbs. of cadmium per year. The facility employs more than 10 full time employees. The EPA toxic pit sludge disposal facility upon the Brick Flat mine at Iron Mountain leaches at a ph of 2 and contains levels of cadmium in excess of 110 ppb, in violation 40 CFR Parts 148, 261, 266, 268, and 271, Land Disposal Restrictions Phase IV: Final Rule Promulgating Treatment Standards for Metal Wastes and Mineral Processing Wastes; Mineral Processing Secondary Materials and Bevill Exclusion Issues, and TCLP, TTLC, STLC, CalWET, EPCRA, CWA, CERCLA, NCP, RCRA, the California Health and Safety Code, the California Water Code, the California Public Resources Code, and the California Toxic Pits Recovery Act.

466. The EPA Superfund Iron Mountain Mine water treatment plant produces sludge in violation EPCRA 313 and has since the day the rule came into effect; May 26, 1998. The sludge is an “acutely hazardous waste” because it is derived from the similarly classified AMD of Iron Mountain Mines. The penalty for failing to report a EPCRA 313 violation is up to $27,500 per day that the violation has continued.

467. Pursuant to the provisions of the California Public Resources Code, Petitioner submits that the EPA reported in its record of decisions that the Brick Flat disposal cell would require an environmental impact statement consistent with the requirements of the National Environmental Policy Act (NEPA). The EPA stated that the BLM would perform this EIS. The EPA has stated that all California Environmental laws are Applicable, Relevant, and Appropriate Requirements (ARAR) all of which are potentially subject to waivers, except for the Toxic Pits Recovery Act.

Petitioner submits that amongst other reasons justifying review, that under the provisions of 21166 (c) of the code, "New information, which was not known and could not have been known at the time the environmental report was certified as complete, becomes available.

468. Petitioner submits that amongst other new information that would justify Review pursuant to 21167 (b)(c)(d) or (e) of the code, that the "Derived From" rules of RCRA hazardous waste inform us that the sludge produced and disposed by the EPA at Iron Mountain Mines, Inc. is by definition an Acutely Toxic Hazardous Waste.

469. Petitioner alleges that plaintiffs intentional and negligent violations of the siting provisions of the code were motivated by malice, fraud, oppression, and deceit, since no rational basis exists for locating the toxic sludge disposal cell at the top of the mountain where it would be in absolute violation of the siting provisions of RCRA and State environmental laws, a decision that was implemented at extraordinary additional expense, and for which the only plausible explanation for this decision is that the EPA intended to deprive the grantees and this petitioner of the opportunity to resume mining on the basis of interference with the EPA's actions.

470. Petitioner submits that due care was performed by Petitioner as joint venturer and miner by informed inquiry to Rick Sugarek , Project Manager for the EPA at the Iron Mountain Mines, Inc. Superfund Site, who stated that the Sludge produced and disposed at Iron Mountain Mines, Inc. Brick Flat Pit Disposal Cell upon the Brick Flat Pit Mine at Iron Mountain Mines, Inc. is not a hazardous waste, and who encouraged any solution to the sludge disposal problem.

Petitioner submits that due care was performed by Petitioner as joint venturer and miner by informed inquiry to Rudy Carver, Manager for AIG Consultants, Inc. Site Operator for the EPA at the Iron Mountain Mines, Inc. Superfund Site, who stated that the Sludge produced and disposed at Iron Mountain Mines, Inc. Brick Flat Pit Disposal Cell upon the Brick Flat Pit Mine at Iron Mountain Mines, Inc. is not hazardous waste, and who authorized sampling of the sludge.

Petitioner submits that due care was performed by Petitioner as joint venturer and miner by informed inquiry to Kathleen Salyer , Site Clean-up Branch Chief for the EPA Region IX, who has corresponded with Grantees and Petitioner to inform that the Sludge produced and disposed at Iron

Mountain Mines, Inc. Brick Flat Pit Disposal Cell upon the Brick Flat Pit Mine at Iron Mountain Mines, Inc. is not a hazardous waste, but a waste subject to the RCRA Beville Act exclusions.

471. Since the joint venture was entered into in January of 2008, the Petitioner has been locked out of Iron Mountain Mine Property, and required to obtain permission for entry from Rick Sugarek and the EPA, required to submit a Work Plan for any activities, forbidden to perform any further sampling, forbidden from entering the mine, required to obtain permission for entry from Rudy Carver and AIG Consultants, Inc., the Site Operator, and been required to maintain constant CB radio contact concerning petitioners whereabouts at all times on the property. The EPA and the Site Operator have made allegations of the Petitioners and Grantees interference with the operations of the facilities.

472. Petitioner demands that the EPA cease and desist in the violation of Petitioner's and Defendant's Civil Rights.

473. Petitioner demands that the EPA comply with the General Mining Law and Landowners property rights in recognition of the Title by Patent Deeds, provisions of the National Contingency Plan (NCP) the Clean Water Act (CWA), the Solid Waste Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or SUPERFUND), the Emergency Planning and Community Right to Know Act (EPCRA), the California Water Code, the California Health and Safety Code. and the California Toxic Pits Act, the same provisions as were required of Iron Mountain Mines and as were used to justify the invasion and occupation of Iron Mountain Mine by the EPA, used to justify the inverse condemnation of Iron Mountain Mines by the EPA, used to justify the Taking without Just Compensation of Iron Mountain Mines, Inc. property by the EPA, used to justify the stigmatic injury and desecration of Iron Mountain Mines by the EPA, used to justify the negligently arbitrary and capricious conduct of the Iron Mountain Mines Superfund site by the EPA, used to justify the deprivations of the rights to Due Process and Equal Protection of T.W. Arman and Iron Mountain Mines, Inc. by the EPA, and used to justify the Personal Injury and Property Damage of T.W. Arman and Iron Mountain Mines, Inc. by the abuse of discretion of the Court as it was manipulated by the EPA.

T.W. Arman and IMMI operated a copper recovery (cementation) plant to remove the copper from the AMD, (the primary metal found to be toxic to fish), until the EPA made that process impossible by bypassing the cementation plant when they installed the HDS lime treatment plant in 1996. This process had been practiced continuously since mining began at Iron Mountain Mines (then Mountain Copper Co.), and was so extensive that the facility had to have a building constructed around it in 1907. The EPA's "scientists" have conjectured that the biological activities of these archaea living in the rock were a result of mining.

474. Petitioner submits that the scientific evidence now available is that the biological activity of the organisms contributing to the Acid Mine Drainage, which is reported to be 7-8 orders of magnitude greater than the ordinary dissolution of metals in sulfate and water, was not a product of mining, but is a naturally occurring phenomena that was present in the ore before mining began, that the Acid Mine Drainage has been occurring for a period of geologic time prior to mining, that mining is the only means to control the cause of the pollution, and that this biological activity cannot be stopped, as the EPA has demonstrated by their utterly ineffectual remedial actions for the last 25 years, and so therefore the only remedy to the pollution is to resume and to finish the job of mining, and there are no other alternatives that are not arbitrary and capricious.

475. T.W. Arman and IMMI proposed insitu solution mining (bio-mining, or bio-leaching) in 1985, had secured the services of the Davy McKee Corp. (the biggest and most experienced solution mining engineering and construction firm in the U.S. at that time, now part of Aker Kvaener Corp.), and had financial commitments to fund the project, but the EPA refused to allow it supposedly based on a "Confidential Enforcement Analysis" prepared by a third party private company, (apparently operated by a single individual calling his company the "Colorado School of Mines Research Institute", no affiliation to the Colorado School of Mines, the preeminent Mine Engineering School in the United States), that still found the IMMI proposal viable, and could only object to the proposal based on a theory that it would be difficult to attract investment capital.) The EPA thereafter refused further consideration without Iron Mountain Mines, Inc. first providing $15 million in "financial assurances" to the EPA.

476. The Petitioner believes that the EPA was determined to prosecute the previous owner (a fortune 500 company) for abandoning Iron Mountain Mine in the deplorable condition that it had deteriorated to, and for which (after 9 years of litigation) they achieved a reported record $950 million settlement in the Dec. 2000 by Consent Decree from the Eastern District Court.

Having obtained the then record settlement from those settling defendants of an amount far in excess of the cost to remedy the problem, the EPA had to continue the negligent endangerment resulting from the AMD treatment to protect its franchise and its hegemony, swaddled in Judicial deference, in complete disregard for protection of human health and the environment, without regard to the general welfare, the General Mining Law, California Property Law, EPA guidance, Executive Orders, or the protections of the United States Constitution.

477. Now the EPA must be made to acknowledge that the methods proposed by AMD&CSI and IMMI are sound and viable, that this remedy should have been implemented and still must be implemented as the best available technology and in fact the only available remedy.

478. The EPA refusal to consider this proposal means that the EPA has its own ulterior motives and its own agenda for the property and for the $950 million in settlement funds, in violation of the General Mining Law, California Property Law, and in violation of the Constitution of the United States, and may thus be presumed to have perpetrated a blatant invasion and occupation of private property under false pretenses and with malice to defraud the property owner of inalienable rights, an abomination of property rights that is fundamentally unjust and contrary to the most cherished principles for the protection of private property rights by the government.

479. Since the EPA has failed to perform its proper function according to its purpose and legal mandate, Grantees and Petitioner have given notice to the DOJ and EPA of a citizen suit.

Petitioner requests emergency protection from the Court to compensate for the deprivations suffered and immediate compensation of just and equitable wages and rents to the grantees.

Claim 2

480. Fraud upon the Court, fraudulent denial of the “Innocent Landowner” defense

The plaintiffs falsely alleged and therefore the Court wrongly concluded that “The United States and California claim that “IMMI and Arman are PRP's because they are either owner[s] [or] operator[s] of a vessel or a facility.”

The actual language of the statute is:

“9607(a)(1) the owner and operator of a vessel or a facility,” It may be understood from judicial precedence that owner or operator typically refers to those PRP's who have already been found to be polluters. From the Memorandum of Points and Authorities in Support of The Joint Motion of the United States of America, the State of California, and Aventis Crop Sciences, USA Inc. for entry of consent decree: “The United States' amended complaint also names Arman and IMMI as owner and operator at the time of disposal”. Petitioner submits that the determination was made by the Court prior to the settlement that the “disposal” occurred prior to the purchase by Iron Mountain Mines, Inc. Petitioner refers to the appeal of Carson Harbor Village LTD for this Circuits determination of a CERCLA “disposal, and for clarification on a determination of the “innocent landowner” defenses. The following are relevant excerpts from the Opinion by Judge McKeown; Partial Concurrence and Partial Dissent by Judge B. Fletcher

The plain meaning of the terms used to define "disposal” compels the conclusion that there was no "disposal" during the Grantees' ownership, because the movement of the contamination, even if it occurred during their ownership, cannot be characterized as a "discharge, deposit, injection, dumping, spilling, leaking, or placing." 42 U.S.C. § 6903(3)

Parsing the meaning of the term "disposal" in § 9607(a)(2) lies at the heart of this question. We conclude that the migration of contaminants on the property does not fall within the statutory definition of "disposal." A defendant may assert a variety of defenses to liability. Most relevant here are the so-called "third party" and innocent landowner" defenses, by which a PRP may show that the release of hazardous substances was caused solely by "an act or omission of a third party," 42 U.S.C. § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before the PRP acquired the property. 42 U.S.C. § 9601(35)(A). In this way, the interpretation of "disposal" affects the application of these defenses. See infra section III.B.2.b.

Once liability is established, the defendant may avoid joint and several liability by establishing that it caused only a divisible portion of the harm--for example, it contributed only a specific part of the hazardous substances that spilled. Even if a defendant cannot do so, it may seek contribution from other PRPs under 42 U.S.C. § 9613(f)(1). See Pinal Creek Group, 118 F.3d at 1300 (noting that Congress's amendment of CERCLA to include § 9613(f)(1) "clarif[ies] and confirm[s]" that contribution is available to PRPs). "A PRP's contribution liability will correspond to that party's equitable share of the total liability and will not be joint and several. " Id. at 1301.

The contribution provision aims to avoid a variety of scenaios by which a comparatively innocent PRP might be on the hook for the entirety of a large cleanup bill. Although we have previously concluded that RCRA's defnition of "disposal" is "clear," 3550 Stevens Creek Assocs., 915 F.2d at 1362, whether the definition includes passive soil migration is an issue of first impression in this circuit.

[T]here is no genuine issue of triable fact as to whether the dismissed defendants spilled chemicals or otherwise contaminated the property; moreover, although hazardous chemicals may have gradually spread underground while the dismissed defendants controlled the property (passive migration), we conclude that prior owners are not liable under CERCLA for passive migration . .

We have not addressed whether "disposal" in§ 9607(a) includes the passive movement of contamination. We have held, however, that the movement of contamination that does result from human conduct is a "disposal." See Kaiser Aluminum & Chem. Corp., 976 F.2d at 1342 (holding that "disposal" under § 9607(a)(2) includes a party's movement and spreading of contaminated soil to uncontaminated portions of property and that "Congress did not limit [`disposal'] to the initial introduction of hazardous material onto property"). 4 In another context, we have held that "disposal" refers "only to an affirmative act of discarding a substance as waste, and not to the productive use of the substance." 3550 Stevens Creek

4 Similarly, under the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), the movement of soil in the context of an agricultural activity called "deep ripping" (i.e., deep plowing) can be a "discharge" of pollutants into wetlands. See Borden Ranch P'ship v. United States Army Corps of Eng'rs, No. 00-15700, _____ F.3d _____, 2001 WL 914217, at *3 (9th Cir. Aug. 15, 2001). Although we ac-

knowledge that the CWA is a different statutory scheme from CERCLA, it is noteworthy that, under both environmental statutes, there is no question that the movement of soil that results from affirmative conduct can subject responsible persons to liability.Assocs., 915 F.2d at 1362 (concluding that there was no "disposal" of asbestos in a building when it was installed for use as insulation and fire retardant).

We have also held that the definition of "disposal" is the same under§ 9607(a)(2) and § 9607(a)(3). See id. ("Because the[`disposal'] definition applicable to actions under § 107(a)(2) and (a)(3) is the same, and there is no meaningful difference for purposes of CERCLA between a party who sells or transports a product containing or composed of hazardous substances for a productive use, and a party who actually puts that product to its constructive use, we see no reason to adopt a different definition in this case.").

5 Although we would normally address the agency's interpretation of the statute, see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984), here there is no EPA determination as a point of reference or deference.

481. Therefore, whether by the interpretation expressed in the Opinion, or by the preponderance of the evidence, there was no “disposal” giving rise to CERCLA liability during the ownership of Iron Mountain Mines, Inc. It is interesting to speculate on what might have happened in this case if not for the settlement, as it seems clear from the Opinion that the liability of the previous owners in the light of Carson Harbor might be seriously cast into doubt. By a preponderance of the evidence, because it is shown that T.W. Arman did make enquiries about environmental issues which might be relevant to the purchase of Iron Mountain Mines, even though there was no law in effect at the time of purchase requiring him to do so, and because the seller concealed such environmental information, and because at the time of purchase the hazardous substances in question were not hazardous substances under the law, so no “knowledge” of these hazardous substances would even be possible, that the Grantees are entitled to a presumption of innocence in the innocent landowner defense. Furthermore, Grantees were third party purchasers of the property, the Court having found in rulings prior to the settlement that Mountain Copper Co. was the party responsible for the pollution, or the “disposal” of waste, having found that Stauffer Chemical Co., which purchased Mountain Cop-

per Co. and all of its assets including Iron Mountain Mines as well as major phosphorus deposits in Utah and Florida was the successor in interest to Mountain Copper. Having found that Grantees T.W. Arman and Iron Mountain Mines, Inc. had no contractual relationship with Mountain Copper Co., and that Stauffer Chemical Co. did no mining, therefore, Iron Mountain Mines, Inc. is entitled to the "Third Party" defense. (It is also interesting to note that AstraZeneca, (successor to the liabilities of Stauffer Chemical Co. through the derivative liability company Stauffer Management Co.) reported to its Stockholders in 2001 that the Iron Mountain Mines settlement with the EPA, (reported as the largest settlement ever with a single polluter at a single site, also reported as the "billion dollar" settlement), was on balance with the value of the other companies merged or divested such as ICI Americas, Aktemix 37, Rhone Polenc, etc. (all responsible parties) and the value of the phosphorus deposits measured against the cost of settlement and litigation was still a profitable transaction for Aventis Crop Sciences and AstraZeneca. No official disclosure of costs was made by the Responsible Party (Aventis Crop Sciences), though they did claim to have spent over $150 million on clean-up plus the $162 million paid to fund the insurance policies attached to the consent decree and statement of work. The successor in interest to Aventis Crop Sciences is Bayer Crop Sciences, they are indemnified by AstraZeneca against future losses or claims from Iron Mountain Mines. The great fortunes made from Mountain Copper Co. were parlayed into major institutional ownership positions of these multi-national conglomerates, estimates of the value of the ore extracted by Mountain Copper Co. exceed $3 billion in today's dollars.) The EPA thought that it was too risky to rely upon the permanent and unlimited liability and obligation of two of the worlds largest multi-national pharmaceutical conglomerates to pay for the remediation at Iron Mountain Mines, and settled instead for an Insurance policy with AIG Consultants through AISLIC, wholly owned subsidiaries of AIG, that will only pay for operations and maintenance for 20 more years.

482. From the joint statement: The Proposed Consent Decree secures the current remedial action over the long term through a structured settlement that combines performance of Site O&M for thirty years, strong financial guarantees, and a large balloon payment to the government in 2030. Under the settlement, the first thirty years of Site activities are to be performed by the site operator,

an affiliate of the IT Corporation ("IT"), which is a signatory to the Consent Decree. The site operator's work is funded through an agreement between IT and a AAA-rated insurer, American Specialty Lines Insurance Company ("AISLIC"), also a Consent Decree signatory, which is to receive a lump-sump payment of approximately $76.7 million for that purpose from Aventis after entry of the consent decree, AISLIC's payment for the work performed by IT is (page 11) provided for by an insurance document (the "Policy"), made an exhibit to the Consent Decree (Appendix J thereto).

483. Under the IT/AISLIC agreement, IT receives payment for work performed under the governing Statement of Work ("SOW") for the thirty-year performance period, together with an additional $100 million of coverage to cover certain unanticipated costs. The Policy also provides $35 million of liability insurance, which covers claims against IT (and related entities), EPA, DTSC, and the CVRWQCB. Site activities from the thirty-first year forward are to be funded through the Terminal Payment, a lump-sum payment from AISLIC to the government parties of approximately $514 million to be made in 2030. The Terminal Payment will be placed in a Superfund Special Account or equivalent. Aventis will pay approximately $62.5 million following entry of the Decree to fund the Terminal Payment.

484. Instead of reimbursing itself for its unnecessary costs, the EPA invested in an insurance policy and made itself the beneficiary of $514 million from the Trust II account in 2030. The EPA maintained its lien against theproperties owned by Iron Mountain Mines, Inc.for supposed recoupment of $51 million in unnecessary costs. Now the government owns AIG, how very convenient. T.W. Arman has owned Iron Mountain Mines, Inc. since 1976.

ULTERIOR GOVERNMENT MOTIVES

485. Petitioner submits that ulterior government motives are implicit in the actions and transactions involving the Iron Mountain Mine EPA Superfund site, that such actions are improper since there was no actual human health threat, and no potential endangerment to fish since there were not any fish living there anymore, the fish having vanished long ago by reason of habitat destruction including water diversions and dams by the United States government, farming and ranching, off road vehicle recreation, and local active and abandoned mining operations, etc.

486. The touchstone for determining the necessity of response costs is whether there is an actual threat to human health or the environment; that necessity is not obviated when a party also has an ulterior government motive for the cleanup.

487. Petitioner submits that it is the duty of the Court to proceed with Judicial Review because of the implication of ulterior government motives in a Fraud Upon the Court, Because the district court erred in failing to recognized the ulterior government motives for the removal action and because there are genuine issues of material fact regarding whether Iron Mountain Mines “share” of response costs were, in fact, "necessary," the Court cannot uphold even a partial summary judgment on this ground.

488. If the Court assumes that those costs were unnecessary by reason of the facts presented herein, or by a determination under judicial review, then no reimbursement for unrecovered past response costs is required and the $51 million lien has been unjustly levied.

489. The Court still must decide whether grantees T.W. Arman and Iron Mountain Mines, Inc.(the " Grantees") are PRPs; if not, the summary judgment was improper and must be reversed and remanded or dismissed.

490. Additional evidence that the selected remedy does not comply with EPA guidance.

EPA 530-R-94-031

NTIS PB94-200979

TECHNICAL RESOURCE DOCUMENT

EXTRACTION AND BENEFICIATION OF

ORES AND MINERALS

VOLUME 4

COPPER

August 1994

U.S. Environmental Protection Agency

Office of Solid Waste

Special Waste Branch

401 M Street, SW

Washington , DC 20460

In Situ Leaching

Another leaching method, involving the leaching of low-grade copper ore without its removal from the ground, is known as in situ leaching. In situ leaching generally refers to the leaching of either disturbed or undisturbed ore. In either case, in situ leaching allows only limited control of the solution compared to a lined heap leach type operation. There are 18 in situ copper operations in the United States that leach disturbed ore in existing underground mines. In situ leaching has certain advantages over conventional mining and milling, including lower capital investment, lower operating costs, and faster startup times. In situ leaching of undisturbed ores is best suited for mining relatively deep-lying oxidized copper deposits.

Insitu leaching of disturbed (rubblized) ore is used for extracting copper from any porous or permeable deposits. In situ leaching of undisturbed ore, where the rock has not been moved from its pre-mining position, involves very different mining technologies from deposits that have been fragmented by mining operations (such as backfilled stope, and previous block-caving mining operations) or hydrofacted areas (U.S. EPA 1989e; Biswas and Davenport 1976, Graybeal and Larson, 1989).

Figure 11-1. In Situ Leaching Operations

(Source: Biswas and Davenport 1976)

Mining Industry Profile: Copper

1-55

, extracts copper from subsurface ore deposits without excavation. Typically, the interstitial porosity and permeability of the rock are important factors in the circulation system. The solutions are injected in wells and recovered by a nearby pump/production-well system. In some cases (where the ore body's interstitial porosity is low), the ore may be prepared for leaching (i.e., broken up) by blasting or hydraulic fracturing.

The chemistry of in situ leaching is similar to that of heap and dump leaching operations. The ore is oxidized by lixiviant solutions such as mine water, sulfuric acids, or alkalines that are injected from

wells into an ore body to leach and remove the valuable minerals. Production wells capture and pump pregnant

The economics of current mining and recovery methods often prevent the mining of ore that either contains insufficient metal values or requires extensive site preparation or operating expense. For this reason, the in situ leach method is gaining favor as a means of recovering additional copper from old mine workings (i.e., block-caved areas and backfilled stopes) from which the primary sulfide deposit has been mined. These types of operations tend to leave behind considerable fractured, copper-bearing rock that is expensive to mine and recover by conventional means (U.S. EPA 1989e).

Most abandoned underground mining operations leave halos or zones of low-grade ore surrounding tunnels, stopes, rises, and pillars. The underground mine development (i.e., the shafts and drifts) required in such mines normally provides the basic circulation needed for a leaching operation. Usually, lixiviant solutions are introduced into the surrounding low-grade ore zones from above by injection through a series of drillholes. The main shaft is almost always used as a main drainage reservoir. Because drifts are designed to run upgrade, water or leach solutions flow naturally by gravity to the main shaft for recovery. Fluids flowing from the extraction drifts and haulage drifts are usually collected behind a dam placed across the main shaft and pumped to the surface. At block-caved operations, the caving method causes the area above the stope mine to be highly fractured and broken. This expands its volume, which increases the porosity of the low-grade ore. Thus, an ideal circulation system for stope leaching operations is created (U.S. EPA 1989e).

491. Additional evidence that the selected remedy does not comply with other agency guidance.

USER'S MANUAL FOR THE U.S. BUREAU OF MINES IN SITU

COPPER OXIDE MINING COST MODEL

By Joseph M. Pugliese, Mining Engineer

Orin M. Peterson, Mathematician.

Twin Cities Research Center ,

U.S. Bureau of Mines, Minneapolis , MN .

ABSTRACT

The U.S. Bureau of Mines has produced a generic in situ copper mine design manual, which contains a computerized cost model for in situ copper oxide mining. The model specifies (1) site-specific parameters, which must be quantified for mine design, (2) a method for minesite design based on those parameters, and (3) a procedure for assessing economic viability for the mine design. The menu-driven computer program performs calculations for developing commercial mine design specifications, as well as capital and operating costs. The default values are based on 1986 dollars, and indices for updating costs are included. The program also provides discounted-cash-flow rate of return (DCFROR) and allows for sensitivity analyses for an in situ mining operation at any specific undisturbed copper oxide deposit.

This report is to be used with the 1990 version of the computer program, which has been made user friendly. It describes the files, tutorial, input phase, help function, and monitor display of all calculated values and of the DCFROR table. The monitor-displayed discounted initial value of investment and annual operating costs are defined. The dual rate-of-return situation and sensitivity analyses are also briefly discussed. Information is provided on obtaining the computer program on diskette.

INTRODUCTION

The U.S. Bureau of Mines believes that the competitive position of the Nation's copper industry can be significantly improved with the application of in situ leach mining techniques. A long-term objective of the Bureau is to increase the probability of the domestic production of copper by the private sector, using in situ leach mining methods. As part of the effort to meet this objective, the Bureau is conducting research to provide the mining industry with the means to design the most economically successful in situ copper operation for any specific deposit.

In 1986, the Bureau initiated a research program emphasizing in situ mining of shallow to moderately deep (500 to 2,000 ft) copper oxide ores. At that time, the Bureau contracted with Science Applications International Corp. (SAIC), McLean , VA , to provide a generic in situ copper mine design manual for developing economically successful mining

operations in copper oxide deposits. ….

Evidence in Support of the Innocent Landowner Defense

492. It may be observed that only a very few cases that could address this issue had come to the court by the time of the passage of SARA in 1986, in which congress sought to clarify much of the more vague aspects of the legislation. It may also be seen from the administrative record that the events and circumstances relevant to this matter commenced prior to the amendments of SARA.

493. Nevertheless, despite numerous amendments to the statute in the intervening years since its adoption, congress has preserved the terms in their original form.

494. Petitioner submits and contend that it is exactly because of the potential for a case to arise such as the present case that the distinction was made, and that logically one may conclude that this distinction was provided to afford the opportunity for the courts to reach a just and equitable decision based on the facts of the case that would allow for a truly innocent landowner to avoid liability. Grantees further submit that it was Congress intent to provide clarity to this intention with the subsequent amendments and their clarifications of the innocent landowner defense, which is why the precise wording of the statute has remained intact.

495. Extensive consideration of the importance of the term "Operator" is given in such cases as U.S. v. Best Foods, (cited by plaintiffs in their pleadings for partial summary judgment);

"Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. See 42 U.S.C. § 9607 (a)(2). This is so regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice. If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability. See Riverside Market Dev. Corp. v. International Bldg. Prods., Inc. , 931 F.2d 327, 330 (CA5) ("CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act"), cert. denied, 502 U.S. 1004 (1991); United States v. Kayser-Roth Corp. , 910 F.2d 24, 26 (CA1 1990) ("a person who is an operator of a facility is not protected from liability by the legal

structure of ownership") ""‘ This much is easy to say; the difficulty comes in defining actions sufficient to constitute direct parental "operation." Here of course we may again rue the uselessness of CERCLA's definition of a facility's "operator" as "any person … operating" the facility, 42 U.S.C. § 9601 (20)(A)(ii), which leaves us to do the best we can to give the term its "ordinary or natural meaning." Bailey v. United States , 516 U.S. 137 , 145 (1995) (internal quotation marks omitted). In a mechanical sense, to "operate" ordinarily means "[t]o control the functioning of; run: operate a sewing machine ." American Heritage Dictionary 1268 (3d ed. 1992); see also Webster's New International Dictionary 1707 (2d ed. 1958) ("to work; as, to operate a machine"). And in the organizational sense more obviously intended by CERCLA, the word ordinarily means "[t]o conduct the affairs of; manage: operate a business ." American Heritage Dictionary, supra, at 1268; see also Webster's New International Dictionary, supra, at 1707 ("to manage"). So, under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

496. The strained wording of CERCLA is acknowledged with " Here of course we may again rue the uselessness of CERCLA's definition of a facility's "operator" as "any person … operating" the facility, 42 U.S.C. § 9601 (20)(A)(ii), which leaves us to do the best we can to give the term its "ordinary or natural meaning." Bailey v. United States , 516 U.S. 137 , 145 (1995) (internal quotation marks omitted)."

497. The significant clarification offered by Best Foods is that " an operator must manage, direct, or conduct operations specifically related to pollution".

Congress saw fit to remedy the inherent lack of clarification in CERCLA with the Superfund Amendment and Reauthorization Act (SARA) of 1986, wherein it created and elaborated on the "Innocent Landowner Defense".

Grantees refer to the 1 st ROD, (Record of Decision) of 10/03/1986, which states (page 4):

"OVERVIEW OF THE PROBLEM

MINERALIZED ZONES THAT HAVE EXTENSIVE UNDERGROUND WORKINGS FROM PAST MINING ACTIVITIES ARE THE PRIMARY SOURCE OF CONTAMINATION."

And a few pages later (page 7),

"THE IRON MOUNTAIN PROPERTY WAS PURCHASED FROM MOUNTAIN COPPER COMPANY BY STAUFFER CHEMICAL COMPANY IN 1967. THE PROPERTY WAS SUBSEQUENTLY SOLD TO IRON MOUNTAIN MINES, INC., IN 1976.

THERE HAS BEEN SOME CORE SAMPLING, BUT THERE IS NO EVIDENCE THAT MINING HAS OCCURRED UNDER THE CURRENT OWNERSHIP."

Grantees therefore submit that as Iron Mountain Mine is an "abandoned mine" according to the EPA, (since mining ceased in 1963), and since Iron Mountain Mine is zoned for mining, which is the only legitimate use for which a permit may be issued by the County, and that no mining permit was ever obtained by the grantees, and since the EPA acknowledged in ROD 1 that "mining activities are the primary source of contamination", and that "there is no evidence that mining has occurred under the current ownership".

It is therefore apparent that for the purposes of CERCLA and this litigation in a determination of liability that the grantees are not the "operators" as they did not " manage, direct, or conduct operations specifically related to pollution."

Claim 3

498. The Government falsely alleged and therefore the Court wrongly concluded that "as a "current owner" of the facility in question, it is not necessary to establish IMMI's liability as an "operator" of the same facility."

499. Petitioner submits that it is this very question which is the most central issue in this matter. Petitioner reiterate that it is apparent that for the purposes of CERCLA liability that the grantees are not the "operators" as they did not "manage, direct, or conduct operations specifically related to pollution."

Claim 4

500.The EPA falsely alleged and therefore the Court wrongly concluded that "to establish liability for CERCLA clean-up costs, a plaintiff must show that the defendant is a potentially responsible party ("PRP")."

501. Petitioner submits that this statement is an example of an unconstitutional interpretation of CERCLA and that it is contrary to the language of the statutes, the intent of the Congress, and the interpretations and precedents of the Courts, as such a showing would only establish "potential" liability, it does not establish liability.

Claim 5

502. The government falsely alleged and therefore the Court wrongly concluded that "Arman is an operator under CERCLA because he is someone who currently "manage[s], directs[s], or conduct[s]…operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." The very decision the government cite as the definitive ruling relevant to this case, (U.S. v. Best Foods, see claim 2) elaborates in great detail on the important distinctions and clarifications that must be taken into account in such a determination, specifically that "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

503. Petitioner submits that the Courts have conclusively determined the parameters for pollution resulting from "leakage" or "disposal", and that neither event has ever occurred under the ownership by Iron Mountain Mines, Inc..

504. Petitioner submits that when no "leakage" or "disposal" is taking place, there are then no decisions to be made about compliance with relevant environmental regulations.

Claim 6

505. The government falsely alleged and therefore the Court wrongly concluded that "Because IMMI purchased the property with knowledge of – indeed, at least in part, because of – the presence of hazardous materials, the innocent landowner defense is not available to IMMI.

Petitioner submits that the "hazardous substances" referred to by government are copper, cadmium, and zinc. Grantees further submit that at the time of purchase of the property, October 21st,

1976, (coincidentally the very day of the enactment of the Resource Conservation and Recovery Act, also known as "RCRA" and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 et seq.), copper, cadmium, and zinc were not "listed" as "hazardous substances" for the purposes of the Clean Water Act (CWA) and its regulation of storm water runoff, such provisions having occurred during deliberations of the transportation subcommittee of Congress the following July, and were not enacted by amendment to the legislation until the following December.

506. Grantees agree that the purchase of the property was because of the presence of the valuable minerals on the property, (since it is after all a mine), particularly the metals copper and zinc, and further submit that they were explicitly so informed by the sellers, (though they were not informed of the potential environmental risks and liabilities and the prospect of pending legislation that the sellers presumably knew about), and were not deterred but rather encouraged into purchasing the property because of the information regarding the presence of these valuable minerals, however, it was not possible for the grantees to have "purchased the property with knowledge of or because of the presence of hazardous materials" if they were not hazardous materials at the time of purchase.

507.Grantees further submit that they "did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release is disposed of on, in, or at the facility." (9601 (35) (A) (i), as no "disposal" was known or disclosed.

508. Grantees further submit that the Courts records show that T.W. Arman made enquiries about the environmental conditions at Iron Mountain Mine prior to purchase, because the responsible officer of Stauffer Chemical found it necessary to correspond with his subordinate regarding disclosure of information concerning the mines to T.W. Arman, and specifically informed them to withhold information about any environmental problems.

509. Petitioner submits that by a preponderance of the evidence therefore, that T.W. Arman did use "due care" regarding hazardous substances at the time of purchase.

510. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the "innocent landowner defense".

Claim 7

511. The government falsely alleged and therefore the Court wrongly concluded that "IMMI has not established the necessary elements of the defense."

512. Petitioner submits that by a preponderance of the evidence they are not "a person otherwise liable", in accordance with claims 1 thru 6.

513. Petitioner submits that, for the sake of argument, (even though they are not otherwise liable):

514.AMD should be recognized as an "Act of God" because it is a "natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight."

515. AMD should be recognized as an "Act of God" because the presence of any "hazardous substance" that is of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found must necessarily be acknowledged as an "Act of God" for such an expression to have any meaning.

516. AMD should be recognized as an "Act of God" because no person is responsible for it having been "deposited, stored, disposed of, or placed".

517. Third party defense: No contractual relationship ever existed between grantees and Mountain Copper Co. (the responsible party for the "disposal" according to government.)

518. Petitioner submits that they (a) [he] exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) [he] took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs.

519. Petitioner submits that therefore, (even though they are not otherwise liable for the costs of the clean-up), the Grantees would still be entitled to a defense to liability pursuant to some combination or all of the defenses enumerated in 9607 (b) (1) and/or (3).

520. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the "innocent landowner defense" the "Third Party defense" and the "Act of GOD defense".

Claim 8

521. The government falsely alleged and therefore the Court wrongly concluded that "It may be doubted whether or not the third party defense is available to landowners who do not qualify for the innocent landowner defense."

522. Petitioner submits that in as much as this defense should not be an issue in this case in accordance with claims 1 thru 7, that nevertheless the absurdity of government conjecture may be plainly understood by inverting the statement: "It may be doubted whether or not a third party defense would be necessary for a landowner who does qualify for the innocent landowner defense." See appeal of Carson Harbor Village, Ltd. V. Unocal Corp.

523. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the "Act of GOD defense" the "innocent landowner defense" and the "Third Party defense".

Claim 9

524. The government falsely alleged and therefore the Court wrongly concluded that "the innocent landowner defense is not available to Arman because he is not the "owner" of the facility in need of clean-up."

525. Petitioner submits that by any and every measure it is commonly understood that the corporate ownership of Iron Mountain Mine is only a formality, that there are no employees, no commerce or revenue to the corporation, even T.W. Arman is unemployed, and the EPA project manager of the Superfund site has recently been publicly quoted when asked about the proposed statue to be built at Iron Mountain Mines in the Redding Searchlight as stating "build it -- it is his property."

526. Petitioner submits that the infamy of the crime of the pollution from Iron Mountain Mine, and the public stigma and ridicule resulting from the governments propaganda and unsubstantiated allegations, which for some segments of the population has elevated the perceived conduct of the perpetrator of the pollution at Iron Mountain Mine to every bit the equivalent of a crime of treason, entitles grantees to constitutional protections of due process and equal protection for crime of infamy and other fundamental and common law rights retained by the people.

Petitioner submits that the infamy of the crime of the natural resource damages, and particularly the characterizations by the government implicating the polluters in the extermination and possible

extinction of the beloved salmon and trout, entitles grantees to constitutional protections of due process and equal protection and other common law rights retained by the people.

Petitioner submits that the infamy of the crime of the habitat destruction and the public perception of the perpetrators selfish plundering of mineral resources with indifference to the threat to the health and welfare of the people, and the alleged "imminent and substantial endangerment" to the public health and the environment, without recourse to equal protection, due process, and protection under the First, Fifth, Eighth, and Fourteenth Amendments, and the prohibition against Bills of Attainder and Ex Post Facto laws, and such other common law rights as are retained by the people, is a violation of grantees civil rights.

527. Petitioner submits that the infamy of the crimes of pollution, natural resource damage, and habitat destruction, in consideration of the fact that all the other parties to the litigation have settled their liability without an admission of guilt, wrongdoing, or responsibility, and that therefore only the remaining grantees are subject to the stigma, blame, public ridicule, derision, and the burden of shame now symbolically associated with Iron Mountain Mines, and in spite of the fact that they are innocent of these crimes, and entitled to an innocent landowner defense, and entitled to other defenses to liability, but nevertheless, and despite the governments settlement with the polluters that resulted in a reported $950 million settlement providing the "Complete Relief" as required in 42 U.S.C. 9613(f)(2), that the government wrongfully continues to prosecute the grantees under CERCLA, to levy a statutory lien against grantees property of $51 million, and to hold grantees responsible for unquantified unlimited future liabilities, and the Court dismissing with prejudice counterclaims for $10 million in damages and claims for contribution against the settling grantees.

528. Therefore, and by a preponderance of the evidence, grantees are entitled to the benefits of the "Act of GOD defense", the "innocent landowner defense" and the "Third Party defense" and are entitled to protection of their civil rights and under the equal protection clause.

Claim 10

529. The government falsely alleged in the joint status report that the terms of the settlement did not provide for reimbursement for past costs.

530. Paragraph 13(B)(3) of the Consent Judgment states: "Third, and only to the extent that the costs of Items (1) and (2), are able to be fully funded, payment of unrecovered past response costs incurred by the Oversight and Support Agencies."

531. Therefore, Petitioner submits that the express provisions of the consent decree provide for "reimbursement of unrecovered past response costs", and the stipulated arrangements made according to the consent decree for the long term investment in insurance vehicles to provide for payment of costs associated with the clean-up were entered into freely by the government, and with full knowledge and understanding including the express terms of paragraph 86.

532. Grantees further submit that the action of the government in stipulating to the purchase of a private insurance vehicle to manage public trust funds without proper safeguards or guarantees and the conflict of interest implicit in such an arrangement when the trustee is also the fiduciary and the contractor is contrary to public law.

533. Grantees further submit that in consideration of the financial failure of the original site operators, followed by the failure of the replacement site operators parent corporation, requiring the unprecedented bailout by the federal government of a private insurance company resulting in the Federal Government owning 79.9% of said corporation, which has effectively resulted in the trustee being the fiduciary being the contractor being the oversight agency, and so therefore the conflict of interest is a breach of duty and a violation of trust.

534. Grantees further submit that as the government now effectively possesses the trust funds in constructive trust, it must release the lien on defendant's property.

Claim 11

535. The government falsely alleged in the joint status report that grantees were given ample opportunity to oppose the consent decree.

536. Petitioner submits that grantees did oppose the terms of the consent decree, but were informed by the Court that the fact that they were not a party to the settlement, and because the settlement was a consent judgment and a final settlement for all costs, and because prior to entering the settlement the Court dismissed all Claims, Cross-claims, and Counter-claims against the settling 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-

ment was the best that the government negotiators could achieve, and so therefore the Court encouraged the grantees to cooperate with the Court in concluding the matter with a just and equitable decision in the proceedings.

537. Petitioner submits that the government delay in resurrecting this claim until the time for filing an appeal to the consent decree had passed is a fraud upon the Court and the grantees.

538. Motion to dismiss under *res judicata* plaintiff's claims for liability for pollution or natural resource damage against the remaining grantees.

Claim 12

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

(3) Limitations on Response.--The President shall not provide for a removal or remedial action under this section in response to a release or threat of release-- (A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found; (4) Exception to Limitations.--Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner. Petitioner submits and the Administrative Record shows that previous grantees were willing and had the authority and capability to respond to the emergency in a timely manner, that said grantees did so respond to the emergency, that these remaining grantees did submit plans for the remedy that was supported by those co-grantees, but were prevented from exercising this duty and implementing the remedy by the EPA. Petitioner submits that nowhere in this section is the agency afforded discretion based upon a determination of the adequacy of financial assurances as grounds for interfering with the owners right to implement a remedy or relief from the obligation imposed by 9604 (3)(A) and (4) and other provisions of CERCLA, CWA, CAA, NCP, EPCRA, and State Laws.

The grantees allege that government violated defendant's civil rights in failing to perform in accordance with 9604 (3)(A) and (4).

540. For the reasons heretofore established in claims 1 through 12, grantees move to reverse, vacate and remand the Partial Summary Judgment of 10-04-2005 denying property owner an innocent land owner defense under 101(35) as void, and because it is no longer equitable that the judgment should have prospective application; and any other reason justifying relief from the operation of the judgment, or because it was the result of fraud upon the Court.

Claim 13

541. Abuse of Discretion for Entering of Consent Decree prior to adoption of a Final Natural Resources Damages Plan as unfair and unreasonable. See U.S. v. Montrose. (Coincidentally the same settling defendants, (Aventis Crop Sciences, Stauffer Chemical, Aktemix 37, Rhone Polenc.as in this case.)) See also: Ross v. Marshall , 426 F.3d 745, 763 (5th Cir. 2005). Or "A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581, 584 (5th Cir. 2003)

542. Abuse of Discretion for adoption of Final Restoration Plan for Natural Resource Injuries that is not consistent with the Department of Interior Natural Resource Damage Assessment (NRDA) and for failure to provide monetary damages for the public benefit consistent with the stated damages in the Administrative Record, and conveyance to the public trust of damaged mine lands without provisions for adequate remediation of mine-scarred lands or potential for habitat restoration or recreational or other beneficial uses.

543. Failure to implement a Natural Resource Damage Assessment according to:

(1) Part II only (Fish-Kill Counting Guidelines) of "Monetary Values of Freshwater Fish and Fish-Kill Guidelines," American Fisheries Society Special Publication Number 13, 1982; available for purchase from the American Fisheries Society, 5410 Grosvenor Lane , Bethesda , MD 20814 , ph: (301) 897-8616. Reference is made to this publication in 11.62(f)(4)(i)(B) and 11.71(l)(5)(iii)(A) of this part.

(2) Appendix 1 (Travel Cost Method), Appendix 2 (Contingent Valuation (Survey) Methods), and Appendix 3 (Unit Day Value Method) only of Section VIII of "National Economic Development (NED) Benefit Evaluation Procedures" (Procedures), which is Chapter II of Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Stud-

ies, U.S. Department of the Interior, Water Resources Council, Washington, DC, 1984, DOI/WRC/-84/01; available for purchase from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161; PB No. 84-199-405; ph: (703) 487-4650. Reference is made to this publication in 11.83(a)(3) of this part.

(3) "Uniform Appraisal Standards for Federal Land Acquisition" (Uniform Appraisal Standards), Interagency Land Acquisition Conference, Washington, DC, 1973; available for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC, 20402; Stock Number 052-059-00002-0; ph: (202) 783-3238. Reference is made to this publication in 11.83(c)(2)(i) of this part.

Grantees seeks review of the Administrative Record and the Court's Records to revisit the innocent landowner defense provisions of and 101(35) for a final determination and due process regarding the remaining grantees that is just and equitable and consistent with the law.

See: Atlantic research v United States EPA “Many prior opinions have called these “potentially responsible parties”(abbreviated “PRP”). We decline to use this term. The PRP term has been developed by the courts. It is not found in CERCLA. The term refers to “a party who may be covered by the statute at the time the party is sued under the statute.” Pneumo Abex Corp. v. High Point, Thomasville & Denton R. R. Co., 142 F.3d 769, 773 n.2 (4th Cir. 1998). After Aviall, the term has been weakened and “may be read to confer on a party that has not been held liable a legal status that it should not bear.” Consolidated Edison Co. c. UGI Utils., Inc., 423 F.3d 90, 98 n.8 (2d Cir. 2005).,”

544. The Court cites Carson Harbor v. Unocal. As the Ninth Circuits definitive ruling relevant to this case, but fails to observe that at the time of the purchase of the property, (October 21st 1976), copper, zinc, and cadmium were not regulated as hazardous substances or as hazardous wastes in storm water discharge, (that is, non-industrial sources) and that their regulation did not come into effect until the following July, (when Congress' Transportation Subcommittee developed standards that included these elements pursuant to the CWA), and did not become law until the following December, (at which time the Regional Water Board immediately instituted measures resulting in NPDES permit requirements).

545. It is therefore clear that while CERCLA liability for polluters is retroactive, applying retroactivity to knowledge a priori of a naturally occurring mineral in its place of origin being a hazardous substance when there was no disposal and so therefore there could be no “hazardous waste” as a condition of establishing innocence is neither the intent of the law nor a literal reading of the statute, is contrary to principles of equal protection and due process, and the Courts reliance and deference to the EPA in this matter amounts to a fraud upon the Court..

Indeed, the copper leaching from the facility was considered a valuable mineral and an asset at that time, having been collected by the copper cementation process there for at least 75 years. To the extent the property owner had any activity in relation to this drainage, it was in the operation of the cementation plant, which was preventing or minimizing the “hazardous substance” from draining into the river, albeit purely (and unprofitably) as a business proposition.

546. Grantees aver, and it will be seen from the Court and Administrative record, such as the Memorandum of Understanding in Support of the Consent Decree entered by the Government in October of 2000, that such a claim for denying liability was not proposed until 2002, almost 11 years after this litigation commenced, the government instead having intended to deprive the Defendant of the innocent landowner defense all along on a theory of interference simply because the Grantees had sought to defend their property rights and for having protested the very actions which are now the focus of this proposed Judicial Review.

547. Grantees declare that at no time did they engage in any action to interfere with the actions of the EPA or the site operators.

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

False Claims to obtain a DETERMINATION OF PROBABLE CAUSE

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

False Claims under CERCLA Due Process Requirements.

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

False Claims of J. WINSTON PORTER, ASSISTANT ADMINISTRATOR OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE.

False Claims of Keith Takata, USEPA

False Claims of Kathleen Salyer, USEPA

False Claims of Michael Hingerty, USEPA

False Claims of Felicia Marcus, USEPA

False Claims of Jeffrey Zelikson, Hazardous Waste Management Division, USEPA

False Claims of David B. Jones, USEPA

False Claims of Rick Sugarek, project manager of the EPA treatment

False Claims of John Sitzley, CH2MHill

False Claims of Jim Mavis, CH2MHill

False Claims of James C. Pedri, Engineer-in-Charge of the Redding Office of the California Regional Water Quality Control Board, Central Valley Region.

False Claims of John Turner, Environmental Service Division, California Dept. of Fish and Game

False Claims of Gary Stacey, Environmental Service Division, California Dept. of Fish and Game

False Claims of Anthony J. Landis, P.E., Chief, California Department of Toxic Substance Control

False Claims of Don Dievert, California Department of Toxic Substance Control

False Claims of Ramon Perez, California Department of Toxic Substances Control

False Claims of William C. Allan, Regional Environmental Assistant

False Claims of Denise Klimas, National Oceanic and Atmospheric Administration

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

"In order to establish that it had no reason to know of the disposal of hazardous substances at the facility, a defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. . . . The court shall take into account commonly known or

reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

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

CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B). (2002 Amendment here represented to supposedly regulate "Due Care" in purchasing of real property in 1976 and as grounds for denial of third party and innocent landowner defenses and requiring knowledge *a priori;. ipso facto; ex post facto,* and also suggesting EPA actions somehow constitute a benefit to the True and Rightful Owners deserving of EPA recoupment by a "Windfall lien".)

FALSE CLAIMS AND FRAUD UPON THE COURT by counsel for government

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Margarita Padilla, Deputy Attorney General, California

Lisa Trankley-Sato California Department of Justice

These blatant lies raise the despotism and tyranny to a crime of infamy and assault on fundamental liberties and private property rights with fraud, malice, oppression, deceit, libel and slander.

"The guilty may fear, but no vengeance he aims At the honest man's life or Estate His wrath is entirely confined to wide frames And to those that old prices abate "; (General Ludd's Triumph, song of the Luddites)

Claim 14

549. Judicial Review under U.S.C. §§ 9658 for property damage and personal injury and for Failure to implement a Remedial Action Plan and for Failure to Perform in accordance with the Na-

tional Contingency Plan, and for selection of remedies that are arbitrary or capricious, negligent, or are otherwise inconsistent with the National Contingency Plan. See Frey v. EPA.

Claim 15

550. Judicial Review as Lead agency did not develop or ignored a limited number of remedial alternatives that attain site-specific remediation levels within different restoration time periods utilizing one or more different technologies, in violation of the National Contingency Plan.

Claim 16

551. Judicial Review as Lead agency did not develop or ignored one or more innovative treatment technologies for further consideration if those technologies offer the potential for comparable or superior performance or implementability; fewer or lesser adverse impacts than other available approaches; or lower costs for similar levels of performance than demonstrated treatment technologies, in violation of the National Contingency Plan.

Claim 17

552. Judicial Review as Lead agency failed to assure that alternatives shall be assessed for the long-term effectiveness and permanence they afford, along with the degree of certainty that the alternative will prove successful, in violation of the National Contingency Plan.

Claim 18

553. Judicial Review as Removal Actions by lead agency failed to comply with the Statement of Work.

(Government have failed to maintain the "copper cementation plant" as provided in the statement of work, and further have failed to provide appropriate plumbing therefore, there being no return drain for the processed AMD to be returned to the system for treatment, thereby preventing the implementation of the grantees first proposed application of resource conservation and recovery technologies documented in the Administrative Record, which was the conversion of the copper cementation plant to modern electro-winning technology.)

Claim 19

554. Judicial Review as Removal Actions by lead agency failed to comply with Federal Environmental Laws, and are therefore are in violation of the National Contingency Plan.

RCRA, 42 U.S.C. § 6972(a)(1)(A);(B);(2), provides that citizens may commence a citizen suit against any person "(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.

555. Claimant declares that the "interim" authority of the EPA to manufacture and generate acutely toxic hazardous waste sludge and to dispose this acutely toxic hazardous waste sludge within the hazardous waste toxic pit upon the Brick Flat Mine at Iron Mountain has long ago expired, and that the imminent and substantial danger to the defendant and the defendant's property, and the imminent and substantial danger to the public health and the environment for the disposal of hazardous wastes in a disposal cell located in an active geological zone with known Holocene faults, and the lack of an actual remedial action plan or an offsite disposal facility, with the resulting status quo that the EPA will manufacture and generate this hazardous waste toxic sludge for several thousand years without any access to a permanent disposal site or provisions for funding such an extraordinary waste, in violation of RCRA, CERCLA, CWA, and otherwise contrary to public law. See Covington v. Jefferson County , 358 F.3d 626 (9th Cir. 2003) Claimant further attests that these hazardous wastes invoke the provisions of Subchapter III, and that no notice is therefore required.

Claim 20

556. Judicial Review as Removal Actions by lead agency failed to comply with State Environmental Laws, and in violation of the National Contingency Plan.

RCRA, 42 U.S.C. § 6972(a)(1)(B), provides that citizens may commence a citizen suit against any person "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.". Claimant attests that the acutely toxic hazardous waste pit sludge is producing its own Acid Mine Drainage, (AMD) as was anticipated by both advocates and critics of the lime treatment plan as documented in the Administrative Record, and that this leachate that is discharging from the acutely toxic hazardous waste sludge contained within the toxic pit upon the Brick Flat Mine at Iron Mountain Mines is leaching at a pH of 2 in violation of RCRA, TCLP, STLC, CalWET, and the California Toxic Pits Act, and, and that this leachate contains levels of cadmium in excess of the allowable limits of the California Toxic Pits Act, RCRA, CWA, and in violation of TCLP, TTLC, STLC, and CalWET standards, and in violation of the California Health and Safety and the California Water Code. Claimant further attests that these hazardous wastes invoke the provisions of Subchapter III, and that no notice is therefore required.

Claim 21

557. Judicial Review as Removal Actions by lead agency failed to consider or ignored the degree to which alternatives employ recycling or treatment that reduces toxicity, mobility, or volume, in violation of the National Contingency Plan.

Claim 22

558. Judicial Review as Removal Actions by lead agency failed to consider or ignored total storage and disposal capacity, in violation of the National Contingency Plan.

Claim 23

559. Judicial Review as Removal Actions by lead agency failed to provide a final Remedial Action Plan, in violation of the National Contingency Plan.

Claim 24

560. Abuse of Civil Authority for waste of public funds incurred due to removal actions undertaken in an arbitrary, capricious, or by policies otherwise inconsistent with the National Contingency Plan. EPA commissioned an "independent" study of the IMMI remedial action proposal in 1985. It

is referred to as “Confidential Enforcement Analysis” in ROD 1. The EPA decision not to accept the IMMI proposal was supposedly based substantially on this study. The study made the following conclusions:

561. “Technical feasibility;

The recovery technologies described by Davy McKee in their October 1985 report are reliable and could be used for removal of copper, copper sulfate, zinc sulfate, jarosite, alum, and gypsum for acid mine drainage (AMD) solution. However, there is insufficient mineralogical, trace metal analyses, and test work to verify that saleable products of jarosite, alum, or gypsum can be economically produced.

Recovery of concentrated leach solutions from reinjection are the key to success of the project and little or no design data is available on this aspect of the proposal.

Insufficient hydrological studies have been conducted on the site to insure solution containment.

Additional Information Needed to More Fully Determine Technical Feasibility

Delineation of reserves and grades of materials to be recovered (ore reserves analysis, grade verification, product purity).

Assessment of excursions of concentrated leach solutions away from the collection site due to the two major faults and the numerous fractures, caved, and subsidence areas of the site.

Investigate leach kinetics to determine how quickly the leach solution can be built up to the 4 to 6 gpl level.

Conduct in situ tests to evaluate the ore body’s response to reinjection.

Determine the extent to which IMMI estimates the orebody requires further fracturing to ensure economic life and recovery.

Economic Viability

Based on the capital and operating costs projected by IMMI (with and without reclamation costs), the project currently has a low probability of producing a positive net present value at risk levels which would attract financing or venture capital.

The cost of a limited preproduction test program for the property is 2 to 5 million dollars.

Depending on reserves, the project life is estimated at between 3 and 9 years.

Meeting all facets of the Clean Water Act could cost $40 to $250 million.

Technical and Environmental Concerns"

Therefore, it may be seen from the Administrative Record that as far back as 1985, the EPA had reason to know and did know that the Defendant's proposed remedy was reliable, and that the proposed remedy might substantially eliminate the source of the contamination in as little as 3 to 9 years, and furthermore that it was even possible for it to be profitable.

562. Motion for the Court to Intervene under Judicial Review to implement the grantees proposed remedies for the cause of the pollution at the Iron Mountain Mine Superfund Site.

Claim 25

563. Judicial Review of statutory lien on defendant's property filed by support agencies for unrecovered past response costs incurred due to removal actions undertaken in an arbitrary, capricious, unnecessary, or by policies otherwise inconsistent with the National Contingency Plan.

Claim 26

564. Judicial Review for Remedial Actions that were Negligently Arbitrary or Capricious.

Claim 27

565. Judicial Review as Removal Actions were not consistent with the National Contingency Plan

Claim 28

566. Judicial Review as Removal Actions are the cause of imminent and substantial endangerment to the public health and the environment, in violation of CERCLA, RCRA, CWA, NEPA, and the California Toxic Pits Act..

Claim 29

567. Judicial Review as Lead agency failed to utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable, in violation of the National Contingency Plan.

Claim 30

568.Judicial Review as Lead agency failed to perform a non-discretionary act or duty under RCRA. 42 U.S.C. § 6972(a)(2)."

Claim 31

569. Judicial Review for determination of inverse condemnation for preventing the recovery of mineral resources from mine lands in violation of State and Federal law, for unlawful interference with the entry of the Petitioner or Defendant(s) to the property, for imposing unreasonable restrictions on the Petitioner or Defendant(s) quiet enjoyment of the property, for interference with Petitioner and Defendant(s) civil liberties, and for destruction of private property and property resources.

570. Petition to sever and certify case to the Court of Federal Claims to adjudicate the Taking of Private Property for the Public Benefit without Just Compensation.

Claim 32

571. Judicial Review for Fraud upon the Court, for fraudulent representation as a windfall lien, and for Malice, Fraud, and Deceit, for violations of due process and other civil rights, and for Violation of Consent Decree by maintaining a Statutory lien on owners property for unrecovered past response costs, in disregard for the stipulated provisions of paragraph 13(B)(3) of the Consent Judgment, which states: "Third, and only to the extent that the costs of Items (1) and (2), are able to be fully funded, payment of unrecovered past response costs incurred by the Oversight and Support Agencies.", and paragraph 86 of the Consent Decree, which states that "The "matters addressed" in this settlement are all response actions taken or to be taken, all response costs incurred or to be incurred, and all Natural Resource Damages incurred or to be incurred, by the United States, the State agencies, or any other person with respect to the Site, and specifically include without limitation the Work to be performed by the Site Operator, all claims, counterclaims, and cross-claims filed by and against the parties in the above captioned cases, and those matters governed by the covenants contained in Sections XXI and XXII of this Consent Decree."

Claim 33

572.Judicial Review for willful and negligent violation with malice and oppression of the California Health and Safety Code and the California Toxic Pits Recovery Act.

573. Since 1992 the DTSC and the RWQCB have been "encouraging" the "further development and consideration of an alternative that could reduce or eliminate the need for treatment at the site, including capping, plugging, and resource recovery approaches".

574. The High Density Sludge produced by the EPA treatment plant is a class A mining waste under California Law.

Table 1.1

Siting (1) Not on Holocene faults;

(2) Outsite of areas of rapid geologic change;

From 54187 of the Administrative Record; Geologic Reconnaissance and Fracture Analysis, Iron Mountain Area…"Faults, joints, and other Fractures are a pervasive feature of the bedrock and associated ore bodies." "they cut across the Brickyard ore body exposed in the open pit."

From 54224 of the Administrative Record; Geology of the Massive Sulfide Deposits at Iron Mountain ….. "The Brick Flat ore body is explored only by rather widely spaced drill holes. It is apparently bounded on the north and south edges by the two strands of the Camden fault, but different widths of ore in drill holes adjacent to each other suggest that other faults are probably present."

575.From 54423 of the Administrative Record; "In Brick Flat, two major fault zones are present:"

576. "The mountain is falling in on itself," said John Spitzley, a civil engineer with the CH2M Hill engineering firm who oversaw much of the remediation work. "Some 30 to 40 acres at the top of the mountain is moving." http://www.savethewildup.org/alerts/?id=438

577. The EPA superfund water treatment plant for acid mine drainage at Iron Mountain Mines removes cadmium, a EPCRA 313 regulated chemical. The treatment plant processes about 3,600 lbs. of cadmium per year. The facility employs more than 10 full time employees. The EPA toxic pit sludge disposal facility upon the Brick Flat mine at Iron Mountain leaches at a ph of 2 and contains levels of cadmium in excess of 110 ppb, in violation 40 CFR Parts 148, 261, 266, 268, and 271, Land Disposal Restrictions Phase IV: Final Rule Promulgating Treatment Standards for Metal Wastes and Mineral Processing Wastes; Mineral Processing Secondary Materials and Bevill Exclusion Issues, and TCLP, STLC, CalWET, EPCRA, CWA, CERCLA, NCP, RCRA, the California Health and Safety Code, the California Water Code, and the California Toxic Pits Cleanup Act.

578. The EPA Superfund Iron Mountain Mine water treatment plant produces sludge in violation EPCRA 313 and has since the day the rule came into effect; May 26, 1998. The sludge is an

"acutely hazardous waste" because it is derived from the similarly classified AMD of Iron Mountain Mines.

579. The recent case of Frey v. EPA offers some useful insight into the parameters of Judicial Review under CERCLA:

580. "But what if EPA decides to study the contamination for an indeterminate period of time without taking any remedial action? Counsel had no response when asked whether the statute precludes review if EPA claims that it will take action, after further study, at some point before the sun becomes a red giant and melts the earth. We then asked counsel whether a reviewing court could invoke the Administrative Procedures Act (APA), 5 U.S.C. §§ 706(1), to compel agency action unlawfully withheld or unreasonably delayed, if EPA dragged its feet for decades. Counsel informed us that a court could not act under these circumstances because CERCLA's rules governing judicial review override the APA. See 5 U.S.C. §§ 702 (stating that Administrative Procedures Act review is not available when "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"); Schalk, 900 F.2d at 1097. We can only conclude from this exchange that EPA considers itself protected from review under CERCLA §§ 113(h) as long as it has any notion that it might, some day, take further unspecified action with respect to a particular site.

581. There is no support in the statute for such an open-ended prohibition on a citizen suit. Frey I spoke of "active steps designed to clean up a site" and held that "the time limits in §§ 113(h) are geared to concrete, existing, remedial measures; not measures that might be devised at some future date." 270 F.3d at 1134. For EPA to delay Frey's suit, it must point to some objective referent that commits it and other responsible parties to an action or plan. No such objective evidence exists in this record. There is no timetable or other objective criterion by which to assess when EPA's amorphous study and investigation phase may end. The special master's report, adopted in 1999 by the district court, instructed EPA and Viacom to negotiate permanent water treatment solutions for the sites "approximately one year following the completion of source control activities at each site." Source control activities were completed in 1999 and 2000, yet EPA concedes in its brief on appeal that no permanent water or soil treatment remedies have been adopted to date. At argument, EPA's

counsel alluded to the possibility of further measures in 2005 or 2006. We are unimpressed with this vague reference, unsupported by any timetable in the record.

582. In its ROD Amendments, EPA referred to future "operable units" that will be implemented to address the contaminated groundwater and sedimentation once excavation has been completed. See 40 C.F.R. §§ 300.430(a)(1)(ii)(A) (discussing use of "operable units" in remediating contaminated sites). We recognize that environmental regulations may call for a phased approach in expediting total site cleanup. Id. And it is quite clear that EPA is entitled to gather data and assess alternatives before selecting an appropriate response. But the data collection and analysis must proceed with some level of transparency. EPA cannot preclude review by simply pointing to ongoing testing and investigation, with no clear end in sight.

583. Frey offers one solution to this problem. She asks us to read the text of §§ 113(h) narrowly to preclude review only when EPA has selected a remedy through its Record of Decision process. Frey concedes that if EPA had selected a final remedy for all three operable phases (excavation, water treatment, sediment treatment) through a ROD, she could not bring suit until all three remedies had been fully implemented. But it did not do so. In this case, she contends, plans for groundwater and sediment remediation cannot reasonably be characterized as later stages of the excavation remedy that EPA has already selected.

584. Frey is correct insofar as there is no evidence of any kind that EPA will be doing anything specific in the future with this site. We do not go so far as to hold that EPA must have issued either a ROD or a ROD Amendment before it obtains the breathing room afforded by §§ 113(h). We conclude only that there must be some objective indicator that allows for an external evaluation, with reasonable target completion dates, of the required work for a site. (Although we are sure that EPA would not try to avoid the statute by submitting a 100-year plan, we note that such a target date would obviously be unreasonable.) Neither the consent decree nor the special master's report serves as an objective measure here. Instead, we see only a desultory testing and investigation process of indefinite duration."

585. "We recognize that Congress intended for remedial action to be complete before permitting judicial review. Frey I, 270 F.3d at 1133; Schalk, 900 F.2d at 1095. Congress did not, however, in-

tend to extinguish judicial review altogether. North Shore Gas Co. v. EPA, 930 F.2d 1239, 1245 (7th Cir.1991)."

586.After a very long wait, grantees assert that they are finally entitled to their day in court.

MEMORANDUM IN SUPPORT OF A FINDING THAT A CONSTITUTIONAL TAKING OF PRIVATE PROPERTY FOR THE PUBLIC BENEFIT CLAIM REQUIRING JUST COMPENSATION EXISTS IN THE PRESENT CASE, THAT THE GRANTEES WERE DENIED EQUAL PROTECTION AND DUE PROCESS, AND THAT THE CONSENT DECREE OF DEC. 2000 WAS BY FRAUD UPON THE COURT AN ERROR OF IMPUNITY AND MISCARRIAGE OF JUSTICE.

587. The maxim, much cited by Macchiavelli, appears in the original Latin as "divide et impera." It may be translated as "divide and rule."

588. Excerpt from the conclusion of the appeal of *United States v. Cannons.*

589. In politics and sociology, divide and rule (derived from Latin divide et impera) (also known as divide and conquer) is a combination of political, military and economic strategy of gaining and maintaining power by breaking up larger concentrations of power into chunks that individually have less power than the one implementing the strategy. In reality, it often refers to a strategy where small power groups are prevented from linking up and becoming more powerful, since it is difficult to break up existing power structures.

590. .Maxims "Divide et impera" or "Divide ut regnes" are traditionally identified with the principle of government of the Roman Senate. This attribution is not entirely reliable, insofar as the Roman policy mainly aimed to unite the conquered nations both politically and culturally, under Roman rule. It is, however, borne out by the example of Gabinius parting the Jewish nation into five conventions, reported by Flavius Josephus in Book I, 169-170 of The Wars of the Jews (De bello Judaico) [1]. Likewise, Strabo reports in Geography, 8.7.3 [2], that the Achaean League was gradually dissolved under the Roman possession of the whole of Greece, owing to them not dealing with the several states in the same way, but wishing to preserve some and to destroy others.

591. In modern times, Traiano Boccalini cites "Divide et impera" in La bilancia politica, 1,136 and 2,225 as a common principle in politics. The use of this technique is meant to empower the sover-

eign to control subjects, populations, or factions of different interests, who collectively might be able to oppose his rule. Machiavelli identifies a similar application to military strategy, advising in Book VI of The Art of War [3] (Dell'arte della guerra [4]), that a Captain should endeavor with every art to divide the forces of the enemy, either by making him suspicious of his men in whom he trusted, or by giving him cause that he has to separate his forces, and, because of this, become weaker.

592. The strategy of division and rule has been attributed to sovereigns ranging from Louis XI to the Habsburgs. Its historical reception has been mixed. Thus Edward Coke denounces it in Chapter I of the Fourth Part of the Institutes, reporting that when it was demanded by the Lords and Commons what might be a principal motive for them to have good success in Parliament, it was answered: "Eritis insuperabiles, si fueritis inseparabiles. Explosum est illud diverbium: Divide, & impera, cum radix & vertex imperii in obedientium consensus rata sunt." [You would be insuperable if you were inseparable. This proverb, Divide and rule, has been rejected, since the root and the summit of authority are confirmed by the consent of the subjects.] On the other hand, in a minor variation, Sir Francis Bacon touts the cunning maxim of "separa et impera" in a letter to James I of 15 February 1615. Likewise James Madison recommends in a letter to Thomas Jefferson of 24 October 1787 [5], summarizing the thesis of The Federalist #10 [6]: "Divide et impera, the reprobated axiom of tyranny, is under certain qualifications, the only policy, by which a republic can be administered on just principles."

593. Typical elements of this technique are said to involve creating or encouraging divisions among the subjects in order to forestall alliances that could challenge the sovereign.

aiding and promoting those who are willing to cooperate with the sovereign.

fostering distrust and enmity between local rulers.

encouraging frivolous expenditures that leave little money for political and military ends.

594. The use of this strategy was imputed to administrators of vast empires, including the Roman and British, who were charged with playing one tribe against another to maintain control of their territories with a minimal number of imperial forces. The concept of "Divide and Rule" gained prominence when India was a part of the British Empire, but was also used to account for the strat-

egy used by the Romans to take Britain, and for the Anglo-Normans to take Ireland. It is said that the British used the strategy to gain control of the large territory of India by keeping its people divided along lines of religion, language, or caste, taking control of petty princely states in India piecemeal.

595. Also mentioned as a strategy for market action in economics, it can be applied to get the most out of the players in a competitive market. *Wikipaedia*

596. On Page 10, Line 20 of the Memorandum of Points and Authorities in Support of The Joint Motion of the United States of America, the State of California, and Aventis Crop Sciences, USA Inc. for entry of consent decree: "The United States' amended complaint also names Arman and IMMI as owner and operator at the time of disposal". Page 13, Line 13: In addition, DTSC and CVRWQCB have waived claims for other past costs in the approximate amounts of $1.5 million and $300,000 respectively, DFG did not file a claim for response costs in the litigation. Page 14, Line 17. Applicable Legal Standard. Page 19, Line 9: As a practical matter, due to the apparent financial condition of Arman and IMMI, it is unlikely that those parties would really face the prospect of having to pay for the entire remainder of Site costs left after the settlement with Aventis. Page 19, Line 17: Because the settlement was arrived at through a procedurally fair means, through arm's length negotiations between sophisticated and well represented parties, and because no party has objected to it, the Court may presume that it is substantively fair, as well. The settlement with Aventis does reduce overall costs at the Site by a very substantial share and is therefore of significant benefit to Arman and IMMI. With a strong and guaranteed return on investment not available on funds invested in the Treasury. The settlement is guaranteed by AISLIC which, as noted, is a AAA-rated insurance company. Accordingly, the financial security of the settlement is on much firmer footing than it would be in the absence of the settlement, which would require the government to look to Aventis to perform the remedy over the long term. In all, the settlement provides for great benefits to the environment and to the public at large. In the view of the United States and the State agencies, which are charged with protecting the public interest and which have been intimately involved in the litigation for the past nine years, the settlement represents a very favorable

resolution of this case and is fully consistent with the environmental clean-up and restoration goals of CERCLA.

The standard in this Circuit governing the Court's approval of a CERCLA consent decree is whether the settlement embodied in the decree is "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve."

597. The constitutional arguments sponsored by Grantees measures up to the *Cannons* test of scrutiny. Counterclaimants submit that there is a constitutional right under federal law to the protections of the innocent landowner defense, see Babbitt New Mexico, LLC v. United States, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641-42, 101 S.Ct. 2061, 2067-68, 68 L.Ed.2d 500 (1981); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 90-91, 101 S.Ct. 1571, 1580, 67 L.Ed.2d 750 (1981), and hence, the Counterclaimants were deprived of a constitutionally protected interest

598. The claims include violation of equal protections and due processes

599. .Therefore

A class of persons who have not yet resolved their liability to the United States or a State in a judicially approved settlement of the innocent landowner defense may not be held liable for claims for contribution regarding matters addressed in a settlement with polluters. Such settlement with innocent landowners must provide for equitable distribution of liability from the sovereign's and societies benefits from the pollution, and for the responsibility of permanent guardianship of the republic and society's environmental defense obligation from the pollution, and include provisions for the protection of a national treasure.

See 42 U.S.C. Sec. 9613(f)(2) (1987).

600. Counterclaimants invoke the "too big to fail" doctrine of the Executive Branch in the environmental defense of Superfund sites.

601. On this issue, we believe it is appropriate to consider the adequacy of the process. To the extent that the process was fair and full of "adversarial vigor," Exxon, 697 F.Supp. at 693, the results come before the court with no assurance of substantive fairness. See, e.g., Rohm & Haas, 721 F.Supp. at 694 , to the contrary, the record shows that the remaining grantees have essentially been

deprived of informed counsel since 1993. (examining extensive discovery leading to settlement terms); Cannons, 720 F.Supp. at 1045; Acushnet, 712 F.Supp. at 1031; Oyster Bay, 696 F.Supp. at 844; see generally De Long, New Wine for a New Bottle: Judicial Review in the Regulatory State, 72 Va.L.Rev. 399, 417-18 (1986) (suggesting that courts could consider their review obligations fulfilled if they merely assured themselves that agency processes functioned adequately to inform and control discretion)

602. Iron Mountain Mines, Inc. and T.W. Arman were deprived of adequately informed counsel from the day Baker & Mckenzie withdrew from the case in 1993. T.W. Arman never claimed to be sophisticated in legal matters. T.W. Arman was prosecuted to attrition without regard to causation or comparative fault.

603. It is clear that because of willful misrepresentations, lack of due process and equal protection, and with allegations of oppression, fraud, malice, and deceit, that the double swaddling enjoyed by the EPA must be examined under the light of judicial review.

604. We must go further. Because Counterclaimants did suffer adverse effects from the consummation of the settlement embodied in the decree, and those effects stem from a systemic unfairness and from the combination of Congress' plan and government' own conduct (including their negotiating strategy).

605. Counterclaimants allege that a case of systemic unfairness exists.

606. Remove the EPA's double swaddling, and what do you find?

607. Evidence of bad faith and collusion on the part of the settling parties, and violation of trust

608. The second layer of swaddling derives from the nature of appellate review. Because approval of a consent decree is committed to the trial court's informed discretion, see id. 896 F.2d at 603-04; United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir.1985); In re AWECO, Inc., 725 F.2d 293, 297 (5th Cir.), cert. denied, 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed.2d 182 (1984), the court of appeals should not be reluctant to disturb a unreasoned exercise of that discretion. In this context, and with allegations of fraud upon the court, the test for abuse of discretion is itself not a deferential one.

609. Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

610. Harmful errors of law: see claims, 2 miners & 8000 acres of land v. United States; **1.** The government falsely alleged and therefore the Court wrongly concluded that "The United States and California claim that "IMMI and Arman are PRP's because they are either owner[s] [or] operator[s] of a vessel or a facility." **2.** The EPA falsely alleged and therefore the Court wrongly concluded that "as a "current owner" of the facility in question, it is not necessary to establish IMMI's liability as an "operator" of the same facility." **3.** The government falsely alleged and therefore the Court wrongly concluded that "Arman is an operator under CERCLA because he is someone who currently "manage[s], directs[s], or conduct[s]…operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." **4.** The government falsely alleged and therefore the Court wrongly concluded that "IMMI has not established the necessary elements of the defense." **5.** The government falsely alleged and therefore the Court wrongly concluded that "It may be doubted whether or not the third party defense is available to landowners who do not qualify for the innocent landowner defense." **6.** The government falsely alleged and therefore the Court wrongly concluded that "the innocent landowner defense is not available to Arman because he is not the "owner" of the facility in need of clean-up." **7.** The government falsely alleged in the joint status report that this action is to" recover response costs incurred and to be incurred". **8.** The government falsely alleged in the joint status report that the terms of the settlement did not provide for reimbursement for past costs. **9.** The government falsely alleged in the joint status report that grantees were given ample opportunity to oppose the consent decree. **10.** The EPA negligently violated the express terms of 9604 (3)(A) and (4) which states: (3) Limitations on Response.--The President shall not provide for a removal or remedial action under this section in response to a release or threat of release--

(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

11. Abuse of Discretion and Failure to Perform. **12.** Violation of constitutionally protected rights and interests, denial of equal protection and due process by misrepresentation and deceit to defraud the grantees of property and livelihood by conspiracy under color of law.

611. A. Procedural Fairness?

612. We agree with the district court that fairness in the CERCLA settlement context has both procedural and substantive components. Cannons, 720 F.Supp. at 1039-40. To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance. See, e.g., id. at 1040; United States v. Rohm & Haas Co., 721 F.Supp. 666, 680-81 (D.N.J.1989); Kelley v. Thomas Solvent Co., 717 F.Supp. 507, 517-18 (W.D.Mich.1989); In re Acushnet River & New Bedford Harbor, 712 F.Supp. 1019, 1031 (D.Mass.1989); Exxon, 697 F.Supp. at 693; State of New York v. Town of Oyster Bay, 696 F.Supp. 841, 844-45 (E.D.N.Y.1988); United States v. Hooker Chemicals & Plastics Corp., 540 F.Supp. 1067, 1080 (W.D.N.Y.1982).

613. In this instance, the district court wrongfully found the proposed decree to possess the requisite procedural integrity, Cannons, 720 F.Supp. at 1040-41, and Counterclaimants hereby offer persuasive reason to alter the findings. It is clear the district court believed that the government conducted negotiations forthrightly and in good faith, because it deferred to the agencies repeated representations to that effect, but the record is replete with indications to the contrary effect, particularly to the effect of the lack of informed counsel damaging grantees.

614. Counterclaimants claim that they are entirely innocent, and entitled by every measure to the innocent landowner defense, and were thus intentionally excluded from the major party settlement. Congress intended to give the EPA broad discretion to structure classes of PRPs for settlement purposes. The failure to provide grantees the innocent landowner defense by fraud upon the court, with malice and oppression, and without due process or equal protection, is a violation of grantees civil rights. The government acted beyond the scope of its discretion in depriving the grantees of these rights, and for the taking of private property for public benefit without just compensation.

615. We say that Counterclaimants were entitled to more civil rights protections from the EPA's negotiating strategy than they received. At the time the RP was initially invited to participate in the

administrative settlement, the EPA, did not by letter, inform Counterclaimants that they were eligible for the settlement in this case.

616. Cannons, 720 F.Supp. at 1033. Counterclaimants knew, early on, that they were within the EPA's determination of a potentially responsible party, a "PRP". Although Counterclaimants did assume that they could ride on the coattails of the major party and join whatever decree emerged--the government had not, on other occasions, allowed for an innocent landowner defense—and the agency was asked for, but it did it not give, any reasonable consideration of the innocent landowner defense in this instance, and did wrongfully deprive grantees of the benefit of the innocent landowner defense. As a matter of law, we do not believe that Congress meant to permit the violation of persons civil rights in CERCLA cases, even when an EPA determination of an environmental emergency exists. This may constitute violations of equal protection and due process, and the taking of private property for the public benefit requiring just compensation. The liability and responsibility for compliance with the National Contingency plan is principally on the EPA. That the EPA did violate grantees rights and allow polluters to resolve their liability, which settlements they might prefer to join, and falsely accused and wrongfully and maliciously prosecuted innocent landowners, wrongfully dismissed counterclaims with prejudice against settling grantees of $10 million, and conveyed to innocent landowners liabilities for unrecovered past response costs of some $51 million plus interest, and unquantified unlimited future liabilities from the polluters in absentia, and without informed counsel, that as a matter of equity and tort, and since grantees were deceived and misled, that the Court must inspect the swaddling of EPA under CERCLA.

617. Iron Mountain Mines, Inc. and T.W. Arman are not the polluters

618. The district court accepted the recommendations of the settling parties in the memorandum of understanding in support of entry of the consent decree, and therefore found the consent decrees to have been the product of fair play. Given that the decree was negotiated without the named grantees participation, and the grantees counsel was soon to be disbarred and who had no experience in Federal Court or with pollution cases and the Department of Justice, and grantees were not sophisticated, and Counterclaimants did not have an opportunity to participate in the negotiations or to

join the settlement, and that the agency did not operate in good faith, that the finding of procedural fairness is eminently unsupportable, and must be vacated for fraud upon the court..

619. B. Substantive Fairness?

620. Counterclaimants aver that if there is no substantive fairness, there can be no comparative fairness.

621. Substantive fairness introduces into the equation concepts of corrective justice and accountability: where an innocent party should not bear the cost of the harm for which it is not legally responsible. See generally Developments in the Law--Toxic Waste Litigation, 99 Harv.L.Rev. 1458, 1477 (1986). The logic behind these concepts dictates that settlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done. Cf. Rohm & Haas, 721 F.Supp. at 685 (the most important aspect of judicial review is relationship of settlement figure to proportion of settlor's waste); Cannons, 720 F.Supp. at 1043 (charging more than proportionate liability must be justified in some way, as by unexpected costs or unknown conditions); Kelley, 717 F.Supp. at 517 (approving settlement because it was unlikely that settlor's comparative fault was less than percentage of cleanup costs it agreed to pay); United States v. Conservation Chemical Co., 628 F.Supp. 391, 401 (W.D.Mo.1985) (liability apportionment should be made on basis of comparative fault). Counterclaimants submit that they did no mining, (the human activity found to have contributed to the release of “hazardous substances”). Counterclaimants submit that they did not profit from the pollution. Counterclaimants submit that their activities at the site served to lessen the severity of the pollution, (albeit inadvertently). Counterclaimants submit that they did offer a plan which actually was a remedy of the pollution, but that the EPA instead decided to embark on a removal (treatment) program that will take over 3000 years.

622. When contesting substantive fairness, the issue as to how comparative fault is to be measured must be resolved. There is in this case a correct approach. When the measure of comparative fault at a particular Superfund site under particular factual circumstances is left to the EPA's expertise and the EPA willfully and with malice, fraud, oppression, and deceit deprives the grantees of the

constitutional right to equal protection and due process of the innocent landowner defense, the EPA in tort and equity violated the grantees' civil rights. Whatever formula or scheme the EPA later advances for measuring comparative fault and allocating liability should be disregarded since the agency did not supply an honest explanation for it, or weld some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling RP. See United States v. Akzo Coatings, 719 F.Supp. 571, 586-87 (E.D.Mich.1989); Acushnet, 712 F.Supp. at 1031: cf. Gardner & Greenberger, Judicial Review of Administrative Action and Responsible Government, 63 Geo.L.J. 7, 33 (1974) (courts must know why an agency has taken an action if they are to perform their review function adequately). Put in slightly different terms, the chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis.4 See 42 U.S.C. Sec. 9613(j) (1987); Rohm & Haas, 721 F.Supp. at 681.

623. Even though the EPA must be given leeway to construct the barometer of comparative fault, and the agency must also be accorded flexibility to diverge from an apportionment formula in order to address special factors not conducive to regimented treatment, the agency must also give a fair consideration of the innocent landowner, third party, and Act of GOD defenses. While the list of possible variables is virtually limitless, two frequently encountered reasons warranting departure from strict formulaic comparability are the uncertainty of future events and the timing of particular settlement decisions. Common sense suggests that a PRP's assumption of open-ended risks may merit a discount on comparative fault, while obtaining a complete release from uncertain future liability may call for a premium. See, e.g., Cannons, 720 F.Supp. at 1043; Superfund Settlements with De Minimis Waste Contributors: An Analysis of Key Issues by the Superfund Settlements Project, May 8, 1987, Vol. XIV Chem. Waste Lit. Rptr. 34, 46 (June 1987) [hereinafter Superfund Settlements] (premium should be paid by PRP for benefit of being permitted to cash out). By the same token, the need to encourage (and suitably reward) early, cost-effective settlements, see, e.g., Acushnet, 712 F.Supp. at 1032 (quick settlement deserves recognition in terms of lowered settlement figure); United States v. Seymour Recycling Corp., 554 F.Supp. 1334, 1339 (S.D.Ind.1982) (similar), and to account inter alia for anticipated savings in transaction costs inuring from celeritous settlement, cf., e.g., Mathewson Corp. v. Allied Marine Indus., Inc., 827 F.2d 850, 855-56 (1st

Cir.1987) (discussing range of considerations influencing private settlements), can affect the construct. Even though Congress intended EPA to have considerable flexibility in negotiating and structuring settlements, we think reviewing courts should not permit the agency to depart from rigid adherence to equal protection and due process wherever the agency proffers a justification for denial of the innocent landowner defense.

624. We believe that a district court should not in this case give the EPA's expertise the benefit of the doubt when weighing substantive fairness--particularly when the agency has deceived and misled the court, which has been confronted by ambiguous, incomplete, or inscrutable information, and the preponderance of the evidence indicating that the court was deceived and misled, and because of the implication of fraud in the present case. In these settlement negotiations, precise data relevant to determining the total extent of harm caused and the role of each PRP was available in this case. See Superfund Settlements, supra p. 16, at 43. It would disserve a principal component of the statute—the provisions for an innocent landowner defense--to leave matters in limbo until more information was amassed. When the EPA uses the data to violate defendant's rights along the broad spectrum of plausible approximations and equitable defenses, judicial intrusion is warranted. See Rohm & Haas, 721 F.Supp. at 685-86 (reasonable relationship to some plausible estimate or range of estimates is standard of fairness).

625. In this instance, the deprivations of equitable defenses are a violation of equal protection and due process and a deprivation of substantive fairness. They also do not adhere generally to principles of comparative fault according to a volumetric standard, determining the liability of each PRP according to volumetric contribution. And, to the extent they deviate from this formulaic approach, they do not do so on the basis of adequate justification. In particular, no consideration is given to the comparative fault between a polluter and a non-polluter.

Counterclaimants' next asseveration--that the decrees favor the major party RP over their non-culpable counterparts- On this record, the district court did misuse its discretion by failing to rule upon the parties' comparative fault.

626. While the decree offers a substantial settlement, the bad-faith justification absolving the polluters of responsibility, and granting absolute finality, makes the injustice readily apparent. In re-

turn for the premium paid, RP can cash out, thus obtaining four important benefits: reduced transaction costs and receiving absolute finality with respect to the monetization of their overall liability. Cf. Superfund Settlements, supra p. 16, at 42-43, and, the responsible party does not retain an open-ended risk anent their liability at the Site, nor are they making any admission of guilt or admission of comparative fault or harm. see Cannons, 720 F.Supp. at 1042, making the comparison of proportionate contributions a vital proposition. At the very least, relief from the $10 million counterclaim, and relief from $51 million in unrecovered past response costs, and relief from unquantifiable unlimited future liability absent any recourse, and the transfer of such $51 million liability and transfer of unquantifiable unlimited future liability to an innocent landowner, and the transfer to an innocent landowner of the infamy and stigmatic shame and comparative fault and harm for pollution and natural resource damage, such as the extermination of salmon and trout, a tradeoff crafted by the government's negotiators without grantees participation, seems unreasonable. Indeed, the acceptance of the settlement is itself an indication of substantive unfairness toward the class to which Counterclaimants belong. See Seymour, 554 F.Supp. at 1339. On this record, the district court did misuse its discretion in ruling that the decrees sufficiently tracked the parties' comparative fault.

627. The last point which merits discussion under this rubric involves the fact that the agency upped the ante as the game continued, that is, the premium assessed as part of the administrative settlement was increased substantially. The district court must see unfairness in this EPA approach.

628. Counterclaimants berate the settlement as discriminating against a non-polluter, and the government's use of such a technique is unfair and serves to promote the violations of grantees civil rights. See 42 U.S.C. Sec. 9622(a) (1987); see also Cannons, 720 F.Supp. at 1037 (emphasizing congressional interest in expedited cleanups); see generally, Note, Superfund Settlements: The Failed Promise of the 1986 Amendments, 74 Va.L.Rev. 123, 126 (1988) (chief congressional purpose of CERCLA was to provide immediate response to threat of uncontrolled hazardous waste). indeed, if the government cannot offer such routine incentives, there will be little inducement on the part of any PRP to enter an administrative settlement. Of course, the extent of the differential must be reasonable and the graduation neither unconscionable nor unduly coercive, but these are

familiar subjects for judicial review in a wide variety of analogous settings. Cf., e.g., United States v. Ven-Fuel, Inc., 758 F.2d 741, 763-64 (1st Cir.1985) (discussing standard of review anent imposition of civil penalty for oil import violation). We believe that the EPA was unreasonable in denying grantees the benefit of the innocent landowner defense, and unreasonable by failing to make a settlement proposal in this CERCLA case that was substantively fair.

629. C. Reasonableness?

630. In this unusual environmental litigation, the evaluation of a consent decree's reasonableness will be a straightforward exercise. Is the consent decree fair? The answer is no. And does the consent decree fulfill the requirements of the NCP? Again the answer is no. We comment briefly upon three such facets. The first is obvious: the decree's likely efficaciousness as a vehicle for cleansing the environment is of cardinal importance. See Cannons, 720 F.Supp. at 1038; Conservation Chemical, 628 F.Supp. at 402; Seymour, 554 F.Supp. at 1339. Except in cases which involve only recoupment of cleanup costs already spent, the reasonableness of the consent decree, for this purpose, will be basically a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses. As this is only a case for recoupment, the additional scope of judicial review is applied

631. The efficaciousness of the remedial actions has not been fully protective of human health and the environment, and may be reasonably observed to have been arbitrary and capricious, and otherwise not in accordance with public law. In fact the treatment facility which reported that it was treating on average 372 lbs. of copper per day when the plant began operations in 1995, reported in 2003 that the plant was now treating approximately 650 lbs. per day, or almost twice the amount of “hazardous substance”. It is therefore apparent that no remedy yet exists for the AMD, and that the problem is now much more severe. Furthermore, no provision for the minimum of 20 acres of off-site storage for the hazardous waste treatment sludge is provided by the State as required by law. No provision is made or suggested for where the 50 million tons of hazardous waste sludge will be disposed. No financial assurances are provided for this disposal.

632. A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response meas-

ures. Like the question of technical adequacy, this aspect of the problem can be enormously complex. The actual past response costs of remedial measures were known at the time this consent decree was proposed. Since the settlement's bottom line is definite, the proportion of settlement dollars to total needed dollars is not debatable. The agency must be held to a standard of mathematical precision. If the figures relied upon do not derive in a sensible way from a plausible interpretation of the record, the court should not defer to the agency's expertise. The agency effectively waived collection of $51 million in unrecovered past response costs from the responsible party, transferred this obligation to Counterclaimants with a statutory lien, and transferred unquantified and unlimited future liability to the innocent landowners.

633. A third integer in the reasonableness equation relates to the relative strength of the parties' litigating positions. If the government's case is strong and solid, it should typically be expected to drive a harder bargain. On the other hand, if the case is less than robust, or the outcome problematic, a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of a proposed settlement must take into account foreseeable risks of loss. See Rohm & Haas, 721 F.Supp. at 680; Kelley, 717 F.Supp. at 517; Acushnet, 712 F.Supp. at 1028; Exxon, 697 F.Supp. at 692; Hooker, 540 F.Supp. at 1072. The same variable, we suggest, has a further dimension: when the government's case is fundamentally defective because of the innocent landowner defense, and it then by definition is a takings for the public benefit claim, and it will take time and money to pay damages and pay to implement private remedial measures through the litigatory failure. So it is better for the government to deny the named defendant in the suit the status of innocent landowner so as to delay justice while swaddled in judicial deference to the EPA. To the extent that time is not of the essence or that the perpetual transaction costs loom large, a settlement which nets less than full recovery of cleanup costs is not necessarily reasonable. See Rohm & Haas, 721 F.Supp. at 680 (interpreting "reasonableness" in light of congressional goal of expediting effective remedial action and minimizing litigation); United States v. McGraw-Edison Co., 718 F.Supp. 154, 159 (W.D.N.Y.1989) (settlement reasonable in light of prospect of protracted litigation as contrasted to expeditious reimbursement and remedy); Acushnet, 712 F.Supp. at 1030 (emphasizing that trial would likely be "complex, lengthy, expensive and uncertain"); Exxon, 697 F.Supp. at 693 (noting

benefit of immediate payment to environmental cleanup effort); Seymour, 554 F.Supp. at 1340 (urgency of abating danger to public must be considered). The reality is that, all too often, litigation is a cost-ineffective alternative which can squander valuable resources, public as well as private. Nevertheless, with these allegations of conflict of interest, and the allegation of compromise and collusion of the parties to the trust funds secured by the consent decree, the settlement must be subject to judicial review.

634. In this case, the district court wrongfully found the consent decrees to be reasonable. Cannons, 720 F.Supp. at 1038-39. Counterclaimants have also seriously questioned the technological efficacy of the cleanup measures to be implemented at the Site. They also contend that the settlement was not designed to assure adequate compensation to the public for harms caused. Given the totality of the record-reflected circumstances, and the probability of fraud upon the court, the lower court's finding of reasonableness should be vacated and remanded.

635. D. Fidelity to the Statute?

636. Of necessity, consideration of the extent to which consent decrees are consistent with Congress' discerned intent involves matters implicating fairness and reasonableness. The three broad approval criteria were not meant to be mutually exclusive and cannot be viewed in majestic isolation. Recognizing the inevitable imbrication, we turn to the final criterion.

637. We describe the two major policy concerns underlying CERCLA:

638. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

639. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir.1986) (quoting United States v. Reilly Tar & Chemical Corp., 546 F.Supp. 1100, 1112 (D.Minn.1982)). The district court thought that these concerns were addressed, and assuaged, by the proposed settlement. Counterclaimants do not.

640. It is crystal clear that the broad settlement authority conferred upon the EPA must be exercised with deference to the statute's overarching principles: accountability, the desirability of an unsullied environment, and promptness of response activities.

641. The bases do not appear to have been touched in this instance. The questions of accountability invite a proper investigation; in this case virtually none of the damaged environment is being restored to any beneficial use or to a condition where it can safely be returned to nature; and the promptness of the response activities and the intention of the response are still open to question.

642. Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

643. Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir.1988).

644. The objectors can demonstrate that the trier made a harmful error of law or has lapsed into "a meaningful error in judgment," Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir.1988), a reviewing tribunal must not stay its hand. While the doubly required deference--district court to agency and appellate court to district court--places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree, an unfair and unjust verdict as a result of fraud upon the court must be overturned.

645. Even accepting substantive fairness as linked to comparative fault, an important issue still remains as to how comparative fault is to be measured. There is no universally correct approach. It appears very clear that what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances is usually left to the EPA's discretion. Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability is upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs. See United States v. Akzo Coatings, 719 F.Supp. 571, 586-87 (E.D.Mich.1989); Acushnet, 712 F.Supp. at 1031: cf. Gardner & Greenberger, Judicial Review of Administrative Action and

Responsible Government, 63 Geo.L.J. 7, 33 (1974) (courts must know why an agency has taken an action if they are to perform their review function adequately). Put in slightly different terms, the chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis.4 See 42 U.S.C. Sec. 9613(j) (1987); Rohm & Haas, 721 F.Supp. at 681. No such formula exists in the present case. While no measure of comparative fault exists in the Consent Decree, the Memorandum in support of entry of the Consent Decree from the agencies and Aventis discusses allocation based upon years of ownership. This formula of allocation, besides for purposes of preliminary assessment, has been found invalid by the Courts. Counsel for government acknowledge that the innocent landowner defense is the only defense available, and suggest that allegation of a lack of "due care" would deny grantees the benefit of the innocent landowner defense. The Courts have found this premise lacking in previous CERCLA cases.

646. Counterclaimants submit that by a preponderance of the evidence, the EPA selected remedies were arbitrary, capricious, and devoid of a rational basis. Counterclaimants further submit that by a preponderance of the evidence, that deprivations of due process and equal protection were facilitated by a conspiracy of officers of the court to systematically and under color of law deprive the grantees of their civil and constitutional rights.

647. 4. Notice. The Counterclaimants also contend that the government's negotiating strategy must be fair. Congress did send the EPA into the toxic waste ring with the obligation to protect the civil rights of those it governs. The EPA may not mislead any of the parties, discriminate unfairly, or engage in deceptive practices.

648. Counterclaimants allege that by a preponderance of the evidence, the government have deceived and misled and discriminated against the remaining Grantees in this case.

649. In this CERCLA context, the government is under an obligation to determine liability in its settlement offers, and innocent landowners must be eligible to join ensuing major party settlements or otherwise resolve their liability for pollution that they did not cause or create. Therefore, and because of the unreasonable extent of the differential, and the graduation of comparative fault unconscionably and unduly coercive in the present case, that grantees were discriminated against, misled, and deceived.

650. Exclusions from Settlements. Under the SARA Amendments, the right to the protections of the innocent landowner defense, and settlement to suit, is a fundamental right. The tyranny of "divide and conquer" as was applied in the present case, and in the contravention and defiance of a congressional directive, requires denial to the EPA the use of so reprobated an axiom of tyranny. So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses. In the present case however, the EPA did not operate in good faith, and the consent decree must be vacated, the trust funds commutated, and a decree of dismissal or acquittal and resolution of liability for the innocent landowner must be entered in this case.

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

REFERENCES

56137, 56163, 56180, 56184, 56186, 56187, 57223, 57266, 56763, 57814, 57850, 60586, 60595, 61784, 61791, 61817, 62740, 63581, 63779, 62047, 62810, 62470, 63569, 63631, of the Superfund administrative record of Iron Mountain Mines.

INTRODUCTION

651. This supporting memorandum investigates the consideration of resource recovery approaches conducted by the EPA during the period from Dec. of 1993 to Feb. 1997. In particular it will examine the evaluation to ascertain if a reasonable scientific consideration of alternatives was given, and to what extent a lack of reasonable scientific consideration may have resulted in unlawful interference with legitimate mining purposes or violation of environmental law.

652. On the matter of the HONOR OF ALL MINING MEN, dignity shall be the remedy and relief from unspeakable errors of impunity and miscarriage of injustice, so grievous is the writ.

William Camden called her the Lost Confidence mine, Col. Charles Magee called her the Lost California mine, and later James Sallee came in and just called her Iron Mountain. After the gossan Gold ran out, Sallee found Silver. After 30 years of mining she was found to have a massive sulfide ore, and the call went out. Men in New York found men in London who would take the Lost Con-

fidence mine into a new era. For a while she became the 6th largest copper and sulfur mine in the world.

653. It was in 1896 that men of London chartered the great Mountain Copper Co., and thereafter created scholarly and wise institutions of corporate power with the wealth thus acquired.

654. It was free mining men who opened Iron Mountain to reveal and profit of her gifts and treasure.

As is by right, in the year of 1976, the "Iron Mountain" mines were sold to T.W. Arman.

By right, T.W. Arman has made her Iron Mountain Mines, Inc. "Mountain Copper lives!"

655. Yet the plaintiff parties would sue and by deceits revoke the Freeholds and Letters Patents to pretend to the Charter and gain by the usurpation of the Franchise.

Yet the impunity most poisonous is for the infamy and stigma and shame that wrongfully lay upon these grantees, and upon all miners, without their participation or counsel in consent, or even knowledge by which to recognize that they had all been poisoned for so long.

656. Thus the honor of all mining men has been cast into the gutter, to be trodden by the crowds.

Therefore, that the honor of all mining men shall be restored, so name & honor: T.W. Arman.

We beseech thee to rectify the unspeakable errors of impunity and miscarriage of justice.

We petition concerning the rights and liberties of all the citizens of this Realm for their repose and quiet, and to prevent and punish abuses in procuring of process of Supersedeas by Right.

657. Also, to avoid vexatious delay in cause, by removing of action and suit out of inferior Court, wherein the former abuse was vexatious and grievous, and chargeable to the subject.

For the above general causes, viz. Peace and Plenty, long may they happily by the goodness of GOD continue without abuse within this Realm.

658. "It has been justly thought a matter of importance to determine from what source the United States derives its authority... The question here proposed is whether our bond of union is a compact entered into by the states, or whether the Constitution is an organic law established by the People. To this we answer: 'We the People... ordain and establish this Constitution'...The government of the state had only delegated power (from the People) and even if they had an inclination, they had no authority to transfer the authority of the Sovereign People. The people in their capacity as Sover-

eigns made and adopted the Constitution; and it binds the state governments without the state's consent. The United States, as a whole, therefore, emanates from the People and not from the states, and the Constitution and the laws of the states, whether made before or since the adoption of that Constitution of the United States, are subordinate to the United States Constitution and the laws made in pursuance of it." - [Bouvier's 14th Edition Law Dictionary (citing 4 Wheat, 402)]

659. Differing court interpretations of a statute "is evidence that the statute is ambiguous and unclear." U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

660. (The court refused to extend the recoupment doctrine to action under the Comprehensive Environmental Response, Compensation and Liability Act for purposes of establishing a waiver of sovereign immunity for mine owners' counter-claim.). United States v. Iron Mountain Mines , 881 F. Supp. 1432, 1445 (E.D. Cal. 1995) (citing opinions in which courts held that the United States did not waive immunity for purposes of regulatory acts under CERCLA, and rejecting those opinions).Claims that the United States was contributorily negligent, caused harm at the site, or assumed the risk of harm at the site have been stricken as, in reality, alleging third party defenses that are not within the terms of §107(b). United States v. Kramer, but see United States v. Iron Mountain Mines, Inc., 881 F.Supp. 1432 (ED Cal 1995) (declining to follow cases holding that EPA has immunity for regulatory or remedial acts under CERCLA and suggesting defendant has good claim in contribution if government fits within the four categories of liable parties.)

661. The court of appeals agreed with a district court decision that arranger liability should not apply to "a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue." Id. at 22a (quoting United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

662. The Acushnet River burden of proof allocation was ignored by the District Court for the Eastern District of California in United States v. Iron Mountain Mines, Inc., even though the court cited Acushnet River as positive authority. In Iron Mountain Mines, permits existed for some but not all of the metal mining waste. The court held that evidence of 'the mere existence' of non-permitted releases 'is sufficient to suggest that non- permitted releases contributed to the harm.

663. Clearly, these decisions establish two divergent bases for proving liability. According to Acushnet River, and to some extent Bunker Hill, a plaintiff must prove not only the existence of the non-permitted releases, but also that the releases contributed to the harm. According to Iron Mountain Mines, on the other hand, a plaintiff need only show the 'mere existence' of the non-permitted releases; that alone is sufficient to suggest contribution. Notably, none of these decisions explains the difference, suggested by the Acushnet River court, between contribution to harm and causation of harm.

664. The extraordinary remedy of mandamus traditionally lies within the court's discretion. Oregon Natural Resources Council v. Harrell, 52 F.3d 1499, 1508 (9th Cir. 1995)(listing elements of mandamus test); Garcia v. Taylor, 40 F.3d 299, 301 (9th Cir. 1994), superseded by statute on other grounds as stated in, Campos v. I.N.S., 62 F.3d 311, 314 (9th Cir. 1995); Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986). Whether the elements of the mandamus test are satisfied is a question of law reviewed de novo. Oregon Natural Resources Council, 52 F.3d at 1508; Garcia, 40 F.3d at 301. The trial court retains discretion in ordering mandamus relief, however, even if all elements are satisfied. Oregon Natural Resources Council, 52 F.3d at 1508. A trial court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard. Garcia, 40 F.3d at 301; Fallini, 783 F.2d at 1345.

665. The United States Supreme Court has established two per se tests under which a regulation can effect a taking absent a physical encroachment onto the land. First, a regulation constitutes a per se taking when it "does not substantially advance legitimate state interests." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016, 120 L. Ed. 2d 798, 112 S. Ct. 2886

Second, a per se taking occurs when a regulation "denies an owner economically viable use of his land." “The United States Supreme Court has noted that whether or not a taking has occurred "depends largely 'upon the particular circumstances in the case’.” Penn Cent., 438 U.S. at 124. In Penn Central, the Court listed the economic impact of the regulation, the regulation's interference with investment-backed expectations, and the character of the governmental action as three such factors . In the most recent of these cases, Lucas, 505 U.S. 1003, the Court found that the regulation deprived the landowner of reasonable economic value. The Court did imply, however, that in situa-

tions in which a reasonable value remains, a second inquiry is appropriate: “An owner [for whom economic value remains] might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, 'the economic impact of the regulation on the claimant and … the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.” Lucas, 505 U.S. at 1019. [Id. @ 65.]

“The most recent pertinent U.S. Supreme Court decision resolves any doubt that there is a two-tiered inquiry in regulatory takings cases. If a landowner fails to meet its burden of proving a per se taking, he can still prove a taking under a fact-specific inquiry. [See Palazzolo, 2001, 150 L. Ed. 2d 592, 121 S. Ct. 2448.]

666. “Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. Id. at 2457 [**17] (citing Penn Cent., 438 U.S. at 124).

667. The Court found that an examination of one distinct right in the property, as the mineral rights, was inappropriate. It noted that the U.S. Supreme Court “has consistently held that in regulatory takings cases, a court must determine the regulation's effect on the full rights in the land.” . Consequently, the Colorado Supreme held that in this case, “.the trial court and court of appeals were correct in holding that the appropriate focus of a takings inquiry is the property rights as an aggregate rather than merely the mineral rights.” [Id. @ 68.]

668. They would neither love nor trust one another, but on the contrary would be a prey to discord, jealousy, and mutual injuries; in short, that they would place us exactly in the situations in which some nations doubtless wish to see us, viz., FORMIDABLE ONLY TO EACH OTHER.

I. Letters Patents under the General Mining Law

669. In the history of the United States, no Land Patent has ever lost an appellate review in the courts. In Summa Corp. v. California ex rel. State Lands Comm'n 466 US 198, the United States Supreme Court ruled that the Land Patent would always win over any other form of title. In that 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].

670. 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

671. 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

672. 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

673. 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

674. The District of Columbia Circuit has suggested that "[i]f the court determines that the agency [has] delay[ed] in bad faith, it should conclude that the delay is unreasonable." IMC, 885 F. Supp. at 1367 (changes in original) (quoting Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987)). The District of Columbia Circuit later explained that "[w]here [an] agency has manifested bad faith, as by singling someone out for bad treatment or asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities." In re Barr Labs., Inc., 930 F.2d 72, 76 (D.C. Cir.)(citing In re Monroe Communications Corp., 840 F.2d 942, 946-47 (D.C. Cir. 1988)), cert. denied, 502 U.S. 906 , 112 S. Ct. 297, 116 L. Ed. 2d 241 (1991).

VI. Post Hoc Rationalization

675. The rule barring consideration of post hoc agency rationalizations operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body. See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 , 631 n. 31, 100 S. Ct. 2844, 2858, 65 L. Ed. 2d 1010 (1980); Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 95 , 63 S. Ct. 454, 462, 87 L. Ed. 626 (1943). However, this rule has been developed in the context of a court's duty to set aside a "final agency decision" if based on a post hoc rationalization. Such a "final agency decision," generally required for judicial review of agency actions, provides the court with a date certain by which it can analyze the agency's justifications. It also identifies the particular decision being challenged and the justifications proffered at that time. Judicial review of an agency's actions under S 706(1) for alleged delay has been deemed an exception to the "final agency decision" requirement. See, e.g., Public Citizen v. Bowen, 833 F.2d 364, 367 (D.C. Cir. 1987); Public Citizen Health Research Group v. Comm, FDA, 740 F.2d 21, 30-32 (D.C. Cir. 1984). Under this exception, the court is examining an agency's actions prior to a final agency decision for purposes of measuring agency delay. Accordingly, there is no date certain by which to evaluate an agency's justifications for its actions.

676. While quo warranto is regarded as the exclusive remedy to try title to public office, under certain circumstances a court will consider title to an office in a mandamus proceeding under section 1085 of the Code of Civil Procedure when title is "incidental" to the primary issue to be resolved

by the action. Generally, this occurs when a de facto officer brings an action such as mandamus to recover some incident of office, such as salary, and a determination as to whether the petitioner is entitled to recover the incident of office must necessarily be preceded by a ruling as to whether the petitioner is entitled to the office. (See Klose v. Superior Court (1950) 96 Cal.App.2d 913 and cases cited therein.) The court must decide whether title may be decided in the action "incidentally" to the ostensible primary issue. (Stout v. Democratic County Central Comm., supra, 40 Cal.2d at 94. See also Lungren v. Deukmejian (1988) 45 Cal.3d 727.)

677. The relief sought requires judicial review of the EPA and DOJ actions. Iron Mountain Mines, Inc.is being wrongfully denied their rights in federal detention, and is seeking relief for the unconstitutional, abusive or neglectful conditions of her incarceration notwithstanding that a district court has granted custody to her captors.

I. INTRODUCTION

678. Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, provides the U.S. Environmental Protection Agency (EPA) with broad and effective enforcement tools that can be used to abate conditions that may present an imminent and substantial endangerment to health or the environment. Section 7003 allows EPA to address situations where the handling, storage, treatment, transportation, or disposal of any solid or hazardous waste may present such an endangerment. In these situations, EPA can initiate judicial action or issue an administrative order to any person who has contributed or is contributing to such handling, storage, treatment, transportation, or disposal to require the person to refrain from those activities or to take any necessary action.

679. Among its many benefits, Section 7003 provides EPA with a strong and effective means of furthering risk-based enforcement and implementing its strategy for addressing the worst RCRA sites first, a strategy which EPA developed in response to its 1990 RCRA Implementation Study.1 Under this strategy, EPA is addressing the universe of waste management facilities on the basis of environmental priorities. Furthermore, at any given site, EPA is attempting to use whatever legal authority is best suited to achieving environmental success. Section 7003 provides an invaluable means for achieving environmental success at many of these sites.

680. In consultation with EPA regional offices and other headquarters offices, the Office of Site Remediation Enforcement and the Office of Regulatory Enforcement have developed this guidance document to assist the regional offices in exercising the Agency's authorities under RCRA § 7003. In addition to providing practical advice on the use of Section 7003, this document summarizes significant legal decisions that have addressed Section 7003.2 This document supersedes (1) the "Final Revised Guidance Memorandum on the Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act (RCRA)" which was issued on September 26, 1984 ("1984 Guidance"), and (2) the fact sheet entitled "The Imminent and Substantial Endangerment Provision of Section 7003," which was issued by the Office of Site Remediation Enforcement in May 1996.

681. EPA references RCRA § 7003 in various policy and guidance documents. In light of the issuance of this guidance, the Region should consult with headquarters regarding the applicability of any of those documents to particular actions described in this guidance. Before taking any particular action, the Region should examine Attachment 1 regarding delegations, consultations, and concurrence.

682. Section 7003 when there is an ongoing criminal investigation or prosecution against the same person concerning the same or a related matter, the Regions should consult the June 22, 1994 memorandum from Steven A. Herman entitled "Parallel Proceedings Policy" and the applicable DOJ parallel proceedings policy.

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

684. It is EPA's position, and at least one court agrees, that EPA may take action under

Section 7003 even if the government is simultaneously taking action against the defendant under CERCLA. The Regions may therefore use Section 7003 either independently or as a supplement to actions taken under CERCLA or other statutes.

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

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

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

a. Advantages of RCRA § 7003

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

C Address potential endangerments caused by materials that meet RCRA's statutory definition of "solid waste" but are not "hazardous substances" under CERCLA -- The definition of "hazardous substance" in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), does not include all materials that qualify as "solid waste" under RCRA § 1004(27), 42 U.S.C. § 6903(27). Note, however, that the CERCLA definition of "hazardous substances" does encompass some materials, such as radionuclides, which are not "solid waste" under RCRA.

688. Address potential endangerments caused by "hazardous waste" that meets the broad definition of that term under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), but which is not a CERCLA "hazardous substance" because it fails to meet the more narrow definitions of "hazardous waste" promulgated in 40 C.F.R. Part 261 pursuant to RCRA § 3001 -- CERCLA's definition of "hazardous substance" includes "hazardous waste" having characteristics identified under or listed pursuant to Section 3001 of RCRA, 42 U.S.C. § 6921. It does not include all materials that qualify as "hazardous waste" as defined in RCRA § 1004(5).

689. On July 9, 2008, the U.S. Court of Appeals for the First Circuit held that a state could intervene, through a consent decree, in a trifurcated CERCLA action four years after first invited and after the trial court had made initial findings of liability. City of Bangor v. Citizens Commc'ns Co., 532 F.3d 70 (1st Cir. 2008). The City of Bangor ("Bangor") had purchased land in 1978 from Citizens Communications ("Citizens"), whose predecessor owned and operated a manufactured gas plant onsite. Bangor, after incurring over $1 million in costs investigating contamination on the property, brought CERCLA and RCRA actions against Citizens. After counterclaims and third and fourth party complaints, the parties agreed to trifurcate the trial: first resolving the liability as between Bangor and Citizens, selecting a remedy in the second phase, and resolving the liability as between Citizens and other party defendants in the third phase. Before the first phase began in 2003, several parties (and the court) requested that the State of Maine intervene, but the state refused. In 2006, the court made findings of fact and conclusions of law as to Citizens' and Bangor's liability. The two parties then negotiated a settlement agreement and a state consent decree that gave them contribution protection. In 2007, Maine sought to intervene in the lawsuit and file the consent decree. The trial court allowed the intervention, approved the consent decree, and found the initial findings no longer binding. The third and fourth parties appealed the district court's decision to allow Maine's intervention and the approval of the consent decree.

689. On appeal, the First Circuit upheld the district court's decision to approve the consent decree. The First Circuit held that a state CERCLA consent decree will be upheld absent an abuse of discretion, although a state agency would not receive the same deference under CERCLA as U.S. EPA would. The appellate court found that the consent decree was procedurally and substantively fair and complied with CERCLA § 122 settlement requirements. The appellate court also upheld the trial court's decision to require that Citizens and other parties litigate their contribution claims in a separate, newly filed action.

690. On December 20, 2007, the U.S. District Court for the District of New Hampshire held that a non-settling PRP may intervene in a consent decree proceeding. United States v. Exxonmobile Corp., 2007 U.S. Dist. LEXIS 95463 (D.N.H. Dec. 20, 2007). In Exxonmobile, a non-settling PRP sought to intervene in consent decree approval proceedings for 96 de minimis "contributors" at the

Beede Waste Oil Superfund Site in New Hampshire. Id. at *2-*3. The consent decree had been announced in the Federal Register, but no motion had been filed in the court to approve the decree at the time the intervenor, Brodie, filed to intervene. Id. at *5. In examining whether or not Brodie met the "interest" criterion for intervening in the suit, the court found persuasive the Eighth Circuit decision in United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995), which held that non-settling PRPs have sufficient interest to support intervention. Id. at *12-*14. The court rejected the argument, accepted by district courts in Michigan, Ohio and Arizona, that CERCLA is intended to encourage settlement, and thus preventing non-settling PRPs from intervening provides an incentive for non-settling PRPs to settle. Id. at *10-*12. As a result, the court allowed Brodie to intervene in the consent decree approval proceedings. On October 1, 2007, the United States Supreme Court refused to grant a writ of certiorari requested by the losing defendant in Maine People's Alliance v. Mallinckrodt, 471 F.3d 277 (1st Cir. 2006). As a result, the U.S. Court of Appeals for the First Circuit's judgment will stand, upholding a broad application of the citizen suit provisions under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B).

690. In Mallinckrodt, several environmental groups had sued Mallinckrodt for its alleged historic mercury contamination of the Penobscot River. Although Mallinckrodt had been working with EPA for years regarding this mercury contamination, the environmental groups brought their own lawsuit under RCRA's "citizen suit" provision, alleging that the mercury contamination "may present an imminent and substantial endangerment to health or the environment." Plaintiffs demanded that Mallinckrodt conduct a comprehensive study of the nature and extent of the endangerment. When Mallinckrodt's attempts to dismiss the case based on EPA's prior involvement failed, the case went to trial. At trial, plaintiffs' lead expert testified that he did not know either the extent or severity of the mercury problem, but thought that there might be a serious endangerment and that it was "highly likely" that remediation would be required. The trial court held that plaintiffs had demonstrated RCRA citizen suit liability.

690. On appeal to the First Circuit, Mallinckrodt attacked both the environmental groups' standing to bring the RCRA claims and the trial court's broad interpretation of RCRA citizen suit liability. Mallinckrodt's principal argument against standing was that, due to uncertainty about the contami-

nation's scope and effect, plaintiffs could not show a substantial probability that harm will occur. However, the appellate court rejected Mallinckrodt's position, finding that plaintiffs had sufficiently shown that the mercury created a substantial probability of increased harm to the environment, which reasonably caused injury to members of the environmental groups.

690. The appellate court also rejected Mallinckrodt's opposition to the trial court's broad interpretation of RCRA's citizen suit liability. After considering and rejecting Mallinckrodt's attempt to limit the statute's reach through an analysis of both statutory language and legislative history, the appellate court concluded that, for purposes of both standing and liability, Congress had intended to allow citizens to ask the courts to grant relief for "any risks posed by toxic waste," even if EPA refuses to address the risk. 471 F.3d at 294-96. Thus, as long as "the threat is near-term and involves potentially serious harm," a federal court can act. Id. at 296.

690. By rejecting Mallinckrodt's request, the First Circuit's opinion on the broad expanse of RCRA citizen suit liability, as well as similar decisions in the Second, Third, Fifth, Tenth, and Eleventh Circuits, remains the law.

Tenth Circuit Imposes Broad Application of RCRA Citizen Suits

691. On September 24, 2007, just a week before the Supreme Court's denial of certiorari in Mallinckrodt, the U.S. Court of Appeals for the Tenth Circuit joined other federal appellate and trial courts in broadly applying the reach of potential liability under RCRA's citizen suit provision for "imminent and substantial endangerment," RCRA § 7002(a)(1)(B). Burlington Northern and Santa Fe R.R. Co. v. Grant, 2007 U.S. App. LEXIS 22680 (10th Cir. Sept. 24, 2007) ("BNSF"). In BNSF, a railroad (BNSF) sued its neighbor whose property allegedly was the source of a tar-like material that BNSF claimed had migrated and would continue to migrate onto BNSF's property. The tar had been generated by historic refinery operations occurring years before either party had purchased their parcels. BNSF sued its neighbor under the RCRA citizen provision and several state law theories, including nuisance and unjust enrichment. As for the RCRA claim, the neighbor argued that BNSF could not prove that the tar "may present an imminent and substantial endangerment" because BNSF had known about the tar problem for years and had allegedly done nothing; no person had been injured and no "immediate" harm could be proved; and no government

agent had ever acted to address the tar. BNSF lost its RCRA and several other state law claims in pre-trial summary judgment rulings. It lost its remaining state law claims at the close of its case-in-chief at trial.

691. On appeal, however, the Tenth Circuit reinstated almost all of BNSF's claims. The Tenth Circuit held that, as a matter of law, the RCRA citizen suit provision could not be interpreted as narrowly as the trial court had. The appellate court found that BNSF's alleged knowledge of and delay in response to environmental conditions was irrelevant to a determination of whether endangerment was currently occurring. The court found that to accomplish RCRA's broad goal of eliminating "any risk posed by toxic wastes," Grant 2007 U.S. Dist. LEXIS at *9, the trial court had to allow BNSF to prove merely a potential harm, not an actual harm. Moreover, there is no requirement that BNSF prove that the actual harm will occur immediately, just that the threat of harm be immediate. In addition, a government agency's failure to act does not prevent an RCRA claim. Thus, the trial court erred when it dismissed BNSF's RCRA claim before trial.

691. The appellate court then addressed the state law claims that BNSF had lost in the court below. On appeal, the court found that the trial court's rulings against BNSF had been largely erroneous. Thus, the decisions below were reversed and the case was returned to the trial court so that BNSF could have the opportunity to prove its RCRA and state law claims under the appellate court's broader interpretation of the law.

692. Fifth Circuit Applies RCRA Citizen Suit Standing a Rights Beyond Plaintiff's Ownership Interests

On August 28, 2007, the U.S. Court of Appeals for the Fifth Circuit became another court broadly applying RCRA citizen liability, declaring that Congress intended to allow citizens to "speed compliance with environmental laws," "put pressure on a government unwilling or unable to enforce such laws," and "close loopholes in environmental protection." Consol. Cos. v. Union Pacific R.R., 2007 U.S. App. LEXIS 20619, at *11 (5th Cir. Aug. 28, 2007) (internal citations omitted). In Consol. Cos., plaintiff Conco owned a piece of a former railyard. Other parties, unrelated to Conco, owned the remainder. Thirty years after Conco purchased its property, it found contamination which the parties stipulated came from the former rail operations. Conco then brought a lawsuit

against Union Pacific Railroad ("UPRR"), the railyard's successor, under the RCRA citizen suit provision, §7002(a)(1)(B), as well as state statutory and common law theories. In its RCRA claim, Conco sought to require UPRR to address contamination, not only on Conco's property, but throughout the site of the entire former railyard, including property not owned by either party to the lawsuit. The trial court held an evidentiary hearing on UPRR's challenge to Conco's standing and its ability to call the entire former railyard a single RCRA "facility." When UPRR lost on both issues in the trial court, it appealed.

692. The Fifth Circuit upheld the trial court's decision on all issues. It found that Conco had standing to address more than the contamination on its property because the contamination on the other parcels demonstrated Conco's "injury in fact." Specifically, Conco showed that contamination on other parcels threatened harm to its property and its employees. This threat of harm was sufficient injury to confer standing to bring a claim. The appellate court also found that the term "facility" under RCRA's citizen suit provision, although not defined in the statute, should be interpreted to include contiguous or adjacent property, just as that term does under RCRA's underground tank provisions and under CERCLA's broad definition of "facility." The court stressed that the expansive interpretation of the term "facility" in the RCRA citizen suit provision was necessary given Congress's intent to facilitate citizens' ability to act as private attorneys general in addressing environmental conditions. According to the court, because nothing in the citizen suit provision requires that a plaintiff have any ownership interest in the contaminated site, there is no basis for limiting the scope of a partial owner's right to demand action.

692. Although the ultimate scope of UPRR's liability and responsibility under this RCRA suit is still to be determined, the Fifth Circuit's opinion is yet another example of the broad reach of RCRA citizen suit liability.

Liberal Standing in RCRA Citizen Suits Endorsed by District Court

693. On October 15, 2007, the United States Court for the Southern District of Indiana held that a RCRA citizen suit plaintiff need not hold legal title to the contaminated property which is the subject of the lawsuit. 1100 West, LLC v. Red Spot Paint & Varnish Co., 2007 U.S. Dist. LEXIS 76710 (S.D. Ind. Oct 15, 2007). In Red Spot, a partnership owned a 7-acre parcel until 1999, when

the partnership was converted into a limited liability company ("1100 West"). Id. at *3. Due to an oversight, the legal title for the parcel was not altered to reflect that 1100 West was the owner until after the RCRA litigation began. The defendant, Red Spot, moved to dismiss for lack of standing because 1100 West did not own the parcel at the time of the suit and because 1100 West did not have any "injury in fact."

693. The court denied Red Spot's motion to dismiss. The court held that 1100 West satisfied the three requirements for standing to sue under Article III of the United States Constitution. In particular, the court found that 1100 West's failure to have title to the contaminated parcel was irrelevant because RCRA allows a citizen suit by "any person," not just one with legal title. Moreover, the court found sufficient allegations of "injury in fact" based on the partnership's allegation that Red Spot's historic contamination interfered with its business of buying and reselling old industrial sites.

693. The district court's opinion is consistent with other courts' recent broad interpretation of RCRA citizen suit standing. Companies in the business of buying contaminated property, who wish to use RCRA citizen suits to force prior owners and operators to remediate the site, will be encouraged by the 1100 West decision.

694. The Eastern District of Texas held on June 20, 2007, that contamination may pose an "imminent and substantial" endangerment under RCRA even if it has lasted for 20 years and the rate of contamination has slowed, or remained the same, over the last decade. K-7 Enterprises v. Jester, E.D. Texas, No. 06-57, 6/20/07. In K-7, property owners brought a RCRA citizen suit against current and former owners of a nearby convenience store, which allegedly had leaking underground gasoline tanks. The defendants, current and former owners and operators of the c-store and its piping systems (collectively, "K-7"), raised several bases for their motion for summary judgment, all of which failed. First, the court refused to find that it should abstain from exercising jurisdiction in favor of ongoing state lawsuits brought by the same plaintiffs. Plaintiffs had filed a lawsuit in state court, seeking declaratory and monetary relief against K-7 under a variety of state law claims, including negligence, trespass and nuisance. Separately, plaintiffs sued the state for failing to order defendants to conduct a corrective action. Because RCRA allows distinctive injunctive relief

against defendants, the court declined to abstain from exercising federal jurisdiction. Defendants' argument that the contamination was neither imminent nor substantial also failed. The court allowed plaintiffs' case to proceed even though the contamination could date from 1987 or before; contaminant levels had remained the same or were declining; groundwater was not used for drinking water; and contaminants were moving very slowly. The court found imminent and substantial endangerment because the contaminants were above recommended state levels. The court also found that RCRA's liability, that encompasses anyone who "contributed" to the contamination, includes any party exercising "some form of control" over the leaking tanks or related equipment. Having denied summary judgment, the case may now proceed to trial.

695. The U.S. District Court for the District of Idaho held that claims that the federal government's cleanup activities were negligently performed were insufficiently related to the government's claim for cost recovery and did not have to be heard as part of the government's cost recovery lawsuit. United States v. Placer Mining Corp., 2007 U.S. Dist. LEXIS 39179 (D. Idaho May 30, 2007). The federal government sued Placer Mining Corp. ("Placer") in 2004, seeking response costs relating to Placer's alleged discharge of contaminated water onto the site. In response to the government's suit, Placer sought to file a counterclaim for negligence under the Federal Tort Claims Act ("FTCA"), asserting that the government engaged in negligent cleanup activities including: negligent construction of a structure, removal of significant amounts of valuable material, causing cave-ins and destroying mine portals, and constructing barriers which excluded Placer from property it owned. The issue arising before the court was whether the FTCA counterclaim was compulsory, in which case no notice of the claim is required prior to proceeding to federal court, or permissive, in which case Placer should have filed a notice of tort claim with the federal agency prior to proceeding before the federal court. The court held that the counterclaim was not compulsory because the factual basis for the counterclaim concerns events which primarily occurred after the original complaint was filed. The court found that there was no "logical relationship" between the facts forming the basis of the Section 107 claim and the facts forming the basis of the negligence counterclaim. Therefore, Placer's request to amend to allow a counterclaim under the FTCA was denied.

Intervention Under CERCLA

696. CERCLA Section 113(f)(2) provides that PRPs who settle with the government in an administrative or a judicially approved settlement receive "contribution protection" as a means of encouraging settlement. This protection allows settling PRPs to insulate themselves from future contribution actions relating to the matters addressed in the settlement.[4] Non-settling PRPs continue to face exposure to cost-recovery or contribution actions by settling parties,[5] in addition to potential joint and several liability for past and future costs of cleanup.[6]

697. Non-settling PRPs have often sought to intervene in the approval of a consent decree in order to retain their ability to seek contribution from the settling parties and to ensure that settling parties absorb a fair share of the cleanup costs.

698. Section 113(i) of CERCLA provides "any person" with the right to intervene in "any action commenced" under CERCLA.[7] However, intervention is contingent on meeting the four-part test that normally governs intervention under Federal Rule of Civil Procedure ("FRCP") 24(a)(2):[8] 1) a timely motion; 2) an interest relating to the action; 3) impairment of the party's ability to protect its interest; and 4) a showing that the existing parties to the action do not adequately represent the party's interest.[9] Where non-settling PRPs have attempted to intervene in approval of consent decrees under CERCLA, courts have focused on whether the party adequately asserts a protectable interest and whether denying intervention will impede that interest.

The Court's Decision

699. In Exxon Mobil, the plaintiff sought to recover response costs expended to remediate contamination at the Beede Waste Oil Superfund Site in Plaistow, New Hampshire ("Site"). Prior to filing suit, EPA ranked the PRPs at the Site according to the activities that had resulted in contamination at the Site.

700. In January 2007, plaintiffs sued Brodie Mountain Ski Area, Inc. ("Brodie"), whom EPA designated as the second highest contributing PRP, along with other highly-ranked PRPs. Four months later, the plaintiffs lodged a consent decree with the district court for approval. Under the proposed consent decree, EPA was settling with a number of PRPs that it had ranked as de minimus ("Settling PRPs").

701. 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.

702. 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]

703. 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]

704. 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]

Decision Stands at Odds with the Majority Rule on Intervention

705. A majority of courts have held that non-settling PRPs may not intervene in consent decrees between the government and settling PRPs. These decisions have rejected intervention based on the finding that a non-settling PRP's contribution interest is too "speculative" or "contingent" to satisfy the protectable interest criterion for intervention under both FRCP 24(a)(2) and Section 113(i) of CERCLA. For example, in State of Arizona v. Motorola, the court held that the non-settling PRPs lacked "a substantial and legally protectable interest," and that their contingent contribution right was "[a]t best ... a remote economic interest that is insufficient to support intervention."[19] These decisions have also rejected motions to intervene based on the impact that intervention would have on the settlement scheme in CERCLA. Drawing on principles of statutory construction, these courts have found conflict between a PRP's right to intervene under Section 113(i) and the contribution protection Section 113(f)(2) affords to settling PRPs.[20] Relying on legislative history, courts have ordinarily resolved this tension in favor of "those who live in close proximity to hazardous waste sites"[21]—not non-settling PRPs who seek to "undermine the consent decree and protect their contribution interests."[22]

706. In contrast, the ExxonMobil court eschewed any consideration of CERCLA's underlying policy. While this approach reflects the minority view,[23] the ExxonMobil decision was based on similar reasoning from Union Electric,[24] where the Eighth Circuit Court of Appeals criticized the majority of courts for relying on legislative history and policy concerns, which it viewed as "inappropriate for courts to consider in determining whether to allow intervention as of right under either [FRCP 24(a)] or the CERCLA provision."[25] The Circuit Court had little difficulty finding that a prospective intervenor had a significant, legally protectable interest to reduce its financial liability and preserve contribution claims against all PRPs.[26]

Conclusion

707. While taking the minority approach, the court's decision in ExxonMobil tracks the Eighth Circuit's decision in Union Electric and a few district courts that have followed the logic of that decision. The law on this issue remains unclear, which may well encourage some parties to seek to intervene in CERCLA consent decree proceedings.

Analysis

708. Because a writ of incidental mandamus may not necessarily be as extraordinary a remedy as a writ of quo Warranto might be, the five factors that cabin your power to grant the writs are presumably just as incidental:

1. "The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires."; Writ of quo Warranto; TRUE

2. "The petitioner or defendants will be damaged or prejudiced in a way not correctable on appeal." Writ of b ™ u £ „„ jf- **ERROR;** TRUE

3. "The circuit court's order is clearly erroneous as a matter of law." Writ of Right; TRUE

4. "The circuit court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules." Writ of INCIDENTAL MANDAMUS; TRUE

5. "The circuit court's order raises new and important problems, or issues of law of first impression." Writ of DETINUE SUR BAILMENT; TRUE

Bauman v. U.S. Dist. Court, 557 F.2d 650, 654–55 (9th Cir. 1977).

The third factor is a necessary condition for granting a writ of mandamus.

The apparently uncontested fact of fraud upon the court with malice and oppression in this case should be reason enough to grant the quo Warranto and incidental mandamus.

Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1551 (9th Cir. 1994). But "all five factors need not be satisfied at once." Valenzuela-Gonzalez v. U.S. Dist. Court, 915 F.2d 1276, 1279 (9th Cir. 1990).

709. Since the appeals court clearly erred, you may determine whether the four additional factors "in the mandamus calculus point in favor of granting the writ." Executive Software, 24 F.3d at 1551.

710. Petitioner alleges that EPA has violated the most fundamental and cherished provisions of U.S. property law concerning mineral rights and miner's rights, that the EPA has interfered with lawful mining operations by false pretenses and illegitimate animus, deceit and fraud upon the court, all to the violation of the covenants of preservation and perfection granted by warrants of patent title from the President of the United States, and in violation of the covenants of rights,

privileges, and immunities provided therein. Petitioner and defendants are not parties to the fraudulent consent decree, so no direct appeal is available.
prima facie usurpation; see Marbury v. Madison

711. Here, Petitioner has raised the constitutional state and federal law protections and of unconscionability, so you must determine which state and federal law applies.
712. California certainly has an interest in protecting the thousands of citizens in the California subclass of this class action from unconscionable environmental laws violating private property rights and other civil rights retained by the people. Yet the attorney general is moot.
713. The United States certainly has an interest in protecting the thousands of citizens in the United States of this class action from unconscionable environmental laws violating private property rights and other civil rights retained by the people, but the U.S. attorney is moot.
714. Because of § 3729. False claims, *qui tam* and 811, 1085, and 1160 Code of Civil Procedure questions, and the likelihood that this matter could go on indefinitely, if only for fraudulent *delectus persona* and *perfect title,* the Court should grant quo Warranto in this case.

FEDERAL QUESTION?

715. Dogma is the established belief or doctrine held by a religion, ideology or any kind of organization: it is authoritative and not to be disputed, doubted or diverged from. The term derives from Greek δόγμα "that which seems to one, opinion or belief" and that from δοκέω (dokeo), "to think, to suppose, to imagine". The plural is either dogmas or dogmata , from Greek δόγματα.
At the core of the dogma concept is absolutism, infallibility, irrefutability, unquestioned acceptance (among adherents) and anti-skepticism. These concepts typically invoke criticism from moderate and modulated conceptual approaches, and thus "dogma" is often colloquially used to indicate a doctrine which has the problem of claiming absolute truth, when other concepts may be superior.
Wikipedia
716. Petitioners submit that the doctrine of “environmentalism” is in fact a government sponsored religion in violation of the constitution of the United States.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

717. If, then, **the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.**

718. **Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.**

719. **This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.**

720. **That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.**

721. **The judicial power of the United States is extended to all cases arising under the Constitution.**

722. **Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?**

This is too extravagant to be maintained.

723. **In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?**

724. **There are many other parts of the Constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?**

725. **The Constitution declares that "no bill of attainder or ex post facto law shall be passed."**

726. **If, however, such a bill should be passed and a person should be prosecuted under it, must the Court condemn to death those victims whom the Constitution endeavours to preserve?**

727. **"No person,' says the Constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."**

728. **Here. the language of the Constitution is addressed especially to the Courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the Legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?**

729. **From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the Legislature.**

730. **Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!**

731. **The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words:**

732. **"I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all**

the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

733. **Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?**

If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime.

734. **It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.**

735. **Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.**

736. **"Congress shall make no law respecting an establishment of religion ..."**

737. **The rule must be discharged.**

writ of unspeakable errors, divide et impera! **RELIEF: UNCONSTITUTIONAL LAW IN VIOLATIONS OF FIRST AND TENTH AMENDMENT CIVIL RIGHTS PROTECTION. § 3729. FALSE CLAIMS; MISTAKE! PROHIBITION!**

Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof. quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

June 3, 2009 Signature:_____

/s/ John F. Hutchens, *pro se; sui juris;* Tenant in

-Chief, Warden of the Forest & Stannaries

MORE DEFINITE STATEMENT FOR INJUNCTIVE & MANDAMUS RELIEF

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

(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) This is a Civil Action founded against civil rights and property rights violation by a regulation of an executive department; and contract, express or implied, with the government;
(4) This is a Civil Action with actions for damages, liquidated or unliquidated, pertaining to those matters of this case that are sounding in tort. The words 'sounding in tort' are in terms referable to these four classes of cases, and specifically do not imply that any civil rights violations, whether unconstitutional violations, congressional violations, or violations of any rights by regulation of an executive department; or violation of any rights by any contract, expressed or implied, with the United States Government, whether or not sounding in tort, are outside the jurisdiction of this Court. Accordingly, the fact that plaintiff has presented an administrative tort claim to the EPA is relevant to suit in this court. Accordingly, the fact that plaintiff has presented a Takings Claim in the Court of Federal Claims is relevant to suit in this court.
Plaintiff exhausted all administrative remedies. TRUE!
Plaintiff filed an administrative claim (Standard form 95) and was denied. TRUE!
Plaintiff notified agency inspector general of allegations of fraud, malice, deceit. TRUE!
Plaintiff filed tort claims as counter-claims in district court on motions to reopen.
COURT ordered motions stricken as improperly captioned. APPEALED
Plaintiffs filed emergency Appeals Court review for reckless negligent endangerment, mandamus denied, other motions moot. Original judicial remedy: case closed…
ABSOLUTE REMEDIES, CIVIL ACTION; TAKINGS: COURT OF FEDERAL CLAIMS
ABSOLUTE REMEDIES, CIVIL ACTION; TORTS: NINTH CIRCUIT COURT OF APPEALS.
Declarations; the taking of private property for the public benefit requiring the payment of just compensation; *quo Avarranto*
Constitutionality; **NOT**; *peremptory mandamus*
Law of Congress, illegitimate purpose and intent; void for vagueness; *illegitimate animus,* adjudication on the merits. *writ of error coram nobis.* **CONSTITUTIONAL CHALLENGE!**
Contract, express or implied, with the government; **YES**, *writs of prohibition, equitable estoppel.*

Regulation of an executive department; *writ quo Warranto, incidental & peremptory mandamus*
Actions for damages, liquidated or unliquidated;
MONEY MANDATED BY THE CONSTITUTION
Actions for Errors; *coram nobis*; errors of impunity and miscarriage of justice, manifest injustice;
Actions for Writs; equitable estoppel; prohibition; quo Warranto; peremptory mandamus;
The taking of private property for the public benefit requiring the payment of just compensation;
WRIT OF RIGHT! RCRA CITIZEN SUIT!
False Claims; Conspiracy; Deprivation of Rights under color of law; Federally Protected Rightsl
Trespassing; Usurpation, Despotism and Tyranny; reckless negligent endangerment;
Kidnapping of a corporation; joint repository of hazardous waste on private property.
Taking of private property for the public benefit requiring the payment of just compensation.
CONCURRENT JURISDICTIONS, NINTH CIRCUIT: THREE JUDGE COURT;
The Takings Clause is a money-mandating provision of the Constitution
Preseault v. ICC, 494 U.S. 1, 11-12 (1990). 9/
Specifically, the Court of Federal Claims does not have jurisdiction over suits against the Government for discrimination, whether stated as a violation of equal protection, due process, or otherwise. Mullenberg v. United States, 857 F.2d 770, 773 (Fed.Cir. 1988). The court lacks jurisdiction over claims for fraud, Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997), nor does the court have jurisdiction over alleged violations of criminal statutes, Campbell v. United States, 229 Ct. Cl. 706, 707 (1981).
The Court of Federal Claims has no power to adjudicate torts, Shearin v. United States, 992 F.2d 1195, 1197 (Fed. Cir. 1993); Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 614, 372 F.2d 1002, 1013 (1967), whether brought under the FTCA or otherwise.
The Tucker Act specifically excludes tort claims from the jurisdiction of the [Federal Claims] court, 28 U.S.C.§ 1491(a)(1), and the FTCA vests exclusive jurisdiction over tort actions in the district courts, id. § 1346(b). Accordingly, the fact that plaintiff has presented an administrative tort claim to the EPA is relevant to his suit in this court.

The question was first considered in Langford v. United States, 101 U.S. 341 , 25 L. ed. 1010, under the statute above cited, giving the court of claims power to hear and determine 'all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.' The suit was brought to recover for the use and occupation of certain lands and buildings of which possession had been forcibly taken by agents of the government, against the will of Langford, who claimed title to the lands. It was held that the act of the United States in taking and holding possession was an unequivocal tort, and a distinction was drawn between such a case and one where the government takes for public use lands to which it asserts no claim of title, but admits the ownership to be private or individual, in which class there arises an implied obligation to pay the owner its just value. 'It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property.' It was held that the limitation of the act to cases of contract, express or implied, 'was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.' [182 U.S. 222, 227] The case was rested largely upon that of Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453, in which an army contractor who had agreed to furnish certain oats at a fixed price had, after the delivery of part of the amount, been released from the obligation to deliver the balance. He was, however, carried before the military authority, and, influenced by threats, agreed to deliver, and did deliver, the full quantity of oats specified in the contract. He brought suit for the difference between the contract price and the market price of the oats at the time of delivery. It was said that 'if such pressure was brought to bear upon him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable,' but that it was not within the court of claims act.

Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract.' 'An action in the nature of assumpsit for [182 U.S. 222, 228] the use and occupation of real estate will never lie where there has been no relation of contract between

the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser.' No distinction was noticed between the phraseology of the original act and the Tucker act, though it seems to have been assumed that the case was one for the recovery of 'damages' sounding in tort.

There are no expressed or implied promises from the EPA to Arman, Hutchens, or IMMI.

The EPA never had permission from Ted Arman or IMMI, the District Court ordered it.

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

VOID AS UNCONSTITUTIONAL AN UNNECESSARY AND IMPROPER LAW

The rule must be discharged.

writ of unspeakable errors, divide et impera! **RELIEF: UNCONSTITUTIONAL LAW IN VIOLATIONS OF FIRST, FOURTH, AND TENTH AMENDMENT PROTECTIONS.**

§ 3729. FALSE CLAIMS; MISTAKE! PROHIBITION! EQUITABLE ESTOPPEL!

Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof. quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

COMPLAINT OF MANIFEST INJUSTICE, TYRANNY AND DESPOTISM

Extent of the Taking

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

739. However, it has also recognized the possibility of compensable stigmatic injuries that extend beyond the tangible aspects of a physical taking. In Hendler v. United States, it held that "if fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compen-

sation." Hendler v. United States, 38 Fed. Cl. 611, 625 (1995) (quoting United States v. 760.807 Acres of Land, 731 F.2d 1443, 1447 (9th Cir. 1984)), aff'd 175 F.3d 1374 (Fed. Cir. 1999); see also Shelden v. United States, 34 Fed. Cl. 355, 373 (1995) (reducing post-taking fair market value of property due to stigma associated with earthquake damage).

740. Iron Mountain Mines contend that the physical taking of the Brick Flat Pit produced a compensable impact on the entire Property's value. Petitioners claim that the remedial action produced two linked effects flowing from the EPA's physical occupation of the Brick Flat Pit. The first effect was the physical taking of the Brick Flat Pit itself, which continues to prevent Iron Mountain Mines, Inc. et al from commercially exploiting the Brick Flat Pit. The second effect was the diminution of the Property's overall market value due to the stigma associated with possible liability to any buyer for the CERCLA action. It should be noted that this "stigma" amounts to considerably more than a mental attitude on the part of buyers. It is based upon a very real possibility that any commercial activity on the property might lead to regulatory prohibition or real physical danger. While T.W. Arman and John Hutchens are not convinced that in fact the Property is unusable, it seems clear that a reasonably prudent buyer would consider that quite probable, and be unwilling to purchase the property at any positive price, or share in the stigma of exterminating the salmon and trout.

Iron Mountain Mines, Inc. has expert testimony stating that, "the mere existence of this huge quantity of waste on the property, even in a constructed repository, creates too great a potential [CERCLA] liability for anyone to consider purchasing the land."

741. In summary, Iron Mountain Mines experts in the valuation of contaminated property argue that anyone buying the Property before the EPA completes the removal action and removes the sludge from the Open Pit would potentially bear liability under CERCLA for costs incurred in the removal action.

742. Consequently, a reasonable purchaser would discount the purchase price of the Property by at least the amount of the liability assumed in the post-removal action condition of the Property. Similarly, Iron Mountain Mines will present evidence that once the presence of hazardous waste has stigmatized property, a reasonable purchaser of said property would discount the sales price for

the costs of removal of all of the offending material currently disposed in the Brick Flat Pit. Iron Mountain Mines noted that the stigma flows from the possibility of leakage of contaminants from the waste in the Open Pit and the potential "consequent liability placed upon Iron Mountain Mines, Inc. and T.W. Arman under CERCLA."

743. According to Iron Mountain Mines, it follows that just compensation should be the difference between the Property's pre-taking fair market value and the sum resulting from the cost of the removal of the hazardous waste in the Open Pit added to the CERCLA liability incurred.

744. The stigma associated with general contamination and burden of infamy associated with natural resource damage and fish extinction dramatically affects the entire Property's value. Hendler and Shelden permit recovery for diminution in value due to the general fear of a hazard caused by a taking, assuming that the hazard's affect on marketability is measurable. See Hendler, 38 Fed. Cl. at 625 (quoting United States v. 760.807 Acres of Land, 731 F.2d 1443, 1447 (9th Cir. 1984)

745. ("[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation.")); see Shelden, 34 Fed. Cl. at 373. It is generally recognized that general market perception of contamination on a future development site results in the depreciation of property value.

746. Iron Mountain Mines argument is that the Open Pit's taking negatively impacts the entire Property's value on the basis of the evidence.

747. In analyzing this impact, the' computations regarding the Property's diminution in value as a result of the stigma associated with hazardous waste and fish extinction.

The Removal Action As A Special Benefit

748. When only a portion of private property is physically taken, the amount of compensation owed for the property of Iron Mountain Mines must be reduced by any special benefits from the government action accruing to the remainder of the property. Hendler, 38 Fed. Cl. at 1380. Special benefits are benefits which inure to the particular property suffering the taking, rather than to the general public. The United States placed a statutory lien for "unrecovered past response costs" and

stated that the removal action conferred a special benefit upon the Property which we should deduct from any ultimate damages valuation, and inferred that it was justified as a "windfall" lien.

749. Such arguments, however, lead nowhere. Even if the Court accepts the government's argument that the removal action benefits the Property's value, the United States will be unable to include any evidence regarding the amount by which such benefit increases the Property's value. Thus, no offset of compensable damages for the benefits allegedly conferred by the removal action are possible.

750. Having resolved these issues, let us now turn to the determination of the Property's fair market value as a function of calculating the just compensation owed to Iron Mountain Mines.

751. Just compensation for a taking under the Fifth Amendment requires that a deprived owner be put "in the same position monetarily as he would have occupied if his property had not been taken." Almota Farmers, 409 U.S. at 474 (internal citations omitted). The necessary corollary to this basic damages principle is that the Court may not place a deprived owner in a better position by a Fifth Amendment taking recovery than if the taking at issue had not occurred.

The fair market value of the highest and best use of the Property before and after the action.

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

753. Iron Mountain Mines calculates the fair market value of mining on the Property prior to the taking by determining the present value of the future income stream of minerals that could have mined on the Property absent the taking over a twenty year period. This methodology required an

estimate of the annual production of minerals on the Property to determine the present value of the future royalty income stream.

754. Iron Mountain Mines, Inc., T.W. Arman and John Hutchens assume that solution mining would have averaged annual production of 500,000 tons of mineral products and a royalty of $100,000,000 (million) per year. Multiplying projected annual production by this royalty rate, Iron Mountain Mines, Inc. and T.W. Arman projected annual royalties from January 1989 until January 2009 of $2,000,000,000.

755. Iron Mountain Mines therefore believe the present value of lost mining opportunity on the Property as of January 1, 1989, to the present at $2,000,000,000.

756. It is well established that "comparable sales are considered by the courts to be the best evidence of fair market value, and thus preferable to other forms of valuation." Stearns Co., Ltd. v. United States, 53 Fed. Cl. 446, 458 (2002) (citing United States v. 50 Acres of Land, 469 U.S. 24 (1984)); Kirby Forest Indus. Inc. v. United States, 467 U.S. 1 (1984). Other valuation methods may prove useful, but a comparable sales methodology is a generally superior indicator of value if an active real estate market existed in the vicinity of the subject property prior to the taking. See Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 35 (1999) (citing Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, affirmed 926 F.2d 1169 (Fed. Cir.), cert. denied, 502 U.S. 952 (1991)).

757. Here, Iron Mountain Mines valued the Property's worth for mining since no comparable comparison was or is available, by analyzing the Property's pre-taking future income stream.

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

Circuit approved of the use of future income stream analysis, as support for the relevance of future income stream analysis in the present case. See 962 F.2d 1169 (Fed. Cir. 1991).

759. Deprived owner Iron Mountain Mines, Inc. is entitled to interest on just compensation awarded pursuant to Fifth Amendment takings. Stearns Co., Ltd, v. United States, 53 Fed. Cl. 446, 466 (2002) (citing Kirby Forest Indus. v. United States, 467 U.S. 1 (1984)). Thus, an award to Iron Mountain Mines, with compounded prejudgment interest from the date of the taking until the date of the judgment is proper. See Id. (citing United States v. Thayer-West Point Hotel Co., 329 U.S. 585, 588 (1947); Miller v. United States, 223 Ct. Cl. 352, 360 (1980). We date the taking as having actually commenced on January 1st, 1989, as the first day of the production for the solution mining plan, for the calculation of pre-judgment interest. Iron Mountain Mines also uses this date because it marks the Courts approval of the physical intrusion from which all damages in this matter arise. Interest computation will be based upon the Contracts Disputes Act, 41 U.S.C. §§ 601-13 (1982). See Jones v. United States, 3 Cl. Ct. 4, 7 (1983). Iron Mountain Mines further seeks awards of attorney fees and costs incurred as a result of litigation to Iron Mountain Mines, Inc. T.W. Arman and John F. Hutchens under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U.S.C. § 4601 et seq. (1995 & 2002 Supp.).

760. Iron Mountain Mines, Inc., T.W. Arman and John F. Hutchens also seek compensation for stigmatic injuries. Iron Mountain Mines, Inc. et al have been unfairly blamed for the endangerment and possible extinction of salmon and trout in the Sacramento River, a crime of infamy if ever there was one, not withstanding that there is no evidence that any fish have been killed in the affected reaches of the Sacramento River since at least 1969, seven years before T.W. Arman. purchased the property, or that T.W. Arman and Iron Mountain Mines, Inc. did not actively mine the massive sulfide ores found to be the source of the minerals passively migrating from the property and alleged to pose an "imminent and substantial endangerment" to the environment, and in disregard of contributory factors, particularly the United States construction of dams that destroyed the habitat of the salmon and trout necessary for their reproduction, and without consideration of other factors affecting the fishes demise, such as urban run-off, untreated sewage, ranching, farming, global warming, and other forms of habitat destruction.

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

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

763. For these reasons Iron Mountain Mines, Inc. et al dispute the United States lawful authority to conduct these CERCLA remedial actions (removal) and demand the return of the property and restoration of rights, privileges, and immunities of patent title to the possession and enjoyment of T.W. Arman and John F. Hutchens.

764. Because the United States has no actual justification for its actions, and the only remedy found to be fully protective of human health and the environment is to finish the mining begun 150 years ago, which is what Iron Mountain Mines, Inc. was doing before the EPA interfered, the EPA should be found liable for the taking of private property for the public benefit requiring the payment of just compensation under the 5th amendment of the constitution.

765. T.W. Arman and Iron Mountain Mines, Inc. used "due care" in the purchase of the property, because copper, zinc, and cadmium were not listed as "hazardous substances" under the relevant provisions of the Clean Water Act (CWA) in 1976 when the property was purchased

CONCLUSION of the extent of the TAKINGS

Iron Mountain Mines, Inc., T.W. Arman and John Hutchens claim that the EPA's remedial (removal) actions constitute a taking of the Iron Mountain Mines, Inc. property warranting just compensation to Iron Mountain Mines, Inc. et al under the Fifth Amendment of the constitution of the United States for a partial takings of private property with actual damages of lost mining opportunities plus stigmatic injuries and property and incidental damages of $7,074,500,000 (billion). We therefore seek an award to Iron Mountain Mines, Inc. et al of $7,074,500,000 (billion) in just compensation, with detinue sur bailment, reversion, plus interest, attorney's fees, and costs. In the alternative that the United States actions are a condemnation that will prevent the lawful mining of Iron Mountain Mines, , T.W. Arman and John F. Hutchens seek an award to Iron Mountain Mines, Inc. et al for the complete taking of private property for the public benefit requiring the payment of $18,000,000,000 (billion) in just compensation.

Plaintiff's "Two Miners" submit that plaintiff's mutual interests are undivided interests.

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

Demand for injunctive relief, concurrent jurisdictions, § 2680. Exceptions!

IMMINENT HAZARD AND SUBSTANTIAL ENDANGERMENT!

FRAUDULENT STIGMATIC INJURIES!

FRAUD UPON THE COURT!

FALSE CLAIMS!

ERRORS!

ABUSE OF DISCRETION!

TORT CLAIMS!

FRAUD! MALICE! DESPOTISM AND TYRANNY!

CLASS ACTIONS! REOPENS AND JOINDERS! INTERVENTIONS! REVIEWS!

VOID FOR VAGUENESS! UNCONSTITUTIONAL LEGISLATION!

766. Writs of: manifest injustice; 10th Amendment repudiation; equitable estoppel.

Knowingly reckless disregard of the truth, deliberate ignorance of actual information; trespass: Praecipe quod reddat & detinue sur bailment; subpoena ad testificandum; subpoena duces tecum; impunity; miscarriage of justice; prohibition; illegitimate animus;

767. Differing court interpretations of a statute "is evidence that the statute is ambiguous and unclear." U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

768. Courts frequently interpret an ambiguous contract term against the interests of the party who prepared the contract and created the ambiguity. This is common in cases of adhesion contracts and insurance contracts. A drafter of a document should not benefit at the expense of an innocent party because the drafter was careless in drafting the agreement.

769. In Constitutional Law, statutes that contain ambiguous language are void for vagueness. The language of such laws is considered so obscure and uncertain that a reasonable person cannot determine from a reading what the law purports to command or prohibit. This statutory ambiguity deprives a person of the notice requirement of Due Process of Law, and, therefore, renders the statute unconstitutional.

West's Encyclopedia of American Law, edition 2.

770. CERCLA still has no preamble, and as applied in this case undermines RCRA, CWA, CAA, NEPA, EPCRA, NCP, and violates the petitioners and defendant's constitutional protections, due process, equal protection, and is a negligently arbitrary and capricious imminent and substantial endangerment to the innocent landowner, miners, the public, and environment.

Writ of *equitable estoppel*;

771. The EPA is required to determine liability based upon applicable law. The doctrine of equitable estoppel provides that in certain cases, the EPA may be estopped from asserting liability based upon actions taken by the EPA in the reliance of which leads to harm or "detriment."

772. The doctrine of equitable estoppel will be applied against a governmental agency when application of estoppel is necessary to prevent manifest injustice.

1. Elements of *equitable estoppel*

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

(2) The party claiming estoppel had a right to believe it was so intended and intentional; TRUE
(33 counter-claims with malice, fraud, oppression, deceit, negligent endangerment)
(3) Ignorant of the true facts; conflict of interest, libel and slander, infamy, stigmatic injuries, concealment, deliberate ignorance, errors of impunity, miscarriage of justice; TRUE
(4) The party claiming estoppel suffered detrimental reliance. TRUE!
(25 years of invasion and occupation, taking private property requiring just compensation, civil rights violations of equal protection and due process, tyranny and despotism, false claims and fraud upon the court, unnecessary negligent endangerment.
2. Detrimental Reliance
Detrimental reliance is present where the EPA's action results in an increased liability. TRUE
3. Application of the Doctrine of Equitable Estoppel
The EPA, as an administrative agency, does not have the legal authority to interpret a statute in such a way as to change its meaning or effect. (Or to alter prior statutes!)
Petition to strike and release liens.
Pursuant to 1107 of the Code, you may grant such protective relief *ex parte*
Writ of certiorari:
773. You should consider whether a government agency may abrogate the laws of the United States and the State of California concerning mineral rights and patent title by merely posting a revised and unattainable environmental law, and then by its actions of despotism and tyranny fail to protect, preserve, or perfect the mine property during its fraudulently obtained receivership, funded by fraudulent trusts and created by false claims and misrepresentations, discrimination, and coercion of the owners and previous owners, with breach of duty, negligently fraudulent violation of environmental laws with the impunity of judicial swaddling and judicial deference, and resulting in the owners and the public's negligent endangerment, with ulterior government motives; to hold a lien against the property for same, as it operates at a loss, and hold the property as they do against the true and rightful owner, even to his entry, with illegitimate animus, and by fraud upon the court.
774. You should as well consider whether the government agency, swaddled in judicial deference, engaged in despotism and tyranny to damage these persons or the general welfare, infringed and

usurped the corporate franchise, slandered and libeled the petitioners and the true and rightful owners, defamed their honor, poisoned their reputations, invaded and occupied their private property without justification and without compensation, and that those who pretended to claim such rights in the water or lands against the true and rightful owner that is Iron Mountain Mines, Inc. make such claims in violation of the constitution of California. When Iron Mountain Mines concluded underground mining in 1954, the copper cementation process continued as it had since copper mining began in 1896. Copper cementation had been practiced almost continuously until the EPA forced T.W. Arman to retire. Copper cementation has been known for over 2000 years and has been practiced on an industrial scale for over 1000 years. You should further consider whether agency actions serve to undermine and abrogate principles of liberty and justice and principles of our democracy and republican form of government, and endanger the general welfare.

Facts

775. Petitioner contracted for mineral rights and a mining lease for the sludge with T.W. Arman and Iron Mountain Mines, Inc. Petitioner formed Artesian Mineral Development & Consolidated Sludge, Inc. which acquired those rights, and which continues to prepare for the resumption of mining using natural biomining (in situ) technologies that have been practiced industrially by the Chinese for over 1000 years, and in Spain for at least 250. These processes, with modern precipitation and solvent extraction techniques and with water recycling, and with the advent of markets for iron oxy-hydroxides, ferro-fluids and spinel ferrites and other natural and synthetic nano-catalysts, zinc and aluminum battery technologies, photo-voltaics, superconductors, etc. not to mention the abundance of precious metals, has made the value of Iron Mountain Mines, Inc. 20 million tons of proven ore reserves a matter of strategic importance and under the circumstances of the emergency situation and imminent and substantial endangerment, and the economic crisis, and with the facts and information showing the fraudulent settlement, is a valid question for this court.

776. As an EPA Superfund site, 500,000 tons of solid waste from treatment of acid mine drainage has unnecessarily accumulated. These wastes were being recovered and recycled by the mine owner until the EPA implemented its sludge treatment remedy, the EPA knew that recycling could be done profitably, but intentionally prevented the recycling and forced construction of an entirely

unnecessary $50 million dam and sludge disposal cell where these wastes accumulate at a rate of 30–40 thousand tons annually. The court and the petitioners were deceived and misled by the government agency, with fraud and with malice and deceit, and with despotism and tyranny in violation of petitioners civil rights by militant libertarian environmentalists and reactionaries in the government agency.

777. The concealment of known and viable technologies from the owner, the failure to assist in the implementation of best available technologies to accomplish this recycling, the interference with the owner and the responsible parties efforts facilitating the proper remedy, the conceit of the government to preserve Iron Mountain Mines, Inc. in a state of calamity, with clouded title by statutory lien, and infamy of public persona, with dubious claims of public and natural resource injury, and falsified scientific data, and the selection of a remedial action that is not fully protective of human health and the environment when such remedy was known and achievable at less expense, is a travesty of government ulterior motives. That these actions serve to violate the petitioners civil rights, and violate fundamental principles of republican government protection of private property rights, sound the alarm of tyranny throughout the land.

778. The office of Project Manager is authorized by the existing consent decree and statement of work. The true and rightful owner of Iron Mountain Mines, Inc. has assigned this responsibility to the Petitioner.

779. Petitioner is intervener by quo Warranto to the office of Project Manager and of Trustee.

780. Petitioner is intervener by incidental and peremptory mandamus for rents and wages, due process, equal protection, and equal protection of a private attorney general to the private Warden of the Forest, for the perfect jurisdiction of Iron Mountain Mines, Inc., and its properties.

781. After becoming aware of the malice, fraud, oppression, and deceit, discrimination and denial of equal protection and due process, and tyranny and despotism, Petitioners filed a citizen and class action lawsuit in the eastern district court, charging EPA with violations the United States and California Constitution, breach of United States and California environmental and property laws, and violation of California codes and statutes. Those petitions were stricken on Dec. 17, 2008. On Dec. 24, 2008, petitioner filed an instant appeal with the 9th Circuit Court, also seeking emergency re-

view for imminent and substantial endangerment. (That same day, an EPA approved mountain of sludge collapsed into a river in Tennessee.) Petitioner subsequently filed qui tam notice to the court, but the Court failed to intervene or grant the writs, and ruled the pleadings moot on March 23, 2009.

Analysis

782. As an extraordinary remedy, a writ of quo Warranto with incidental and peremptory mandamus may be qualified by the five factors that cabin your power to grant the writs:

1. "The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires."; Writ of quo Warranto; TRUE

2. "The petitioner or defendants will be damaged or prejudiced in a way not correctable on appeal." Writ of unspeakable ERRORS; Stigmatic Injuries: TRUE

3. "The circuit court's order is clearly erroneous as a matter of law." Writ of Right; TRUE The petitioner is entitled to intervention and citizen suit by right.

4. "The circuit court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules." Writ of INCIDENTAL MANDAMUS; TRUE

5. "The circuit court's order raises new and important problems, or issues of law of first impression." Writ of DETINUE SUR BAILMENT; TRUE

Bauman v. U.S. Dist. Court, 557 F.2d 650, 654–55 (9th Cir. 1977).

The third factor is a necessary condition for granting a writ of mandamus.

783. The apparently uncontested fact of fraud upon the court with malice and oppression in this case should be reason enough to grant the quo Warranto and incidental mandamus.

Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1551 (9th Cir. 1994). But "all five factors need not be satisfied at once." Valenzuela-Gonzalez v. U.S. Dist. Court, 915 F.2d 1276, 1279 (9th Cir. 1990). Since the district court clearly erred, you may determine whether the four additional factors "in the mandamus calculus point in favor of granting the writ." Executive Software, 24 F.3d at 1551.

784. Petitioner alleges that the U.S. EPA has violated the most fundamental and cherished principles of U.S. property law concerning safety and security, mineral rights and miner's rights, protec-

tions against invasion and occupation, and that the EPA has interfered with lawful mining operations by false claims and illegitimate animus, fraudulent deceit and fraud upon the court, fraudulent pretenses, and willful and fraudulent misrepresentations, all to the violation of the covenants of preservation and perfection granted by warrants of patent title from the President of the United States. Petitioners are not parties to the fraudulent consent decree, so no direct appeal is available. Petitioner has shown that the EPA treatment of Iron Mountain Mines, Inc. as a superfund site effectively constitutes creation of a federal instrumentality and is therefore properly before the court by writ of quo Warranto.

785. Petitioner has shown that the EPA has violated the petitioners civil rights by denying an innocent landowner defense by false claims of a failure to use "due care" in the property purchase based upon "due care" standards adopted by amendment to the legislation from 1986 to 2002 being applied retroactively as a standard for purchase of real property in 1976. It is not possible for T.W. Arman to have had knowledge in 1976, a priori, of copper, zinc, and cadmium being designated as "hazardous substances" for purposes of the clean water act (CWA) in 1977. This is the EPA's only basis for denial of the innocent landowner defense to the non-settling defendants. Petitioner has further shown that the illegitimate animus of the EPA and its misapplication of these environmental laws have resulted in its unconstitutional application ex post facto, and as a bill of attainder. Petitioner has shown that petitioners have been libeled and slandered by false accusations and of crime of infamy, and have presented facts and information of a substantial nature to be recognized as representatives of a class.

786. Petitioners have shown the necessary conditions for joinder and intervention, meeting all three criteria recognized by the Courts, so petitioner is entitled to intervention of right by Fed.R.Civ.P. 24(a)(2),

787. Petitioners have shown that EPA actions have failed to achieve the legislations goals while at the same time they have served to undermine fundamental principles of republican government and are in violation of civil rights with illegitimate animus.

788. Petitioner has shown that a fundamental failure of government has occurred, that a basic imbalance of powers in contravention of the Constitution of the United States exists, that this imbal-

ance serves to endanger the health, wealth, and prosperity of the citizens of the United States as well as petitioners, and Petitioners have provided a reasonable and logical course of remedy to the governments problems.

789. The courts thus erred in holding that Petitioner was not properly before the courts.

790. These errors reflect fundamental misapplications of law and go to the heart of petitioner's claims. They alone should be sufficient to satisfy the third Bauman factor.

791. Here, Petitioner has raised the alarm to the most fundamental constitutional state and federal law protections of property; of endangerment, raised the alarm of environmental disaster perpetrated by agents and agencies of the federal government acting out of despotism and tyranny; and unconscionability, so you must determine which state and federal law applies.

792. California certainly has an interest in protecting the thousands of citizens in the California subclass of this class action from unconscionable environmental laws violating private property rights and other civil rights retained by the people. Yet the attorney general is moot.

793. The United States certainly has an interest in protecting the thousands of citizens in the United States of this class action from unconscionable environmental laws violating private property rights and other civil rights retained by the people, but the U.S. attorney is moot.

794. Because of § 3729. False claims, with qui tam and 811, 1085, and 1160 Code of Civil Procedure, and the likelihood that this matter could go on indefinitely, the Court should grant quo Warranto with incidental mandamus in this case. The petitioner has further demonstrated a willingness to serve in a capacity consistent with the office and agency, and the factors for creation quo Warranto of such office and agency by writ or letters patents.

795. The circuit court erred in not analyzing U.S. and California law as to whether the EPA actions are both procedurally and substantively unfair and unconscionable.

796. You generally examine the first and second factors together. See Bauman,

557 F.2d at 654 (the second factor "is closely related to the first").

Inc., 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006),

797. The first and second Bauman factors weigh in favor of granting the relief requested. Petitioner "has no other adequate means" of becoming project manager or joining the case, as the EPA

is not communicating with the petitioner or the property owner because of these allegations, and the EPA apparently continues to hold that its actions are appropriate and do not represent a failure or violation on its part, nor is anyone else protecting petitioners interests as a miner and mining joint venturer, or for his and his heirs and successors interests in the assignment, or for ensuring that he and his successors and assigns can continue as the class representative. Bauman, 557 F.2d at 654. This would "prejudice []" Petitioner "in a way not correctable on appeal." Id. (and which is not available anyway).

798. The fifth Bauman factor also favors the relief requested. The district court's order discriminating against an innocent landowner and enforcing reckless negligent endangerment through judicial swaddling and judicial deference to EPA misconduct with malice and oppression "raises new and important problems" addresses "issues of law of first impression." Bauman, 557 F.2d at 655, and raises fundamental constitutional questions.

799. This hopefully is the last time any federal court will have to consider whether the EPA enforcement of environmental laws is being used to intentionally deprive vested property rights by the EPA's pretended protection and preservation with illegitimate animus, to the exclusion of the prior rights of the real parties in interest, and to the exclusion of the properties real protection, preservation, and perfection, all working to the dissipation and degeneration of the general welfare, and in violation of prior rights to complete development of mining property that is unconstitutional and a negligently malicious unnecessary imminent and substantial endangerment, thus deserving immediate resolution.

800. Because all five Bauman factors favor relief, and none militates against it, you should conclude that the balance of factors favors issuing all the writs. The district court's consent decree should be stayed by rule 62(g)(h), and the intervention should be granted with;

CREATION OF THE OFFICE OF THE PRIVATE WARDEN OF THE FOREST;

CREATION OF THE ESSENTIAL PRODUCTS ADMINISTRATION;

REVERSION TO THE OFFICE OF PROJECT MANAGER SHOULD BE GRANTED;

REMISSION OF WAGES AND RENTS SHOULD BE GRANTED;

DETINUE SUR BAILMENT SHOULD BE GRANTED.

THE PETITION TO STRIKE THE STATUTORY LIEN SHOULD BE GRANTED.

THE PETITIONS FOR JOINDER AND INTERVENTION SHOULD BE GRANTED

801. …the terms of a penal statute… must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties… and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Connally v. General Const. Co by Justice Southerland

802. (The court refused to extend the recoupment doctrine to action under the Comprehensive Environmental Response, Compensation and Liability Act for purposes of establishing a waiver of sovereign immunity for mine owners' counter-claim.). United States v. Iron Mountain Mines , 881 F. Supp. 1432, 1445 (E.D. Cal. 1995) (citing opinions in which courts held that the United States did not waive immunity for purposes of regulatory acts under CERCLA, and rejecting those opinions).Claims that the United States was contributorily negligent, caused harm at the site, or assumed the risk of harm at the site have been stricken as, in reality, alleging third party defenses that are not within the terms of §107(b). United States v. Kramer, but see United States v. Iron Mountain Mines, Inc., 881 F.Supp. 1432 (ED Cal 1995) (declining to follow cases holding that EPA has immunity for regulatory or remedial acts under CERCLA and suggesting defendant has good claim in contribution if government fits within the four categories of liable parties.)

803. The court of appeals agreed with a district court decision that arranger liability should not apply to "a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue." Id. at 22a (quoting United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

804. The Acushnet River burden of proof allocation was ignored by the District Court for the Eastern District of California in United States v. Iron Mountain Mines, Inc., even though the court cited Acushnet River as positive authority. In Iron Mountain Mines, permits existed for some but not all of the metal mining waste. The court held that evidence of 'the mere existence' of non-permitted releases 'is sufficient to suggest that non- permitted releases contributed to the harm.

805. Clearly, these decisions establish two divergent bases for proving liability. According to Acushnet River, and to some extent Bunker Hill, a plaintiff must prove not only the existence of the non-permitted releases, but also that the releases contributed to the harm. According to Iron Mountain Mines, on the other hand, a plaintiff need only show the 'mere existence' of the non-permitted releases; that alone is sufficient to suggest contribution. Notably, none of these decisions explains the difference, suggested by the Acushnet River court, between contribution to harm and causation of harm.

806. Appeals were taken to the United States Court of Appeals Ninth Circuit by the petitioner; and after their abuse of discretion and failure to intervene or perform, this complaint with petitions for leave to file writs, briefs, and memorandum are presented asking for emergency review without waiting. Because of the importance of the question and the advantage of a speedy final determination thereof, the writs should be granted. 296 U.S. 571 , 56 S.Ct. 371.

807. The injury to appellees is present and very real, not a mere possibility in the remote future. If no relief is possible …" the injury will become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity." Pierce v. Society of Sisters, 268 U.S. 510, 535 , 536 S., 45 S.Ct. 571, 574, 39 A.L.R. 468

808. See, also, Terrace v. Thompson, 263 U.S. 197, 215 , 216 S., 44 S.Ct. 15; Swift & Co. v. United States, 276 U.S. 311, 326 , 48 S.Ct. 311; Euclid v. Ambler Co., 272 U.S. 365, 386 , 47 S.Ct. 114, 54 A.L.R. 1016; City Bank Co. v. Schnader, 291 U.S. 24, 34 , 54 S.Ct. 259.

73. In United States v. Butler, 56 S. Ct. 312, 297 U.S. 1, 80 L. Ed. 477 (1936), the U.S. Supreme Court invalidated a federal agricultural spending program because a specific congressional power over agricultural production appeared nowhere in the Constitution. According to the Court in Butler, the spending program invaded a right reserved to the states by the Tenth Amendment.

809. Though the Court decided that Butler was consistent with Madison's philosophy of limited federal government, it adopted Hamilton's interpretation of the General Welfare Clause, which gave Congress broad powers to spend federal money. It also established that determination of the general welfare would be left to the discretion of Congress. In its opinion, the Court warned that to challenge a federal expense on the ground that it did not promote the general welfare would "natu-

rally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." The Court then obliquely confided,"[H]ow great is the extent of that range … we need hardly remark." "[D]espite the breadth of the legislative discretion," the Court continued, "our duty to hear and to render judgment remains." The Court then rendered the federal agricultural spending program at issue invalid under the Tenth Amendment.

810. Nowhere in the federal Constitution is Congress given authority to regulate local matters concerning the health, safety, and morality of state residents. Known as police powers, such authority is reserved to the states under the Tenth Amendment. "it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them the powers not expressly delegated to the national government are reserved." hammer v. dagenhart, 247 U.S. 251, 38 S. Ct. 529, 62 L. Ed. 1101

811. "Beneficent aims however great or well directed can never serve in lieu of constitutional power".

812. 'Any person aggrieved by an order issued by the [EPA] in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the [EPA] be modified or set aside in whole or in part. ... The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the [EPA], as the case may be, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (sections 346 and 347 (1254) of Title 28).' CARTER v. CARTER COAL CO., 298 U.S. 238 (1936)

813. (The Court of Appeals should have certified these questions, and granted intervention). 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough. Pennsylvania v. West Virginia, 262 U.S. 553 , 592-595.

814. "The genius of our government provides that, within the sphere of constitutional action, the people….have the power to determine as conditions demand, what services and functions the public welfare requires." Helvering v. Gerhardt, 304 U.S., at 427 (concurring opinion).

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

815. 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.

WHEREFORE;

The United States is liable for violations of civil rights (§ 1343), United States as defendant (§ 1346), injuries under federal law (§ 1357), supplemental jurisdiction (§1367), United States as defendant (§ 1402), venue of cases under chapter 5 of title 3 (§ 1413), creation of remedy (§ 2201), further relief (§ 2202), process and procedure (§ 2361), three-judge court (§ 2284), constitutional question (§ 2403), quiet title action (§ 2409a), federal lien (§ 2410), liability of United States (§ 2674), exceptions (§ 2680), false claims (§ 3729), vindictive actions, illegitimate animus, and an abuse of discretion in despotism and tyranny, and maliciously and negligently arbitrary and capricious acts.

The finding of Probable Cause of May, 2000, the Consent Decree of Dec. 2000, and Partial Summary Judgment of 10-04-2005 denying property owner an innocent land owner defense under 101(35) are void and vacated for fraud upon the Court.

The innocent landowner defense, the third party defense, and the act of God defense are hereby granted to T.W. Arman and Iron Mountain Mines, Inc. The United States is liable as a responsible party for clean-up and recycling costs of the toxic pit disposal with contributory negligence for CERCLA and RCRA hazardous wastes

Judgment against the United States of seven billion, seventy four million, five hundred thousand dollars; ORDER FOR CERTIFICATION OF CLASS ACTION

Inverse condemnation with stigmatic injury, libel and slander, fraudulent *delectus personae*, deliberate ignorance of actual information, reckless disregard of the truth, and takings of private property for the public benefit requiring the payment of just compensation is GRANTED.

The Constitutional questions are certified to the Supreme Court of the United States.

§§ 42 U.S.C 9601 *et seq* (9601-9675) is void for vagueness and therefore is unconstitutional.

LIENS imposed against the properties of Iron Mountain Mines, Inc. are stricken and VOID!

QUO WARRANTO with Incidental and Peremptory MANDAMUS is GRANTED

ABSOLUTE ORDER IS GRANTED: writs of *fieri facia; mutatis mutandis.* CITIZEN SUIT!

FEDERAL QUESTION & EXTRAORDINARY WRIT IN THE NATURE OF MANDAMUS

The authority given to the Supreme Court by the act establishing the judicial system of the United States to issue writs of mandamus to private officers is warranted by the Constitution:

WRIT OF RIGHT! QUO WARRANTO! INCIDENTAL & PEREMPTORY MANDAMUS!

To the extent that the verboseness of the fact based pleadings is intended to expedite the speedy resolution of this matter by presenting the facts of the case in the complaint rather than merely giving notice, plaintiff reaffirms the request and motion for adjudication on the merits.

PETITION FOR WRIT OF ERROR, SPECIAL INJURIES, MALICE AND DECEIT

816. In 1993, on motion of Rhone Polenc Basic Chemicals, the U.S. v. Iron Mountain Mines, Inc. case was bifurcated, and Rhone Polenc went on to defend itself alone, leaving Iron Mountain Mines, Inc. to ride on its coattails and see what the outcome of that litigation would be. The Courts records officially lists the litigation with IMMI as closed since 1993.

817. Hence, here is the evidence of a bonafide termination of litigation.

818. In 1997 the EPA entered into settlement negotiations with Rhone Polenc (successor to Stauffer Chemical, soon to become Aventis Crop Sciences, etc.) after a decision was made by the Court in the bifurcated proceedings.

819. T.W. Arman and Iron Mountain Mines, Inc. were not a party to the decision.

820. E.D. Cal. 1997 "Acquisition of mining companies assets accomplished through two tender offers, which gave acquiring company control and ownership of mining company, and subsequent liquidation and distribution of mining company assets to acquiring company as sole shareholder, constituted "asset purchase" for purposes of determining whether acquiring company was liable for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

821. Company that acquired assets of mining company was mining company corporate successor, and therefore, acquiring companies corporate successor was "responsible party" liable under CERCLA for response costs incurred in connection with investigation and abatement of hazardous substances contamination at mining site; assignment agreements between mining company and acquiring company explicitly provided that acquiring company would assume all mining liabilities."

987 F. Supp. 1233

822. This was in effect the conclusion of the principle litigation, for although Rhone Polenc had presented a credible case that it did not perform any of the mining determined to constitute the "disposal" giving rise to CERCLA liability and the cause of the migration of "hazardous substances" in the acid mine drainage, it was stuck with the successor liability.

823. Therefore the EPA knew since 1997 that the "responsible party" was identified in the person of Rhone Polenc.

824. Hence there was an absence of probable cause.

825. On May 4th, 2000, EPA Regional Judicial Officer Stephen W. Anderson conducted a CERCLA lien proceeding concerning Iron Mountain Mines, Inc properties.

"DETERMINATION OF PROBABLE CAUSE

826. This matter is a proceeding to determine whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect a lien pursuant to Section 107(l)of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on certain property in Shasta County, California owned by Iron Mountain Mine, Inc. (IMMI).

827. The proceeding is being conducted in accordance with EPA's Supplemental Guidance on Federal Superfund Liens dated July 29, 1993 (OSWER Directive No. 9832.12-1a). In accordance

with the Supplemental Guidance, I have been designated to make a written recommendation to the Regional Counsel (the Region official authorized to file liens) as to whether EPA has a reasonable basis to perfect the lien.

828. A telephone conference call was held on April 25, 2000 with the owner and chief executive officer of IMMI, IMMI's attorney, and representatives of EPA, at which each party made oral presentations in support of its position. IMMI also presented facts and arguments in support of its position in a letter dated March 9, 2000 to the Regional Counsel.

829. After considering the lien filing record and presentations made by the parties in the April 25, 2000 conference call, I find that the lien filing record supports the determination that EPA has probable cause, or a reasonable basis to believe that the requisite statutory criteria have been met, to file a CERCLA lien against this property."

CERCLA Lien Provision

830. Section 107(l) of CERCLA, 42 U.S.C. §9607(l), provides that all costs and damages for which a person is liable to the United States in a cost recovery action under CERCLA shall constitute a lien in favor of the United States upon all real property and rights to such property which (1) belong to such person and (2) are subject to or affected by a removal or remedial action. The lien arises at the time costs are first incurred by the United States with respect to a response action under CERCLA or at the time the landowner is provided written notice of potential liability, whichever is later. CERCLA Section 107(l)(2); 42 U.S.C. 9607(l)(2). The lien also applies to all future costs incurred at the site. The lien continues until the liability for the costs or a judgment against the person arising out of such liability is satisfied or becomes unenforceable through operation of the statute of limitations. CERCLA Section 107(l)(2); 42 U.S.C. 9607(l)(2).

Due Process Requirements

831. While CERCLA does not provide for challenges to imposition of a lien under Section 107(l), in accordance with the Supplemental Guidance the Agency affords property owners an opportunity to present evidence and to be heard when it files CERCLA lien notices. The Supplemental Guidance was issued by the Agency in response to the decision in Reardon v. U.S., 947 F.2d 1509 (1st Cir. 1991). Under Reardon, the minimum procedural requirements would be notice of an intention

to file a lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed. Reardon at 1522; In the Matter of Harbucks, Inc., Revere Chemical Site, EPA Docket No. III-93-004L, Probable Cause Determination, November 2, 1994.

Criteria for Review

832. Under the Supplemental Guidance, I am to consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements for perfecting a lien under Section 107(l) of CERCLA have been satisfied. Specific factors for my consideration include:

(1) Was the property owner sent notice by certified mail of potential liability?

(2) Is the property owned by a person who is potentially liable under CERCLA?

(3) Is the property subject to or affected by a removal or remedial action?

(4) Has the United States incurred costs with respect to a response action under CERCLA?

(5) Does the record contain any other information which is sufficient to show that the lien should not be filed?

833. In order to demonstrate that EPA lacks a reasonable basis for perfecting the lien, IMMI must show by a preponderance of the evidence that the property owner is not liable for cleanup or that the property is not subject to or affected by a removal or remedial action.

Factual Background

834. The property at issue in this proceeding consists of approximately thirty-six legal parcels located in Shasta County, California. See parcel maps in the lien filing record, and Attachments 1, 2, and 3 to the Notice of Intent to File Lien. According to IMMI, sulfide ore bodies on the property were mined from 1896 through 1962 by the Mountain Copper Company. IMMI purchased the property from Stauffer Chemical Company, a successor in interest to the Mountain Copper Company, in 1976.

835. IMMI states that it has not conducted mining activities on the property. However, the earlier mining activities have resulted in continuing acid mine drainage and runoff of heavy metals into Keswick Lake and the Sacramento River from the property, causing significant environmental harm. See Declaration of James C. Pedri, Engineer-in-Charge of the Redding Office of the California Regional Water Quality Control Board, Central Valley Region. Beginning in August,1977, the

Regional Water Quality Control Board (RWQCB) issued a series of orders to IMMI directing it to abate the effects of the discharge of acid mine drainage and runoff containing heavy metals from IMMI's property; IMMI has not complied with the orders to the RWQCB's satisfaction. See Declaration of James C. Pedri.

836. Here Judicial Officer Anderson refers to allegations by James C. Pedri of the RWQCB, an official of the State of California repeatedly identified by T.W. Arman as harboring personal animosity and bias against T.W. Arman and IMMI.

837. In 1982 and thereafter, EPA notified IMMI that it considered IMMI to be a responsible party at the Iron Mountain Mine Superfund Site, and, in accordance with the provision for joint and several liability of Section 107 of CERCLA, demanded payment of costs incurred to date in excess of $7.75 million. Letters dated April 5, 1982 and [date illegible on file copy]. By letter dated January 25, 2000, EPA notified IMMI of its intent to perfect a lien on the property in order to secure payment to the United States of costs and damages for which IMMI, as the owner of the property, would be liable to the United States under Section 107(a) of CERCLA.

838. In 1982, and thereafter, EPA notified IMMI that it considered IMMI to be a "potentially responsible party."

Issues Presented

839. With respect to the five factors listed for consideration in the Supplemental Guidance:

(1) There is no dispute that the property owner, IMMI, was sent notice by certified mail of potential liability. See letters dated April 5, 1982 and [date illegible on file copy]in the lien filing record.

(2) IMMI disputes that the property is owned by a person who is potentially liable under CERCLA. IMMI appears to make two arguments in this regard: (1) that since IMMI "did not mine or aggravate the ore bodies to cause AMD [acid mine drainage]" it should not be held liable for any response costs at the site, and (2) that IMMI is entitled to the "innocent landowner defense." IMMI's arguments are discussed below. As explained there, I find that IMMI has failed to show by a preponderance of the evidence that it is not liable under CERCLA for cleanup costs at the property.

(3) IMMI does not dispute EPA's assertion that the property is subject to or affected by a removal or remedial action.

(4) IMMI does not dispute that the United States incurred costs with respect to a response action under CERCLA.1 See cost documents in the lien filing record.

(5) With respect to the fifth factor, IMMI argues (1)that "it was defrauded at the point of the property sale by Stauffer . . ." in that Stauffer "intentionally failed to disclose material facts about the AMD [acid mine drainage]problem at the property to IMMI," and that Stauffer shoul dbear all of the cost to remedy the acid mine drainage situation at the site, (2) that EPA has "waived its right to impose a lien against IMMI's real property due to the EPA's failure to exhaust its Administrative Law Remedies prior to initiating its legal action against IMMI and the other potentially responsible parties" at the site, (3) that EPA should "mediate or discuss the lien issue" in ongoing settlement negotiations between the parties rather than filing a lien unilaterally, and (4) that because of pending cost recovery litigation involving EPA, IMMI, Stauffer and a third potentially responsible party, the lien "is premature and legally improper because the United States Federal District Court has superior jurisdiction over this matter." IMMI's arguments are discussed below. I find that none of IMMI's arguments are sufficient to show that the lien should not be filed against the property.

Discussion

840. (1) With respect to IMMI's argument that it should not be held liable for any response costs at the site because it did not mine or aggravate the ore bodies to cause acid mine drainage, it is clear under the liability scheme of Section 107 of CERCLA that a subsequent landowner may be liable for response costs for environmental contamination it did not cause. CERCLA Section 107(a)(1); 42 U.S.C. Section 9607(a)(1). It should also be noted that one purpose of the lien authority in Section 107(l) is to prevent windfalls: "A statutory lien would allow the Federal Government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from cleanup and restoration activities." 131 Cong. Rec. S11580 (statement of Senator Stafford)(September 17, 1985). See also House Energy and Commerce Report on H.R.2817, p.40, indicating that the lien provision was intended to prevent unjust enrichment. In the Matter of Copley Square Plaza Site, Determination of Probable Cause, June 5, 1997. Thus, IMMI's assertion that it did not cause the contamination at the site is not a sufficient basis for finding that a CERCLA lien should not be filed.

841. Here is the evidence of the EPA's malicious agenda being carried out. Even though it had established blanket liability against one of the worlds largest pharmaceutical & chemical conglomerates of liability for the CERCLA clean-up, it resumed the prosecution against IMMI in this most sinister and diabolical way by falsely establishing probable cause. Although IMMI presented substantial evidence that would easily meet a much higher standard of "beyond a reasonable doubt" innocence, the EPA judicial officer systematically ignored, denied, dismissed, obfuscated, or plainly lied about the merit of T.W. Arman and IMMI assertions of innocence and the third party defense.

842. (2) With respect to IMMI's assertion that it is entitled to the "innocent landowner" defense against CERCLA liability, IMMI's argument fails on several points. A potentially responsible party [PRP] under CERCLA may have a defense to liability where the contamination at issue was caused by an act or omission of a third party, if it meets certain conditions specified in the statute.2 See CERCLA Section 107(b); 42 U.S.C. Section 9607(b).

843. Here the EPA judicial officer Anderson fails to make an effort to even appear to give credible consideration to the innocent landowner defense, and obfuscates and confuses it with the third party defense. This in itself is effectively an abuse of process.

844. One such condition is that the PRP must establish by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance,

in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. CERCLA Section 107(b)(3);42 U.S.C. Section 9607(b)(3).

845. IMMI has failed to establish by a preponderance of the evidence that it has exercised due care with respect to the acid mine drainage and other contamination at the site. IMMI has not rebutted the Declaration of James Pedri, cited above, which states that for significant periods of time from 1977 through 1981, and for an unspecified period thereafter, IMMI failed to properly operate copper cementation plants on Slickrock Creek and Boulder Creek which were intended to reduce copper and other heavy metal contamination and acid mine drainage which otherwise would dis-

charge into Keswick Lake and the Sacramento River. According to Mr. Pedri's Declaration, the Boulder Creek plant had been operated by the Stauffer Chemical Company (prior to the transfer of the property to IMMI) so as to achieve 95 percent removal of copper, but over a period of four years after IMMI purchased the property it generally failed to operate the plant so as to achieve the required reduction of copper. The Declaration states that the reduction is necessary to prevent toxic concentrations of copper from occurring in Keswick Lake and the Sacramento River. Declaration of James C. Pedri, par. 4. In view of the unrebutted statements in the Declaration, I find that IMMI has not established by a preponderance of the evidence that it exercised due care with respect to the preexisting contamination at the site.3

846. Here Anderson again cites Pedri, and we can glimpse the bias that pervades these proceedings, as Pedri accuses Arman and IMMI of failing to operate the copper cementation plants. Such a claim might give someone the impression that copper cementation was a pollution control measure. Copper cementation was not a pollution control measure, but an exceedingly primitive method of recovering copper from the leachate of copper sulfate in waters percolating through copper bearing soils and ores. The fact that it was beneficial to fish to remove the copper sulfate from waters draining into the river was incidental. In fact, it would not be possible to have a copper cementation plant certified as any sort of pollution control device, then or now. In fact T.W. Arman rebutted all of Pedri's statements, but these rebuttals were entirely ignored by Anderson.

847. It is hard to imagine what Pedri is talking about here, for few people have any clue what a copper cementation plant is. These are a series of large basins about 3 feet deep, 15 feet wide and 20 ft. long; large concrete boxes, filled with scrap iron, usually scrap from canning companies. The acid mine drainage is conveyed about a half mile in stainless steel troughs into these boxes, where the acid reacts with the iron, making rust. A significant portion of the rust dissolves into the acid water, but what remains is coated with a layer of copper sulfate. Periodically the boxes are cleaned of their contents with a large bucket loader, and the copper laden scrap is lifted about 20 ft. and dumped into a large hopper, where a laborer forces shovel loads of the scrap into a large cylindrical steel screen cage, which is rotated by a large

electric motor, and the copper is shaken off of the scrap. The scrap then gets pushed into another hopper with a finer screen where it is physically beaten once more. The slime that is removed from the scrap contains around 50% copper sulfate, which can then be sold for about 1/8 the going price of copper. In all it is a tremendously labor intensive process, prone to constant breakdown of equipment, easily overwhelmed by inclement weather, and at the mercy of a willing and affordably cooperative labor force. The equipment that T.W. Arman inherited with Iron Mountain Mines was already at least 30 years old.

848. In retrospect it is easy to understand why Pedri would harbor animosity towards T.W. Arman and IMMI, since Pedri had initiated the litigation against IMMI in the first place.

When IMMI complied with the new State requirement to obtain an NPDES permit for pollution discharges, and when IMMI was unable to meet these discharge requirements, the State began fining IMMI, fines that ultimately exceeded 16 million dollars.

849. When those fines were reduced by the Courts to under 500 hundred thousand, and IMMI was allowed to remain in business, Pedri's credibility was severely tarnished and he suffered humiliation and public ridicule. So it is easy to understand why Pedri would have an ax to grind with T.W. Arman and IMMI.

850. The administrative record reflected facts indicate that Pedri intentionally lied against T.W. Arman, and intentionally framed IMMI to assist in its terminal injury.

851. Hence there was Malice.

852. Another condition which a landowner who takes title from a third party who caused contamination must meet in order to avoid CERCLA liability is that the real property must have been acquired by the PRP after the disposal or placement of the hazardous substances on, in, or at the facility,4 and

. . . [a]t the time the PRP acquired the facility the PRP did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

CERCLA Section 101(35)(A)(i); 42 U.S.C. §9601(35)(A)(i).

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

CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B).

853. IMMI has failed to show by a preponderance of the evidence that it meets this condition. While there is evidence that Stauffer Chemical Company attempted to withhold information "relating to environmental issues" from IMMI, see memorandum from T.J. Kent to L.E. Mannion dated February 4,1977, there is no dispute that prior to the close of escrow on the property5 IMMI was aware the property had been the site of large scale mining. This alone should have been enough to put a prospective buyer on notice of possible environmental problems at the site. In addition, IMMI was aware that the RWQCB was interested in having IMMI continue operation of the cleanup activities at the site. Either a failure to obey cleanup orders or the described interference with Agency cleanup activities could constitute an independent basis for finding that IMMI has failed to show that it exercised due care with respect to the hazardous substances at the site.

854. This is the most glaring example of the maliciousness of these proceedings, and the deception and subterfuge of Anderson by ignoring the fact that copper, cadmium, and zinc were not regulated substances at the time of the purchase, were not considered "hazardous substances" under the law, (the transportation committee of Congress added them in July 1977, and Congress amended the legislation in December of 1977, which is when the State began requiring NPDES permits).

855. There were no "clean-up orders", no law regulating the "due care" of such property purchase, or any evidence of "interference" with Agency cleanup activities that could constitute an independent basis for finding that IMMI has failed to show that it exercised due care with respect to the hazardous substances at the site.

856. T.W. Arman and IMMI were simply framed by State and Federal Officers with oppression, malice, fraud, and deceit under color of law.

857. (3) IMMI argues that "it was defrauded at the point of the property sale by Stauffer . . ." in that Stauffer" intentionally failed to disclose material facts about the AMD[acid mine drainage] problem at the property to IMMI," and that Stauffer should therefore bear all of the cost to remedy the acid mine drainage situation at the site.

858. Without expressing any opinion as to the likelihood that IMMI would or would not prevail in civil litigation against Stauffer on grounds of fraud, I note that IMMI's argument does not present a defense to liability under Section 107 of CERCLA. As discussed above, in order to avoid CERCLA liability a purchaser of property must undertake "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B). Stauffer appears to have withheld information from IMMI regarding environmental conditions on the property. See the Stauffer internal memorandum dated February 4, 1977 from T.J.Kent to L.E.Mannion, in which Mr. Kent states:

. . . we agreed that you would not provide IMM [IMMI]with any geological or technical information not pertinent to the 1900 acres sold last year to IMM nor would you give up any correspondence, reports, etc. relating to environmental issues at Iron Mountain.

In spite of this, IMMI should have been able to inform itself about the acid mine drainage and other environmental problems at the property by reviewing RWQCB records or by conducting a thorough inspection of the property. I therefore find that, with respect to its liability under Section 107(a)of CERCLA, IMMI did not undertake an "appropriate inquiry into the previous . . . uses of the property" before purchase, regardless of any efforts by Stauffer to avoid disclosing environmental information in its possession.

859. (4) IMMI argues that EPA has "waived its right to impose a lien against IMMI's real property due to the EPA's failure to exhaust its Administrative Law Remedies prior to initiating its legal action against IMMI and the other potentially responsible parties" at the site. It is unclear what "administrative law remedies" are referred to, since CERCLA does not set any time deadlines or simi-

lar administrative requirements on EPA's decision to impose a lien on property subject to a removal or remedial action. See, CERCLA Section107(l); 42 U.S.C. 9607(l) and CERCLA Guidance on Federal Superfund Liens dated September 22, 1987 at Section III. To the contrary, a CERCLA lien may be imposed at any time after EPA incurs costs and provides notice of potential liability to the landowner.6 CERCLA Guidance on Federal Superfund
Liens dated September 22, 1987.

860. "The lien imposed by this subsection shall arise at the latter of the following:
(A) The time costs are first incurred by the United States with respect to a response action under this chapter.(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.
CERCLA Section 107(l)(2); 42 U.S.C. 9607(l)(2).10

(5) IMMI argues that EPA should "mediate or discuss the lien issue" in ongoing settlement negotiations7 between the parties rather than filing a lien unilaterally. While EPA could elect to do so as an exercise of discretion, the fact that EPA and a PRP are currently in settlement negotiations does not in any way diminish the Agency's legal authority to file a lien under Section 107(l) of CERCLA. Furthermore, in light of the underlying purpose of a CERCLA lien, to protect the Government's ability to recover public funds expended on the cleanup of contamination on the property and to avoid a windfall to the landowner, as a matter of policy the Agency will consider perfecting a lien whenever settlement negotiations have not yet resulted in appropriate assurance that the Government will be able to recover the funds it has expended at the site. CERCLA Guidance on Federal Superfund Liens dated September 22, 1987, Section IV.

861. Since a CERCLA lien is "subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the federal lien has been filed," CERCLA Section 107(l)(3), 42 U.S.C. Section 9607(l)(3), any delay by EPA in filing the lien risks that EPA's ability to recover costs will be impaired.

862. (6) IMMI argues that because of pending cost recovery litigation brought by EPA against IMMI, Stauffer and other companies considered by EPA to be potentially responsible parties at the site, the lien "is premature and legally improper because the United States Federal District Court

has superior jurisdiction over this matter."8 IMMI suggests that EPA could "request" a lien if a judgment is rendered in that case against IMMI.

863. Contrary to the argument put forward by IMMI, a CERCLA lien can be filed irrespective of whether there is pending cost recovery litigation regarding the site. Section 107(l)

48. 1IMMI does not concede the reasonableness of the costs.

Stauffer . . ." in that Stauffer "intentionally failed to disclose material facts about the AMD [acid mine drainage]problem at the property to IMMI," and that Stauffer should bear all of the cost to remedy the acid mine drainage situation at the site, (2) that EPA has "waived its right to impose a lien against IMMI's real property due to the EPA's failure to exhaust its Administrative Law Remedies prior to initiating its legal action against IMMI and the other potentially responsible parties" at the site, (3) that EPA should "mediate or discuss the lien issue" in ongoing settlement negotiations between the parties rather than filing a lien unilaterally, and (4) that because of pending cost recovery litigation involving EPA, IMMI, Stauffer and a third potentially responsible party, the lien "is premature and legally improper because the United States Federal District Court has superior jurisdiction over this matter." IMMI's arguments are discussed below. I find that none of IMMI's arguments are sufficient to show that the lien should not be filed against the property.

864. Section 107(b) of CERCLA provides that defenses to liability under CERCLA §107(a) include:

The release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light

of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

CERCLA §107(b); 42 U.S.C. Section 9607(b).6

865. 3 The Declaration and lien filing record also refer to cleanup orders issued to IMMI by state and federal regulatory agencies, and an injunction obtained by EPA to enjoin IMMI from interfering with EPA's cleanup and restoration activities." 131 Cong. Rec. S11580 (statement of Senator Stafford)(September 17, 1985). See also House Energy and Commerce Report on H.R.2817, p.40, indicating that the lien provision was intended to prevent unjust enrichment. In the Matter of Copley Square Plaza Site, Determination of Probable Cause, June 5, 1997. Thus, IMMI's assertion that it did not cause the contamination at the site is not a sufficient basis for finding that a CERCLA lien should not be filed.

866. IMMI asserts that all the contamination at the site was caused by previous owners; EPA notes that release of hazardous substances(for example, acid mine drainage) continues to occur at the site.

867. IMMI entered into an agreement to purchase the property October 22, 1976; escrow closed December 15, 1976.

868. Boulder Creek copper cementation plant. Deposition of Theodore Arman dated August 12, 1996, vol. 1, at 166:11-24. While IMMI disputes that Mr. Pedri, the RWQCB engineer, told it at that time of the RWQCB's full environmental concerns regarding the property, even if Mr. Pedri only inquired whether IMMI would continue to operate the Boulder Creek copper cementation plant, that inquiry by a state regulatory official should have been enough to put a prospective buyer on notice of possible water contamination problems at the site. In addition, the RWQCB issued a cleanup and abatement order to Stauffer Chemical Company on November 5, 1976, which addressed the effects of the discharge of acid mine drainage into Spring Creek and the Sacramento River. A copy of the cleanup and abatement order was received by IMMI some time in November,1976. Deposition of Theodore Arman dated August 12, 1996,vol. 1, at 129:5-22 and 161:8-17.

Thus, before the close of escrow in December, 1976, IMMI had specific information as to a significant environmental problem at the property. IMMI has therefore failed to show by a preponderance of the evidence that it did not know and had no reason to know that hazardous substances had been disposed of on the property.

869. The "settlement negotiations" referred to is a mediation proceeding before Judge Julius Irving in United States and State of California v. Iron Mountain Mines, Inc., et al., No. CIV-S-91-0768DFL JFM

870. CERCLA provides for an independent in rem action against the property subject to the lien: The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred.

871. CERCLA Section 107(l)(4); 42 U.S.C. Section 9607(l)(4). There is no requirement that EPA institute a civil cost recovery action under CERCLA as a prerequisite to the imposition of a CERCLA lien or for the purpose of recovering costs under the lien. To the contrary, it was anticipated that CERCLA liens would often be filed early in the history of a response action, at a point where EPA would not know the full cost of its response action, let alone have filed any type of cost recovery case. Reardon v. U.S., 947 F.2d. 1509, 1513 (1st Cir.1991). Just as it is not necessary to institute a cost recovery action under CERCLA in order to impose a CERCLA lien, this CERCLA lien proceeding is not part of the pending cost recovery action referred to by IMMI, and EPA is free to proceed with lien filing regardless of the procedural posture of the pending cost recovery litigation. In the Matter of Paoli Rail Yard Superfund Site, EPA Docket No. III-93-004L,Determination of Probable Cause, November 30, 1995.

872. To the extent IMMI suggests that EPA could "request" alien if a judgment is rendered against IMMI in the pending cost recovery litigation, IMMI is confusing a judgment lien with a CERCLA lien under Section 107(l).

873. As noted below, this determination of probable cause does not bar EPA or the property owner from raising any claims or defenses in further proceedings. Consequently, the present determination does not limit or foreclose any claims or defenses either EPA or IMMI may have in the pending cost recovery litigation.

Conclusion

874. After considering the lien filing record and presentations made by the parties in the April 25, 2000 conference call, I find that the lien filing record supports a determination that EPA has a reasonable basis to perfect alien under Section 107(l) of CERCLA against the specified property owned by Iron Mountain Mine, Inc. in Shasta County,
California. IMMI has not established any issue of fact or law which rebuts EPA's claim that it has a reasonable basis to perfect a lien.

875. The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a reasonable basis to perfect its lien and whether or not the property owner has proven any of the defenses available under Section 107 of CERCLA. This recommended decision does not bar EPA or the property owner from raising any claims or defenses in further proceedings. This recommended decision is not a binding determination of ultimate liability or non-liability. This recommended decision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding.

/S/ Steven W. Anderson

Regional Judicial Officer

Dated: May 4, 2000

876. Although the conclusion qualifies these proceedings as narrowly limited and only a recommended decision with no preclusive effect, it may be seen from the proceedings that followed such was not the case, and the EPA and the Courts effectively adopted these findings as conclusive evidence of T.W. Arman and IMMI liability.

877. On September 30, 2002, Judge Levi issued an order:

"To establish liability for CERCLA clean-up costs, a plaintiff must show that the defendant is a potentially responsible party ("PRP"). The United States and California claim that IMMI and Arman are PRP's because they are either "owner[s] [or] operator[s] of a vessel or a facility [in need of clean-up]." 42 U.S.C 9607 (a)(1). Defendants asserts that the plaintiffs did not adequately define the "facility" in question, and did not prove that defendants were "operators" of such facility.1 These contentions lack merit. Arman is an operator under CERCLA because he is someone who

currently "manage[s], direct[s], or conduct[s]… operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." United States v. Best Foods, 524 U.S. 51, 66-67 (1998). For example, under Arman's management, IMMI operated Boulder Creek and Slickrock Creek copper cementation plants. Arman is the decision-maker for IMMI concerning compliance with environmental regulations, and he deals directly with State and Federal environmental agencies.

Also, plaintiffs have submitted more than adequate evidence to describe the bounds of the relevant facility.

878. Because IMMI is already liable under CERCLA as a "current owner" of the facility in question, it is not necessary to establish IMMI's liability as an "operator" of the same facility.

879. After a potentially responsible party ("PRP") is identified under CERCLA, the PRP may be entitled to defeat liability if all elements of an affirmative defense are proven. Defendant IMMI first asserts the innocent landowner defense under 42 U.S.C. 9601 (35(A)-(B). 2 This defense, however, is only available to PRPs who, at the time of purchase, "did not know or had no reason to know that any hazardous substance which is the subject of the release or threatened release is disposed of on, in, or at the facility." 8691 (35)(A)(i). Because IMMI purchased the property with knowledge of – indeed, at least in part, because of – the presence of hazardous materials, the innocent landowner defense is not available to IMMI.

880. IMMI and Arman also assert the third party defense, available to PRPs who can establish that the release of the hazardous substances or threat thereof was caused solely by "an act or omission of a third party other than and employee or agent of the defendant…." 42 U.S.C. 9607(b)(3). It may be doubted whether or not the third party defense is available to landowners who do not qualify for the innocent landowner defense. See Carson Harbor Village, Ltd. v. Unocal Corp., 270 F. 3d. 863, 887 (9th Cir. 2001) ("In a single stroke, SARA first clarified that one who purchases land from a polluting owner or operator cannot present a third-party defense.") Even if the third party

881. The innocent landowner defense is not available to Arman because he is not the "owner" of the facility in need of clean-up.

Defense were available to IMMI, however, IMMI has not established the necessary elements of the defense. The defense only applies to defendants who do not have a contractual relationship with the alleged third party polluter. See 42 U.S.C. 9607 (b)(3). But IMMI purchased the land from Stauffer Chemical Company ("Staffer"), successor to Mountain Copper Company, the third party most responsible for the pollution. IMMI's transaction with Stauffer thereby created a contractual relationship via land deed as defined in CERCLA 9601 (35)(A). Further, defendant Arman could only assert the third party defense could he show that he has "exercised due care" in the handling of the hazardous waste after discovery of the contamination. 9607 (b)(3)(a). He cannot meet this burden in light of his violation of state court and EPA orders concerning the site.

882. Finally, defendants assert the "divisibility of harm" defense.3 This defense allows a PRP to avoid joint and several liability by showing that the harm caused by the hazardous waste is divisible. See Carson Harbor, 270 F. 3d at 871. Defendants in this case have not made such a showing. Given the nature of the pollution at the site, it would be difficult to identify distinct harms. To the extent that IMMI and Arman may be less responsible than others for acid mine drainage, this is a factor that may considered in a contribution proceeding.

883. Although CERCLA is based on a strict liability scheme, most circuits, including the Ninth, have recognized a common law divisibility of harm defense in a few narrow situations.

884. For the foregoing reasons, the plaintiffs' summary judgment motion is hereby GRANTED.

885. IT IS SO ORDERED.

Dated: 30 September, 2002

886. Clearly, Judge Levi accepted the government's claims for summary judgment almost verbatim.

887. One must still wonder why the EPA thought it necessary to entrap T.W., Arman and IMMI, having achieved the record setting Consent Decree it proudly trumpeted as the "billion dollar settlement". It is understandable though if one considers the prosecutions perspective, which must have immediately recognized the potential exposure of the settlement and its capture by IMMI should the defendants be able to find a way to implement an actual remedy. Having effectively precluded any realistic possibility of the resumption of hardrock mining,

the only possible opportunity for IMMI would be for a serious mining company to step forward and join IMMI in a solution mining venture. As this industry was beginning to show real vitality, the best way to prevent IMMI from seizing such an opportunity would be to burden it with an enormous CERCLA liability, effectively shutting off any possible mining venture capital. So the EPA fabricated the entire IMMI liability, including declining to reimburse itself for its fraudulent "unrecovered past response costs" in order to cloud title and stigmatize the property so thoroughly that no prudent company would have anything to do with it.

888. T.W. Arman believed that when the litigation was over he would be able to get back into business, and to this day remains incredulous and angry that with a property holding billions more in mineral resources than all but a handful of other mines in this country, that not one mining company will even return phone calls from Iron Mountain Mines, Inc.

889. On May 20, 2005, the District Court heard a joint status conference

890. "As stated in the plaintiffs' memorandum in support of their motion to enter the 2000 Consent Decree [Docket No. 1178, at 10–14], the monies paid by Rhône-Poulenc under that settlement (with a few excepted items) secured future operation and maintenance of the Iron Mountain Mine remedial actions.

891. The plaintiffs were not reimbursed for their past costs (with the exception of two payments of $1 million that DTSC and the Regional Board each received from certain insurance proceeds and applied towards their past costs); and Rhône-Poulenc absorbed its own past costs.

892. Accordingly, because of the competing claims and defenses of the parties to the settlement memorialized in the Consent Decree, the settlement specifically settled the settling parties' respective past costs as among those parties. All costs, including past costs, are included as "matters addressed" under Paragraph 86 of the Consent Decree, contrary to defendants' mischaracterizations. Therefore, the settling parties are entitled under Paragraph 85 of the Decree to contribution protection as to all such matters, and a third-party claim by defendants Arman and IMMI against any settling party would be inappropriate.

893. Defendants Arman and IMMI agreed at the time that the Court was considering entry of the Consent Decree not to oppose approval of the settlement and entry of the Decree. See Statement of Proceedings at 3–4 (entered December 11, 2000) [Docket No. 1186]; see also Reply Declaration by T.W. Arman and Iron Mountain Mines, Inc. to Joint Motion for Entry of Consent Decree at 2:1 [Docket No. 1183]. The plaintiffs therefore oppose any attempt by defendants to collaterally attack the 2000 settlement.

894. B. Defendants' Statement

895. Despite the settlement embodied in this Court's consent decree entered December 2000, it is possible that defendants IMMI and Arman would seek to file a third-party complaint for contribution against former defendant and settling party Aventis (formerly known as Rhône-Poulenc). IMMI and Arman briefly explain why.

896. Plaintiffs' settlement with Aventis includes total payments made by or on behalf of the settling parties in excess of $835 million. With respect to those payments and other aspects of the settlement, the consent decree provides that the "matters addressed in the settlement" include, among other things, "all response actions taken or to be taken, [and] all response costs incurred or to be incurred" by the plaintiffs (emphasis added). Consent Decree, 86.

897. Accordingly, it would appear that under the express terms of the settlement, the settling defendants were making payments and providing other valuable consideration worth in excess of $835 million in satisfaction of their potential liability for past response costs incurred by the plaintiffs.

898. CERCLA Section 113(f)(2) provides that the potential liability of defendants IMMI and Arman shall be "reduced by the amount of the settlement" between plaintiffs and Aventis. Notwithstanding that the value of the settlement greatly exceeds plaintiffs past response costs, plaintiffs apparently now contend that they somehow "reserved" and/or "carved out" their right to seek all of their past response costs from the non-settling defendants, i.e., that their settlement with Aventis included only future response costs.

899. Plaintiffs cannot have it both ways, namely: if the settlement with Aventis addresses plaintiffs' past response costs, as the consent decree that plaintiffs submitted to this Court states, then

IMMI's and Arman's potential liability to plaintiffs must be reduced by the "amount of the settlement" between plaintiffs and Aventis (with the result that defendants are not liable for any of plaintiffs' past response costs and not likely to have any liability for plaintiffs' future response costs for the foreseeable future, if at all); alternatively, if plaintiffs have in fact reserved or carved out a right to seek all past response costs from defendants

900. IMMI and Arman, as plaintiffs appear to presently contend, the settlement with Aventis did not "address" those past response costs. If that is the case, claims by IMMI and Arman against Aventis for contribution would therefore not be barred. See CERCLA Section 113(f)(2), (contribution claims are barred only as to those "matters addressed in the settlement").

901. Defendants presently believe the right result is that the Aventis settlement did in fact satisfy plaintiffs' claims for past response costs. Nevertheless, defendants necessarily reserve their right to seek to file a third-party complaint for contribution against Aventis in the event that this Court were to rule otherwise.

902. Citing a hearing transcript of December 11, 2000 and a declaration submitted by defendant Arman, plaintiffs say that "Arman and IMMI agreed at the time that the Court was considering entry of the Consent Decree not to oppose approval of the settlement and entry of Decree."

903. Whether or not defendants Arman and IMMI objected to the Consent Decree is relevant to the determination of the "matters addressed." Further, the Arman declaration is fact an objection to the Consent Decree to the extent that the Decree purports to allocate significant responsibility to Arman and/or IMMI for "Site costs." As Mr. Arman stated in that declaration (at 3): "I do strongly object to the factual and legal characterization and formula used to apportion the alleged liability among the defendants in this matter." As Mr. Arman further stated in that declaration (at 5): "Defendant Aventis (formerly Rhône-Poulenc and Stauffer) actively mined the Massive Sulfide ore bodies…. IMMI and myself have never actively mined the Massive Sulfide ore bodies…. IMMI and I are not responsible for the damage to the property, which caused the AMD condition. Thus, it is factually and legally incorrect when the Settling parties allege that I am 22% responsible for the liability and Site costs."

904. Any Expected or Desired Amendment of Pleadings

905. A. Plaintiffs' Statement

906. Plaintiffs do not anticipate amending their pleadings at this point. Defendants evidently intend to file amended answers to the respective complaints the United States and the State plaintiffs. Plaintiffs would object to defendants' attempt to amend their answers for two reasons. First, defendants' current answers to the complaints contain a recoupment defense, which Judge Schwartz earlier determined may be deemed a counterclaim. See United States, et al. v. Iron Mountain Mines, Inc., et al., 812 F. Supp. 1528, 1552 (E.D. Cal. 1992). However, this Court in a 1995 ruling held that defendants' "recoupment claims" could not be maintained in the face of the federal government's sovereign immunity and the State's Eleventh Amendment immunity. 881 F. Supp. 1432, 1456–57 & n.43 (E.D. Cal. 1995).2/ Accordingly, proposed amendments to bring claims for set-off would be both unnecessary and futile.

Second, as noted above, defendants' view of the scope of the December 2000 settlement with Rhône-Poulenc is dramatically flawed and cannot give rise to any claim or defense against the plaintiffs.

907. B. Defendants' Statement

908. Defendants anticipate filing a motion for leave to amend and supplement their answer in order to allege at least one additional affirmative defense, including the following: that the settlement embodied in this Court's December 13, 2000, consent decree has fully satisfied plaintiffs' monetary claims in this action against defendants, at least to date and for the foreseeable future. Defendants are presently studying their current pleadings to determine whether any further amendments would be appropriate, even if necessary only to preserve the record on appeal with respect to prior rulings by this Court. Defendants will prepare the amended and supplemental answer and seek plaintiffs' stipulation that it may be filed without necessity of a formal motion.

909. Since Plaintiffs already obtained a ruling on defendants' liability on October 1, 2002, Plaintiffs anticipate moving for summary judgment as to the amount of response costs each is owed. Plaintiffs further anticipate that a scheduling conference may be required to discuss this and other matters set out below. Plaintiffs do object to defendants' stated desire to take discovery concerning the 2000 settlement with Rhône-Poulenc; such discovery amounts to a collateral attack on the set-

tlement, which defendants previously did not oppose although they were given ample opportunity to do so.

910. VIII. Future Proceedings

911. A. Plaintiffs' Statement

As noted, Plaintiffs have already obtained a ruling on defendants' liability. All that remains is to determine the amount of response costs due the governments. Plaintiffs believe that determination can be made on summary judgment, especially given the Court's prior ruling on the appropriateness of administrative record review in this case, see United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1250 (E.D. Cal. 1997), as well as State of California, On behalf of the Department of Toxic Substances Control v. Alco Pacific, 317 F.Supp.2d 1188 (2004) (DTSC costs reviewable on the record). At the same time, plaintiffs recognize that limited discovery may be appropriate before such a motion may be brought. Again, these issues may need to be addressed at a scheduling conference.

912. Therefore it is clear that the EPA was conducting this CERCLA lien proceeding with ulterior government motives, and was furthermore committing a willful act in a wrongful manner. The EPA conduct was clearly designed to inflict harm and damage the plaintiffs.

913. Restatement Second of Torts, section 682 provides: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

914. "Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place). Hence, abuse of process claims typically arise for improper or excessive attachments or improper use of discovery." (Bidna v. Rosen (1993) 19 Cal.App.4th 27, 40 [23 Cal.Rptr.2d 251], internal citations omitted.)

915. "The gist of the tort is the misuse of the power of the court: It is an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose. Some definite act or threat not authorized by the

process or aimed at an objective not legitimate in the use of the process is required. And, generally, an action lies only where the process is used to obtain an unjustifiable collateral advantage. For this reason, mere vexation [and] harassment are not recognized as objectives sufficient to give rise to the tort." (Younger v. Solomon (1974) 38 Cal.App.3d 289, 297 [113 Cal.Rptr. 113], internal citations omitted.)

916. "Process is action taken pursuant to judicial authority. It is not action taken without reference to the power of the court." (Adams v. Superior Court (1992) 2 Cal.App.4th 521, 530 [3 Cal.Rptr.2d 49].)

917. "The term 'process' as used in the tort of abuse of process has been broadly interpreted to encompass the entire range of procedures incident to litigation. . . . This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution." (Younger, supra, 38 Cal.App.3d at p. 296, internal citations omitted.)

918. " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' " (Spellens v. Spellens (1957) 49 Cal.2d 210, 232-233 [317 P.2d 613], internal citation omitted.)

919. "[A]n improper purpose may consist in achievement of a benefit totally extraneous to or of a result not within its legitimate scope. Mere ill will against the adverse party in the proceedings does not constitute an ulterior or improper motive." (Ion Equipment Corp. v. Nelson (1980) 110 Cal.App.3d 868, 876 [168 Cal.Rptr. 361], internal citations omitted.)

920. "Merely obtaining or seeking process is not enough; there must be subsequent abuse, by a misuse of the judicial process for a purpose other than that which it was intended to serve. The gist of the tort is the improper use of the process after it is issued." (Adams, supra, 2 Cal.App.4th at pp. 530-531, internal citations omitted.)

921. " ' "Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and here is no liability where the defendant has

done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." ' " (Clark Equipment Co. v. Wheat (1979) 92 Cal.App.3d 503, 524 [154 Cal.Rptr. 874], internal citations omitted.)

922. Civil Code section 47 provides, in part, that a privileged publication or broadcast is one made "(b) . . . (2) in any judicial proceeding." The privilege applies to statements that are (1) made in judicial or quasi-judicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the objects of the litigation, and (4) that [have] some connection or logical relation to the action." (Kimmel v. Goland (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)

923. "[T]he scope of 'publication or broadcast' includes noncommunicative conduct like the filing of a motion for a writ of sale, the filing of assessment liens, or the filing of a mechanic's lien. The privilege also applies to conduct or publications occurring outside the courtroom, to conduct or publications which are legally deficient for one reason or another, and even to malicious or fraudulent conduct or publications." (O'Keefe v. Kompa (2000) 84 Cal.App.4th 130, 134 [100 Cal.Rptr.2d 602], internal citations omitted.)

924. "[I]t is consistent with the purpose of section 47, subdivision (2) to exempt malicious prosecution while still applying the privilege to abuse of process causes of action." (Abraham v. Lancaster Community Hospital (1990) 217 Cal.App.3d 796, 824 [266 Cal.Rptr. 360].)

925. "The use of the machinery of the legal system for an ulterior motive is a classic indicia of the tort of abuse of process. However, the tort requires abuse of legal process, not just filing suit. Simply filing a lawsuit for an improper purpose is not abuse of process." (Trear v. Sills (1999) 69 Cal.App.4th 1341, 1359 [82 Cal.Rptr.2d 281], internal citations omitted.)

926. [T]he essence of the tort "abuse of process" lies in the misuse of the power of the court; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice.' We have located no authority extending the tort of abuse of process to administrative proceedings. Application of the tort to administrative proceedings would not serve the purpose of the tort, which is to preserve the integrity of the court." (Stolz v. Wong Communications Ltd. Partnership (1994) 25 Cal.App.4th 1811, 1822-1823 [31 Cal.Rptr.2d 229], internal citations omitted.)

Therefore, the damage was intentional and with malice, fraud, oppression, and deceit

CONCLUSION

927. Wherefore, petitioners have established the necessary elements of: (a) bonafide termination of litigation, (b) absence of probable cause, (c) malice, and (d) damage to plaintiffs, to show abuse of process. Further, since the fraudulent lien of $51 million dollars and the stigmatic injury of CERCLA liability were perpetrated to intentionally damage the plaintiffs and prevent their business opportunities and deny them the means to implement the actual remedy by fraud upon the court, a special injury rising to malicious prosecution exists.

928. The clear presence of malicious government motives in these intentional and fraudulent actions is the hallmark of tyranny and despotism, and the incontrovertible facts of vindictive actions and illegitimate animus rise to unconstitutional and unconscionable abuses of process and deceit under color of law and fraud upon the Court with negligently arbitrary endangerment.

STRIKE THE LIENS! SPECIAL INJURIES! MERITLESS PROSECUTION!

CITIZEN SUIT!

929. To the extent that any inadvertence may present an obstacle to that purpose, Plaintiffs refer to the publications of the California Judicial Counsel, summarized to wit:

930. The State of California Judicial Counsel has, through published materials addressed the need of the Judiciary to act in the interests of fairness to self-represented litigants. The California rules express a preference for resolution of every case on the merits, even if resolution requires excusing inadvertence by a pro se litigant that would otherwise result in a dismissal. The Judicial Counsel justifies this position based on the idea that "Judges are charged with ascertaining the truth, not just playing referee... A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits." It suggests "the court should take whatever measures may be reasonable and necessary to insure a fair trial"

931. In consideration of the gravity of the Absolute Orders, the **First Amended Complaint** and **Special Injury Writ of Error *Coram Nobis*;** Plaintiffs refer to our founding fathers, Court **precedent, and the wisdom of our constitution, that "We the People do Ordain", to wit:**

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

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

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

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this **cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.** The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the

judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. **If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents".**

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

Federalist No. 78: Alexander Hamilton.

933. Plaintiffs demand by Original Absolute Order an Answer to the First Amended Complaint.

934. In the matter of Marbury v. Madison, it was laid down that:

The clerks of the Department of State of the United States may be called upon to give evidence of transactions in the Department which are not of a confidential character.

935. The Secretary of State cannot be called upon as a witness to state transactions of a confidential nature which may have occurred in his Department. But he may be called upon to give testimony of circumstances which were not of that character.

936. Clerks in the Department of State were directed to be sworn, subject to objections to questions upon confidential matters.

937. Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And the power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission.

938. If the act of livery be necessary to give validity to the commission of an officer, it has been delivered when executed, and given to the Secretary of State for the purpose of being sealed, recorded, and transmitted to the party.

939. In cases of commissions to public officers, the law orders the Secretary of State to record them. When, therefore, they are signed and sealed, the order for their being recorded is given, and, whether inserted into the book or not, they are recorded.

940. When the heads of the departments of the Government are the political or confidential officers of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

941. The President of the United States, by signing the commission, appointed Mr. Marbury a justice of the peace for the County of Washington, in the District of Columbia, and the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and the appointment conferred on him a legal

right to the office for the space of five years. Having this legal right to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right for which the laws of the country afford him a remedy.

942. To render a mandamus a proper remedy, the officer to whom it is directed must be one to whom, on legal principles, such writ must be directed, and the person applying for it must be without any other specific remedy.

943. Where a commission to a public officer has been made out, signed, and sealed, and is withheld from the person entitled to it, an action of detinue for the commission against the Secretary of State who refuses to deliver it is not the proper remedy, as the judgment in detinue is for the thing itself, or its value. The value of a public office, not to be sold, is incapable of being ascertained. It is a plain case for a mandamus, either to deliver the commission or a copy of it from the record.

944. You are commanded by 1086, 1088, and 1094 of the Code of Civil Procedure to issue the Writs. Pursuant to 1107 of the Code, you may grant such relief *ex parte* to compel the admission of the Petitioner to the use and enjoyment of the right and office.

945. To enable the Court to issue a mandamus to compel the delivery of the commission of a public office by the Secretary of State, it must be shown that it is an exercise of appellate jurisdiction, or that it be necessary to enable them to exercise appellate jurisdiction. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create the cause.

946. The authority given to the Supreme Court by the act establishing the judicial system of the United States to issue writs of mandamus to private officers appears to be warranted by the Constitution.

947. It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.

948. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

949. At the December Term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, severally moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late President of the United States, nominated the applicants to the Senate for their advice and consent to be appointed justices of the peace of the District of Columbia; that the Senate advised and consented to the appointments; that commissions in due form were signed by the said President appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions by the Secretary of State; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as Secretary of State of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the Secretary of State or any officer in the Department of State; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the Senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term. This rule having been duly served, Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court and were required to give evidence, objected to be sworn, alleging that they were clerks in the Department of State, and not bound to disclose any facts relating to the business or transactions of the office.

950. The court ordered the witnesses to be sworn, and their answers taken in writing, but informed them that, when the questions were asked, they might state their objections to answering each particular question, if they had any.

951. Mr. Lincoln, who had been the acting Secretary of State, when the circumstances stated in the affidavits occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

952. The court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought anything was communicated to him confidentially, he was not bound to disclose, nor was he obliged to state anything which would criminate himself. The questions argued by the counsel for the relators were, 1. Whether the Supreme Court can award the writ of mandamus in any case. 2. Whether it will lie to a Secretary of State, in any case whatever. 3. Whether, in the present case, the Court may award a mandamus to James Madison, Secretary of State.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

953. "At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case requiring the Secretary of State to show cause why a mandamus should not issue directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.

954. No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it require a complete exposition of the principles on which the opinion to be given by the Court is founded.

955. These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the Court, there will be some departure in form, though not in substance, from the points stated in that argument.

956. In the order in which the Court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is:

1. Has the applicant a right to the commission he demands?

His right originates in an act of Congress passed in February, 1801, concerning the District of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts,

"that there shall be appointed in and for each of the said counties such number of discreet persons to be justices of the peace as the President of the United States shall, from time to time, think expedient, to continue in office for five years. "

It appears from the affidavits that, in compliance with this law, a commission for William Marbury as a justice of peace for the County of Washington was signed by John Adams, then President of the United States, after which the seal of the United States was affixed to it, but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the Constitution declares,

957. "The President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

958. The third section declares, that "He shall commission all the officers of the United States."

An act of Congress directs the Secretary of State to keep the seal of the United States,

"to make out and record, and affix the said seal to all civil commissions to officers of the United States to be appointed by the President, by and with the consent of the Senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

959. These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations:

1. The nomination. This is the sole act of the President, and is completely voluntary.

2. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

3. The commission. To grant a commission to a person appointed might perhaps be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

960. The acts of appointing to office and commissioning the person appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the Constitution which authorizes Congress

"to vest by law the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or in the heads of departments;"

thus contemplating cases where the law may direct the President to commission an officer appointed by the Courts or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which perhaps could not legally be refused.

961. Although that clause of the Constitution which requires the President to commission all the officers of the United States may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.

962. It follows too from the existence of this distinction that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer, and if he was not removable at the will of the President, would either give him a right to his commission or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

963. (This is an appointment made by Original Absolute Order of a Grantee, without advice or consent, and is evidenced by no act but the commission itself.)

964. This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable, it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still, the commission is not necessarily the appointment; though conclusive evidence of it.

965. But at what stage does it amount to this conclusive evidence?

966. The answer to this question seems an obvious one. The appointment, being the sole act of the President, must be completely evidenced when it is shown that he has done everything to be performed by him.

967. Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

968. The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act, and, being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an inchoate and incomplete transaction.

969. Some point of time must be taken when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the Legislature when the act passed converting the Department of Foreign Affairs into the Department of State. By that act, it is enacted that the Secretary of State shall keep the seal of the United States,

"and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President: . . . provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States, nor to any other instrument or act without the special warrant of the President therefor."

970. The signature is a warrant for affixing the great seal to the commission, and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

971. It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

972. The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

973. This is not a proceeding which may be varied if the judgment of the Executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

974. If it should be supposed that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the Executive can do to invest the person with his office is done, and unless the appointment be then made, the Executive cannot make one without the cooperation of others.

975. After searching anxiously for the principles on which a contrary opinion may be supported, none has been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the Court could suggest have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

976. In considering this question, it has been conjectured that the commission may have been assimilated to a deed to the validity of which delivery is essential.

977. This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment -- a supposition by no means unquestionable. But, for the purpose of examining this objection fairly, let it be conceded that the principle claimed for its support is established.

978. The appointment being, under the Constitution, to be made by the President personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office; it never is so made. The law would seem to contemplate that it should be made to the Secretary of State, since it directs the secretary to affix the seal to the commission after it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the Secretary for the purpose of being sealed, recorded, and transmitted to the party.

979. 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.

980. It has also occurred as possible, and barely possible, that the transmission of the commission and the acceptance thereof might be deemed **necessary to complete the right of the plaintiff.** The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment, which must precede it and which is the mere act of the President. If the Executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the

sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed, not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point to inquire whether **the possession of the original commission be indispensably necessary to authorize a person appointed to any office to perform the duties of that office**. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the Office of the Secretary of State would be, to every intent and purpose, equal to the original. The act of Congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If indeed it should appear that the original had been mislaid in the Office of State, that circumstance would not affect the operation of the copy. **When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is in law considered as recorded**, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

981. In the case of commissions, the law orders the Secretary of State to record them. When, therefore, they are signed and sealed, the order for their being recorded is given, and, whether inserted in the book or not, they are in law recorded.

982. A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

983. Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity.

984. That this is the understanding of the government is apparent from the whole tenor of its conduct.

985. A commission bears date, and the salary of the officer commences from his appointment, not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office and had created the original vacancy.

986. It is therefore decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

987. Where an officer is removable at the will of the Executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested if still in the office. But when the officer is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

988. The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. **The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.**

989. Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.

990. This brings us to the second inquiry, which is:

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

991. The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

992. In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says,

993. "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."

And afterwards, page 109 of the same volume, he says,

994. "I am next to consider such injuries as are cognizable by the Courts of common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals are, for that very reason, within the cognizance of the common law courts of justice, for **it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."**

995. The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

996. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

997. It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt from legal investigation or exclude the injured party from legal redress. In pursuing this

inquiry, the first question which presents itself is whether this can be arranged with that class of cases which come under the description of damnum absque injuria -- a loss without an injury. This description of cases never has been considered, and, it is believed, never can be considered, as **comprehending offices of trust, of honour or of profit.** The office of justice of peace in the District of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of Congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. **It is not then on account of the worthlessness of the thing pursued that the injured party can be alleged to be without remedy.**

998. Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy?

999. That there may be such cases is not to be questioned, but that every act of duty to be performed in any of the great departments of government constitutes such a case is not to be admitted. By the act concerning invalids, passed in June, 1794, the Secretary at War is ordered to place on the pension list all persons whose names are contained in a report previously made by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? **Is it to be contended that the heads of departments are not amenable to the laws of their country?**

1000. Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.

1001. No act of the Legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.

1002. After stating that personal injury from the King to a subject is presumed to be impossible, Blackstone, Vol. III. p. 255, says,

1003. "but injuries to the rights of property can scarcely be committed by the Crown without the intervention of its officers, for whom, the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting the errors and misconduct of those agents by whom the King has been deceived and induced to do a temporary injustice."

1004. By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, the purchaser, on paying his purchase money, becomes completely entitled to the property purchased, and, on producing to the Secretary of State the receipt of the treasurer upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State, and recorded in his office. If the Secretary of State should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, **can it be imagined that the law furnishes to the injured person no remedy?**

1005. It is not believed that any person whatever would attempt to maintain such a proposition.

1006. It follows, then, that the question whether the legality of an act of the head of a department be examinable in a court of justice or not must always depend on the nature of that act.

If some acts be examinable and others not, there must be some rule of law to guide the Court in the exercise of its jurisdiction.

1007. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

1008. By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

1009. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being en-

trusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the Department of Foreign Affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the Courts.

1010. But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion, sport away the vested rights of others.

1011. The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. **But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.**

1012. If this be the rule, let us inquire how it applies to the case under the consideration of the Court.

1013. The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated, and consequently, **if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by Executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.**

1014. The question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate and proceeded to act as one, in consequence of which a suit had been instituted against him in which his defense had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

1015. So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is equally a question examinable in a court, and the decision of the Court upon it must depend on the opinion entertained of his appointment.

1016. That question has been discussed, and the opinion is that the latest point of time which can be taken as that at which the appointment was complete and evidenced was when, after the signature of the President, the seal of the United States was affixed to the commission.

1017. It is then the opinion of the Court:

1. That, by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the County of Washington in the District of Columbia, and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years.

2. **That, having this legal title to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.**

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on:

1. The nature of the writ applied for, and

2. The power of this court.

1. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be

"a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions requiring them to do some particular thing therein specified which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in 3 Burrows, 1266, in the case of The King v. Baker et al., states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge,

1018. "there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government."

In the same case, he says,

1019. "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

1020. In addition to the authorities now particularly cited, many others were relied on at the bar which show how far the practice has conformed to the general doctrines that have been just quoted. This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone,

1021. "to do a particular thing therein specified, which appertains to his office and duty and which the Court has previously determined or at least supposes to be consonant to right and justice."

Or, in the words of Lord Mansfield, t**he applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.**

1022. These circumstances certainly concur in this case.

1023. Still, to render the mandamus a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed, and the person applying for it must be without any other specific and legal remedy.

1024. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate, and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that, in such a case as this, the assertion by an individual of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should, at first view, be considered by some as an attempt to intrude into the cabinet and to intermeddle with the prerogatives of the Executive.

1025. It is scarcely necessary for the Court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.

1026. But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the Executive can be considered as having exercised any control; **what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim or to issue a mandamus directing the performance of a duty not depending on Executive discretion, but on particular acts of Congress and the general principles of law?**

1027. If one of the heads of departments commits any illegal act under colour of his office by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct if the case be such a case as would, were any other individual the party complained of, authorize the process?

1028. It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which Executive discretion is to be exercised, in which he is the mere organ of Executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

1029. But where he is directed by law to do a certain act affecting the **absolute rights of individuals,** in the performance of which he is not placed under the particular direction of the President, and **the performance of which the President cannot lawfully forbid,** and therefore is never presumed to have forbidden -- as **for example, to record a commission**, **or a patent for land**, **which has received all the legal solemnities; or to give a copy of such record -- in such cases, it is not perceived on what ground the Courts of the country are further excused from the duty of giving judgment that right to be done to an injured individual than if the same services were to be performed by a person not the head of a department.**

1030. This opinion seems not now for the first time to be taken up in this country.

It must be well recollected that, in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the Circuit Courts, which act, so far as the duty was imposed on the Courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

1031. This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list was a legal question, properly determinable in the Courts, although the act of placing such persons on the list was to be performed by the head of a department.

1032. That this question might be properly settled, Congress passed an act in February, 1793, making it the duty of the Secretary of War, in conjunction with the Attorney General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court of the United States on the validity of any such rights, claimed under the act aforesaid.

1033. After the passage of this act, a mandamus was moved for, to be directed to the Secretary of War, commanding him to place on the pension list a person stating himself to be on the report of the judges.

1034. There is, therefore, much reason to believe that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

1035. When the subject was brought before the Court, the decision was not that a mandamus would not lie to the head of a department directing him to perform an act enjoined by law, in the performance of which an individual had a vested interest, but that a mandamus ought not to issue in that case -- the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

1036. The judgment in that case is understood to have decided the merits of all claims of that description, and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional in order to place themselves on the pension list.

The doctrine, therefore, now advanced is by no means a novel one.

1037. It is true that the mandamus now moved for is not for the performance of an act expressly enjoined by statute.

1038. (It is true that the mandamus now Ordained is for an act expressly enjoined by statue.)
It is to deliver a commission, on which subjects the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right of which the Executive cannot deprive him. He has been appointed to an office from which he is not removable at the will of the Executive, and, being so appointed, he has a right to the commission which the Secretary has received from the President for his use. The act of Congress does not, indeed, order the Secretary of State to send it to him, but it is placed in his hands for the person entitled to it, and cannot be more lawfully withheld by him than by another person.

1039. It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury, in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold is incapable of being ascertained, and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission or a copy of it from the record.

1040. This, then, is a plain case of a mandamus, either to deliver the commission or a copy of it from the record, and it only remains to be inquired:

Whether it can issue from this Court.

1041. The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, **being a person, holding an office under the authority of the United States, is precisely within the letter of the description, and if this Court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.**

1042. The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case, **because the right claimed is given by a law of the United States.**

In the distribution of this power. it is declared that

1043. "The Supreme Court shall have **original jurisdiction in all cases affecting** ambassadors, other public ministers and consuls, and **those in which a state shall be a party**. In all other cases, the Supreme Court shall have appellate jurisdiction."

1044. It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court con-

tains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that Court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.

1045. If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage -- is entirely without meaning -- if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.

1046. Affirmative words are often, in their operation, negative of other objects than those affirmed, and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.

1047. It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it.

1048. If the solicitude of the Convention respecting our peace with foreign powers induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them, yet the clause would have proceeded no further than to provide for such cases if no further restriction on the powers of Congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction unless the words be deemed exclusive of original jurisdiction.

1049. When an instrument organizing fundamentally a judicial system divides it into one Supreme and so many inferior courts as the Legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be that, in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. ,If any other construction

would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

1050. To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

1051. It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that, if it be the will of the Legislature that a mandamus should be used for that purpose, **that will must be obeyed**. This is true; yet the jurisdiction must be appellate, not original.

1052. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings **in a cause already instituted,** and does not create that case. Although, **therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this to enable the Court to exercise its appellate jurisdiction.**

1053. The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

1054. The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

1055. That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

1056. This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or **establish certain limits not to be transcended by** those departments.

1057. The Government of the United States is of the latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.

1058. Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

1059. Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

1060. If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

1061. It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

1062. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

1063. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

1064. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

1065. This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

1066. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.

1067. The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

1068. In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

1069. It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

1070. The Constitution declares that "no bill of attainder or ex post facto law shall be passed."

1071. If, however, such a bill should be passed and a person should be prosecuted under it, must the Court condemn to death those victims whom the Constitution endeavours to preserve?

"No person,' says the Constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

1072. Here. the language of the Constitution is addressed especially to the Courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the Legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

1073. From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the Legislature.

1074. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

1075. The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words:

1076. "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

1077. Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him?

1078. If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime.

1079. It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

writ of unspeakable errors, divide et impera! **RELIEF: VIOLATIONS OF TITLE 18. U.S.C. § 241. CONSPIRACY. MALICE AND DECEIT; ABUSE OF PROCESS AND DISCRETION. § 242. DEPRIVATION OF RIGHTS UNDER COLOR OF LAW. FRANCHISE TRESSPASS. § 245. FEDERALLY PROTECTED RIGHTS. FRAUD UPON THE COURT. ABUSE. § 3729. FALSE CLAIMS; HARD BARGAIN, FRAUD, ACCIDENT, TRUST, HARDSHIP; MALICE. WRITS OF EQUITABLE ESTOPPEL! PROHIBITION! NEGLIGENCE!**

Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof. quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

June 14, 2009 Signature:_____

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

1. The circuit court erred in not analyzing U.S. and California law as to whether the EPA actions are both procedurally and substantively unfair or unconscionable.

You generally examine the first and second factors together. See Bauman, 557 F.2d at 654 (the second factor "is closely related to the first").

Inc., 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006),

2. The first and second Bauman factors weigh in favor of granting the relief requested. petitioner "has no other adequate means" of becoming project manager or joining the case, nor is anyone else protecting his interests as a mining joint venturer, and his and his heirs and successors interests in the assignment, or ensuring that he and his successors and assigns can continue as the class representative. Bauman, 557 F.2d at 654. This would "prejudice[]" Petitioner "in a way not correctable on appeal." Id. (which is not available anyway).

3. The fifth Bauman factor also favors the relief requested. The district court's order discriminating against an innocent landowner and enforcing reckless negligent endangerment through judicial swaddling and judicial deference to EPA misconduct with malice and oppression "raises new and important problems" and addresses "issues of law of first impression." Bauman,557 F.2d at 655.

1080. This hopefully is the last time any federal court has to consider whether the enforcement of environmental laws to intentionally deprive vested property rights by pretended preservation and illegitimate animus to the exclusion of the prior rights of the real parties in interest, and to the exclusion of the properties real perfection and preservation, all working to the dissipation and degeneration of the general welfare, and in violation of prior rights to complete development is unconstitutional, thus deserving immediate resolution.

* * *

Because all five Bauman factors favor relief, and none militates against it, you should conclude that the balance of factors favors issuing all the writs.

VIOLATION OF ESTBLISHMENT CLAUSE, ESTABLISHED BELIEFS

The Supreme Court has interpreted religion to mean a sincere and meaningful belief that occupies in the life of its possessor a place parallel to the place held by God in the lives of other persons.

The religion or religious concept need not include belief in the existence of God or a supreme being to be within the scope of the First Amendment.

As the case of United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944), demonstrates, the Supreme Court must look to the sincerity of a person's beliefs to help decide if those beliefs constitute a religion that deserves constitutional protection. The Ballard case involved the conviction of organizers of the I Am movement on grounds that they defrauded people by falsely representing that their members had supernatural powers to heal people with incurable illnesses. The Supreme Court held that the jury, in determining the line between the free exercise of religion and the punishable offense of obtaining property under False Pretenses, should not decide whether the claims of the I Am members were actually true, only whether the members honestly believed them to be true, thus qualifying the group as a religion under the Supreme Court's broad definition. In addition, a belief does not need to be stated in traditional terms to fall within First Amendment protection. For example, Scientology—a system of beliefs that a human being is essentially a free and immortal spirit who merely inhabits a body—does not propound the existence of a supreme being, but it qualifies as a religion under the broad definition propounded by the Supreme Court. The Supreme Court has deliberately avoided establishing an exact or a narrow definition of religion because freedom of religion is a dynamic guarantee that was written in a manner to ensure flexibility and responsiveness to the passage of time and the development of the United States. Thus, religion is not limited to traditional denominations.

The First Amendment guarantee of freedom of religion has deeply rooted historical significance. Many of the colonists who founded the United States came to this continent to escape religious persecution and government oppression.

This country's founders advocated religious freedom and sought to prevent any one religion or group of religious organizations from dominating the government or imposing its will or beliefs on society as a whole. The revolutionary philosophy encompassed the principle that the interests of society are best served if individuals are free to form their own opinions and beliefs.

When the colonies and states were first established, however, most declared a particular religion to be the religion of that region. But, by the end of the American Revolution, most state-supported

churches had been disestablished, with the exceptions of the state churches of Connecticut and Massachusetts, which were disestablished in 1818 and 1833, respectively. Still, religion was undoubtedly an important element in the lives of the American colonists, and U.S. culture remains greatly influenced by religion.

Establishment Clause

The Establishment Clause prohibits the government from interfering with individual religious beliefs. The government cannot enact laws aiding any religion or establishing an official state religion. The courts have interpreted the Establishment Clause to accomplish the separation of church and state on both the national and state levels of government.

The authors of the First Amendment drafted the Establishment Clause to address the problem of government sponsorship and support of religious activity. The Supreme Court has defined the meaning of the Establishment Clause in cases dealing with public financial assistance to church-related institutions, primarily parochial schools, and religious practices in the public schools. The Court has developed a three-pronged test to determine whether a statute violates the Establishment Clause. According to that test, a statute is valid as long as it has a secular purpose; its primary effect neither advances nor inhibits religion; and it is not excessively entangled with religion. Because this three-pronged test was established in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), it has come to be known as the Lemon test. Although the Supreme Court adhered to the Lemon test for several decades, since the 1990s, it has been slowly moving away from that test without having expressly rejected it.

SNIPE HUNTING FOR REVOLUTIONARY PHILOSOPHY

Christmas and the First Amendment have had a rocky relationship. A decades-long battle over the place of worship and tradition in public life has erupted nearly every year when local governments sponsor holiday displays on public property. Lawsuits against towns and cities often, but not always, end with the courts ordering the removal of religious symbols whose government sponsorship violates the First Amendment. Since the 1980s, however, the outcome of such cases has become less predictable as deep divisions on the Supreme Court have resulted in new precedents that take a more nuanced view of the law. In such cases, context determines everything. Placing a na-

tivity scene with the infant Jesus outside a town hall may be unconstitutional, for example, but the display may be acceptable if Santa Claus stands nearby.

On the question of religious displays, the First Amendment has two broad answers depending on the sponsor. Any private citizen can put up a nativity scene on private property at Christmas time: citizens and churches commonly exercise their First Amendment right to Freedom of Speech to do so. But when a government sets up a similar display on public property, a different aspect of the amendment comes into play. Governments do not enjoy freedom of speech, but, instead, are controlled by the second half of the First Amendment—the Establishment Clause, which forbids any official establishment of religion. All lawsuits demanding that a crèche, cross, menorah, or other religious symbol be removed from public property allege that the government that put it there has violated the Establishment Clause.

The Supreme Court has reviewed challenges to government sponsored displays of religious symbols under the Lemon test. Based on criteria from several earlier decisions and named after the case Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1973), the test recognizes that government must accommodate religion but forbids it to support religion. To survive constitutional review, a display must meet all three requirements or "prongs" of the test: it must have a secular (nonreligious) purpose, it must have the primary effect of neither advancing nor inhibiting religion, and it must avoid excessive entanglement between government and religion. Failing any of the three parts of the test constitutes a violation of the Establishment Clause.

Starting in the 1980s, the test began to divide the Supreme Court. Conservative justices objected because it blocked what they saw as a valid acknowledgment of the role of religion in public life; opposing them were justices who believed in maintaining a firm line between government and religion. In significant cases concerning holiday displays, the Court continued to use the Lemon test but with new emphasis on the question of whether the display has the effect of advancing or endorsing a particular religion.

This shift in emphasis first emerged in 1984 in a case involving a Christmas display owned and erected by the City of Pawtucket, Rhode Island, in a private park. The display included both a life-sized nativity scene with the infant Jesus, Mary, and Joseph and secular symbols such as Santa's

house, a Christmas tree, striped poles, animals, and lights. Pawtucket residents successfully sued for removal of the nativity scene in federal district court, where it was found to have failed all three prongs of the Lemon test (Donnelly v. Lynch, 525 F. Supp. 1150 [D.R.I. 1981]). The decision was upheld on appeal, but, surprisingly, in Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984), the Supreme Court narrowly reversed in a 5–4 vote and found the entire display constitutional.

The majority in Lynch stressed historical context, emphasizing that the crèche belonged to a tradition "acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries." The display, ruled the Court, passed each prong of the Lemon test. First, the city had a secular purpose in celebrating a national holiday by using religious symbols that "depicted the historical origins" of the holiday. Second, the display did not primarily benefit religion. Third, no excessive entanglement between government and religion existed. Perhaps most significantly, the Court saw the crèche as a "passive symbol": although it derived from religion, over time it had come to represent a secular message of celebration.

Lynch laid bare the deep divisions on the Court. By emphasizing context, the majority appeared to suggest that the ruling was limited to circumstances similar to those in the case at hand: religious symbols could be acceptable in a holiday display if used with secular symbols. The majority did not enunciate any broad new protections for governments eager to sponsor crèches. Nonetheless, the opinion did not satisfy the dissenters, who sharply criticized the majority for failing to vigorously apply the Lemon test. They noted that the city could easily have celebrated the holiday without using religious symbols, and they saw the crèche as nothing less than government endorsement of religion.

The emphasis on context became even more pronounced in a 1989 case, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472. In Allegheny, a Pennsylvania county appealed a lower court ruling that had banned its two separate holiday displays: a crèche situated next to poinsettia plants inside the county courthouse, and an eighteen-foot menorah (a commemorative candelabrum in the Jewish faith) standing next to a Christmas tree

and a sign outside a city-county office building. Each religious symbol was owned by a religious group—the crèche by the Catholic Holy Name Society and the menorah by Chabad, a Jewish organization. Viewing the displays in context, the Court permitted one but not the other, and its reasoning turned on subtle distinctions.

The Court deemed the crèche an unconstitutional endorsement of religion for two reasons. First, the presence of a few flowers around the crèche did not mediate its religious symbolism in the way that the secular symbols had done for the crèche in Lynch. Second, the prominent location doomed the display. By choosing the courthouse, a vital center of government, the Court said the county has sent "an unmistakable message" that it endorsed Christianity.

But the menorah passed constitutional review. Like the crèche in Lynch, its religious significance was transformed by the presence of secular symbols: the forty-five-foot Christmas tree and a sign from the city's mayor that read, "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are keepers of the flame of liberty and our legacy of liberty." Even so, members of the majority disagreed on precisely what message was sent by the display. Justice harry a. blackmun read it as a secular message of holiday celebration. In a more complicated view, Justice Sandra Day O'Connor said it "acknowledg[ed] the cultural diversity of our country and convey[ed] tolerance of different choice in matters of religious belief or non-belief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens." Whatever the exact message, the majority agreed that it did not endorse religion.

Since the 1980s the thrust of Supreme Court doctrine has been to allow publicly sponsored holiday displays to include religious symbols. This expansive view of the First Amendment grew out of the Court's acknowledgment that local governments can accommodate civic tradition. Religious symbols on their own are unconstitutional. A display including such symbols may pass review, however, if it features secular symbols as well. Context is the determinant: to avoid violating the Establishment Clause, a crèche or menorah may need a boost from Santa Claus.

The Court has stated that the Establishment Clause means that neither a state nor the federal government can organize a church. The government cannot enact legislation that aids one religion, aids all religions, or prefers one religion over another. It cannot force or influence a person to par-

ticipate in, or avoid, religion or force a person to profess a particular religious belief. No tax in any amount can be levied to support any religious activities or organizations. Neither a state nor the federal government can participate, whether openly or secretly, in the affairs of any religious groups.

Federal and state governments have accepted and implemented the doctrine of the separation of church and state by minimizing contact with religious institutions. Although the government cannot aid religions, it can acknowledge their role as a stabilizing force in society. For example, religious institutions, along with other charitable or nonprofit organizations, have traditionally been given tax exemptions. This practice, even when applied to religious organizations, has been deemed constitutional because the legislative aim of a property tax exemption is not to advance religion but to ensure that the activities of groups that enhance the moral and mental attitudes of the community will not be inhibited by taxation. The organizations lose the tax exemption if they undertake activities that do not serve the beneficial interests of society. Thus, in 1983, the Supreme Court decided in Bob Jones University v. United States, 461 U.S. 574, 103 S. Ct. 2017, 76 L. Ed. 2d 157, that nonprofit private schools that discriminated against their students or prospective students on the basis of race could not claim tax-exempt status as a charitable organization for the purposes of federal tax laws.

It is also believed that the elimination of such tax exemptions would lead the government into excessive entanglements with religious institutions. The exemption, therefore, is believed to create only a minimal and remote involvement between church and state—less than would result from taxation. The restricted fiscal relationship, therefore, enhances the desired separation.

Religion and Education The many situations in which religion and education overlap are a source of great controversy. In the early nineteenth century, the vast majority of Americans were Protestant, and Protestant-based religious exercises were common in the public schools. Legal challenges to these practices began in the state courts when a substantial number of Roman Catholics arrived in the United States. Until 1962 when the U.S. Supreme Court began to directly address some of these issues, most states upheld the constitutionality of prayer and Bible reading in the public schools.

In the 1962 case of engel v. vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601, the Supreme Court struck down as unconstitutional a prayer that was a recommended part of the public school curriculum in the state of New York. The prayer had been approved by Protestant, Catholic, and Jewish leaders in the state. Although the prayer was nondenominational and student participation in it was strictly voluntary, it was struck down as violative of the Establishment Clause.

Agostini v. Felton

In June 1997 the U.S. Supreme Court rolled back restrictions that it had imposed twelve years earlier on federal aid to religious schools. In a 5–4 decision in Agostini v. Felton, 117 S. Ct. 1997 (1997), the Court ruled that public school teachers can teach remedial education classes to disadvantaged students on the premises of parochial schools—a dramatic reversal of the Court's earlier hard line.

Federal law provides funds for such services to all children of low-income families under title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C.A. § 6301 et seq.). But in 1985 the Court barred public school instructors from teaching title I classes on parochial school premises. In Aguilar v. Felton (473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290), the majority ruled that the mere presence of public employees at these schools had the effect of unconstitutionally advancing religion. To comply with the order, New York parked vans outside of parochial school property to deliver the services, a system that cost taxpayers $100 million between 1985 and 1997. In a 1995 challenge, New York City argued that intervening cases had invalidated the Supreme Court's earlier ruling. Upon accepting the case on appeal in 1997, the Court agreed. In her majority opinion, Justice Sandra Day O'Connor held that Aguilar had been overruled by two more recent cases based on the Establishment Clause of the U.S. Constitution, Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986), and Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d (1993). O'Connor said that the two cases—permitting a state tuition grant to a blind person who attended a Christian college, and allowing a state-employed sign language interpreter to accompany a deaf student to a Catholic school, respectively—made it clear that the premises in Aguilarwere no longer valid.

Although limited specifically to title I programs, the decision added fuel to another long-standing controversy. Proponents and opponents of school vouchers—a system under which parents would be able to allocate their tax dollars to their children's private school education—disputed whether the case indicated that the Court was moving toward embracing the voucher idea.

In 1963, the Supreme Court heard the related issues of whether voluntary Bible readings or recitation of the Lord's Prayer were constitutionally appropriate exercises in the public schools (abington school district v. schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844). It was in these cases that the Supreme Court first formulated the three-pronged test for constitutionality. In applying the new test, the Court concluded that the exercises did not pass the first prong of the test: they were not secular in nature, but religious, and thus they violated the Establishment Clause because they violated state neutrality requirements.

Although students in public schools are not permitted to recite prayers, the practice of a state legislature opening its sessions with a nondenominational prayer recited by a chaplain receiving public funds has withstood constitutional challenge. In Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), the Supreme Court ruled that such a practice did not violate the Establishment Clause. In making its decision, the Court noted that this was a customary practice and that the proponents of the Bill of Rights also approved of the government appointment of paid chaplains.

The Supreme Court has also held that a religious invocation, instituted by school officials, at a public school graduation violates the Establishment Clause (lee v. weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 [1992]). Subsequently, the Court made clear that even indirect school support of a prayer given by students violates the First Amendment. In Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000), the Court held that a Texas public school district could not let its students lead prayers over the public address system before its high school football. The school district's sponsorship of the public prayers by elected student representatives was unconstitutional because the schools could not coerce anyone to support or participate in religion.

In 1980, the Supreme Court overturned a Kentucky statute requiring the posting of the Ten Commandments, copies of which were purchased with private contributions, in every public school classroom (Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199). Although the state argued that the postings served a secular purpose, the Court held that they were plainly religious. Four of the Supreme Court's nine justices dissented from the Court's opinion and were prepared to conclude that the postings were proper based on their secular purpose.

Because the Establishment Clause calls for government neutrality in matters involving religion, the government need not be hostile or unfriendly toward religions because such an approach would favor those who do not believe in religion over those who do. In addition, if the government denies religious speakers the ability to speak or punishes them for their speech, it violates the First Amendment's right to Freedom of Speech. The Supreme Court held in 1981 that it was unconstitutional for a state university to prohibit a religious group from using its facilities when the facilities were open for use by organizations of all other kinds (Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440). The principles established in Widmar were unanimously reaffirmed by the Supreme Court in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). In 1995, the Supreme Court held that a state university violates the Free Speech Clause when it refuses to pay for a religious organization's publication under a program in which it pays for other student organization publications (Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700).

Facing another education and religion issue, the Supreme Court declared in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), that public school buildings could not be used for a program that allowed pupils to leave classes early to receive religious instruction. The Court found that this program violated the Establishment Clause because the tax-supported public school buildings were being used for the teaching of religious doctrines, which constituted direct government assistance to religion.

However, the Court held that a release-time program that took place outside the public school buildings was constitutional because it did not involved religious instruction in public school

classrooms or the expenditure of public funds (Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 [1952]). All costs in that case were paid by the religious organization conducting the program.

The U.S. Supreme Court has also held that states may not restrict the teaching of ideas on the grounds that they conflict with religious teachings when those ideas are part of normal classroom subjects. In Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968), the Court struck down a state statute that forbade the teaching of evolutionary theory in public schools. The Court held that the statute violated the Establishment Clause because its purpose was to protect religious theories of creationism from inconsistent secular theories.

In Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed. 2d 510 (1987), the Supreme Court struck down a Louisiana "Creationism Act" which prevented any teaching of evolution in public schools unless the course was also accompanied by the teaching of biblical creationism. In his majority opinion, Justice william brennan wrote that the Lemon test had to be used to judge the constitutionality of the Creationism Act. The state contended that the law was simply designed to promote Academic Freedom by ensuring that students would hear about more than one theory on the origins of life. However, the Court noted that teachers were permitted to present more than one such theory before the law had been passed. The actual purpose of the law, then, had to be to make sure that creationism was taught if anything at all was taught. Brennan ruled that the act did not have a secular purpose and that it did not advance academic freedom. To the contrary, it restricted the abilities of teachers to teach what they deemed appropriate. Brennan also pointed out that Louisiana provided instructional packets to assist in the teaching of creationism but did not provide similar materials for the teaching of evolution. This demonstrated an interest in promoting creationism and religion.

In a 1993 case, the Supreme Court held that the Establishment Clause did not prevent a public school from providing a sign language interpreter for a deaf student who attended a religiously affiliated school within the school district (Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1). Commentators have noted that this case demonstrates the Court's willingness to uphold religiously neutral government aid to all school children, regardless

of whether they attend a religiously affiliated school, where the aid is designed to help the children overcome a physical or learning disability. As of 2003, it was not clear, however, whether the Court would extend this holding to more general forms of aid to children in religious and public schools alike.

Government and Religion The closing of government offices on particular religious holidays is unconstitutional if no secular purpose is served (Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 [1976]). But if employees won the closing through Collective Bargaining, it is permissible even without a secular purpose (Americans United for Separation of Church and State v. Kent County, 97 Mich. App. 72, 293 N.W. 2d 723 [1980]).

Government display of symbols with religious significance raises Establishment Clause issues. In the 1984 case of Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604, the Supreme Court upheld the right of a city to erect in a park a Christmas display that included colored lights, reindeer, candy canes, a Santa's house, a Christmas tree, a "SEASONS GREETINGS" banner, and a nativity scene. The Court decided the inclusion of the nativity scene along with traditional secular Christmas symbols did not promote religion to an extent prohibited by the First Amendment.

Since the mid-1990s, displays of the Ten Commandments in public buildings other than schools has become more common. Several judges drew national attention when they posted the Ten Commandments in their courtrooms, thereby triggering litigation. Alabama trial judge Roy Moore used the publicity from his refusal to remove the Ten Commandments from his courtroom to run for and be elected chief justice of the Alabama Supreme Court in November 2000. After taking office in January 2001, he briefly avoided controversy by posting the Ten Commandments in his chambers rather than in the Supreme Court's courtroom. However, Moore installed a 5,300 pound Ten Commandments monument in the judicial building on a summer night in 2001. A group of citizens objected and filed a lawsuit in U.S. District Court. In November 2002, the federal court issued an order directing Moore to remove the monument. Moore refused and vowed to appeal the decision (Glassroth v. Moore, 242 F.Supp. 2d 1068 [M.D.Ala.2002]). In 2003, the Eleventh Circuit Court of Appeals affirmed the lower court decision in Glassroth v. Moore, 335 F. 3d 1282.

Despite a federal court order to remove the monument, Moore refused. Finally, in September 2003, the other members of the Alabama Supreme Court had the monument removed. Moore was suspended from office while a judicial inquiry commission reviewed his conduct.

Free Exercise Clause

The Free Exercise Clause guarantees a person the right to practice a religion and propagate it without government interference. This right is a liberty interest that cannot be deprived without Due Process of Law. Although the government cannot restrict a person's religious beliefs, it can limit the practice of faith when a substantial and compelling state interest exists. The courts have found that a substantial and compelling State Interest exists when the religious practice poses a threat to the health, safety, or Welfare of the public. For example, the government could legitimately outlaw the practice of Polygamy that was formerly mandated by the doctrines of the Church of Jesus Christ of Latter-Day Saints (Mormons) but could not outlaw the religion or belief in Mormonism itself (Reynolds v. United States, 98 U.S. 145, 25 L. Ed. 244 [1878]). The Supreme Court has invalidated very few actions of the government on the basis of this clause.

Religious practices are not the only method by which a violation of the Free Exercise Clause can occur. In West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Supreme Court held that a public school could not expel children because they refused on religious grounds to comply with a requirement of saluting the U.S. flag and reciting the Pledge of Allegiance. In that case, the children were Jehovah's Witnesses, and they believed that saluting the flag fell within the scope of the biblical command against worshipping false gods.

A more recent decision by the Ninth Circuit Court of Appeals ignited a firestorm of controversy. The appeals court, in Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002), ruled that Congress had violated the Establishment Clause when, in 1954, it inserted the words "Under God" into the pledge. Therefore, a California school district's daily recitation of the Pledge of Allegiance injured the daughter of an atheist father, for the pledge sent a message to her that she was an "outsider" and not a member of the political community. The defendants vowed to petition the Supreme

Court to review the case. The Ninth Circuit stayed its ruling until the Supreme Court resolved the issue by either denying review or taking the appeal.

In Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the Supreme Court held that state laws requiring children to receive education up to a certain age impinged upon the religious freedom of the Amish who refuse to send their children to school beyond the eighth grade because they believe that doing so would impermissibly expose the children to worldly influences that conflicted with Amish religious beliefs.

In 1993, Congress passed the controversial Religious Freedom Restoration Act (RFRA), which provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, "unless the government can demonstrate that the burden advances a compelling governmental interest in the least restrictive way. This statute was enacted in response to the Supreme Court's 1990 decision in Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876. The Smith case involved a state law that denied Unemployment Compensation benefits to anyone who had been fired from his or her job for job-related misconduct. This case involved two individuals who had been fired from their jobs for ingesting peyote, which was forbidden by state law. The individuals argued that their ingestion of peyote was related to a religious ceremony in which they participated. The Supreme Court ruled that the Free Exercise Clause did not require an exemption from the state law banning peyote use and that unemployment compensation could therefore lawfully be denied.

RFRA directly superseded the Smith decision. However, soon after it was enacted, many courts ruled that RFRA violated either the Establishment Clause or the Separation of Powers doctrine. In the 1997 case of City of Boerne v. P. F. Flores, 1997 WL 345322, the U.S. Supreme Court voted 6–3 to invalidate RFRA on the grounds that Congress had exceeded the scope of its enforcement power under section 5 of the Fourteenth Amendment in enacting RFRA. Section 5 of the Fourteenth Amendment permits Congress to enact legislation enforcing the Constitutional right to free exercise of religion. However, the Court held that this power is limited to preventative or remedial measures. The court found that RFRA went beyond that and actually made substantive changes in the governing law. Because Congress exceeded its power under the Fourteenth Amendment in en-

acting RFRA, it contradicted vital principles necessary to maintain separation of powers and the federal-state balance and thus was unconstitutional.

Although the Free Exercise Clause protects against government action, it does not restrict the conduct of private individuals. For example, the courts generally will uphold a testator's requirement that a beneficiary attend a specified church to receive a testamentary gift because the courts refuse to question the religious views of a testator in the interest of public policy. Similarly, the Free Exercise Clause does not protect a person's religious beliefs from infringement by the actions of private corporations or businesses, although federal and state Civil Rights laws may make such private conduct unlawful.

The government cannot enact a statute that wholly denies the right to preach or to disseminate religious views, but a state can constitutionally regulate the time, place, and manner of soliciting upon the streets and of conducting meetings in order to safeguard the peace, order, and comfort of the community. It can also protect the public against frauds perpetrated under the cloak of religion, as long as the law does not use a process amounting to a Prior Restraint, which inhibits the free exercise of religion. In a 1951 case, the Supreme Court held that it was unconstitutional for a city to deny a Baptist preacher the renewal of a permit for evangelical street meetings, even though his previous meetings included attacks on Roman Catholicism and Judaism that led to disorder in the streets, because it constituted a prior restraint (Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280).

State laws known as Sunday closing laws, which prohibit the sale of certain goods on Sundays, have been declared constitutional against the challenge of Orthodox Jews who claimed that the laws created an economic hardship for them because their faith requires them to close their businesses on Saturdays and who therefore wanted to do business on Sundays (Braunfield v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 [1961]). The Supreme Court held that, although the law imposed an indirect burden on religion, it did not make any religious practice itself unlawful.

In United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), the Supreme Court upheld the requirement that Amish employers withhold Social Security and unemployment insurance contributions from their employees, despite the Amish argument that this violated their

rights under the Free Exercise Clause. The Court found that compulsory contributions were necessary to accomplish the overriding government interest in the proper functioning of the Social Security and unemployment systems.

The Supreme Court has also upheld the assignment and use of Social Security numbers by the government to be a legitimate government action that does not violate the Free Exercise Clause (Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 [1986]).

In the 1989 case of Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766, the Supreme Court held that the government's denial of a taxpayer's deduction from gross income of "fixed donations" to the Church of Scientology for certain religious services was constitutional. These fees were paid for certain classes required by the Church of Scientology, and the Court held that they did not classify as charitable contributions because a good or service was received in exchange for the fee paid.

In Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990), the Court ruled that a religious organization is not exempt from paying a state's general sales and use taxes on the sale of religious products and religious literature.

Similarly, the Court decided in Heffron v. International Society for Krishna Consciousness (ISKCON), 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981), that a state rule limiting the sale or distribution of merchandise to specific booths was lawful, even when applied to ISKCON members whose beliefs mandated them to distribute or sell religious literature and solicit donations in public places.

Military regulations have also been challenged under the Free Exercise Clause. In Goldman v. Weinberger, 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986), the Supreme Court held that the Free Exercise Clause did not require the U.S. Air Force to permit an Orthodox Jewish serviceman to wear his yarmulke while in uniform and on duty. The Court found that the military's interest in discipline was sufficiently important to outweigh the incidental burden the rule had on the serviceman's religious beliefs.

However, a law that places an indirect burden on the practice of religion so as to impede the observance of religion or a law that discriminates between religions is unconstitutional. Thus, the

Supreme Court has held that the denial of unemployment compensation to a Seventh-Day Adventist who was fired from her job and could not obtain any other work because of her refusal to work on Saturdays for religious reasons was unconstitutional (Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 [1963]). The Sherbert case was reaffirmed and applied in the 1987 case of Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190.

In the 1993 case of Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472, remanded on other grounds, the High Court overturned a city law that forbade animal slaughter insofar as the law banned the ritual animal slaughter by a particular religious sect. The Court found that the law was not a religiously neutral law of general applicability but was specifically designed to prevent a religious sect from carrying out its religious rituals.

In Cruz v. Beto, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972), the Supreme Court affirmed that prisoners are entitled to their rights under the Free Exercise Clause, subject only to the requirements of prison security and discipline. Thus, the Court held that a Texas prison must permit a Buddhist prisoner to use the prison chapel and share his religious materials with other prisoners, just as any other prisoner would be permitted to so act.

States have been allowed to deny disability benefits, however, to applicants who refuse to submit to medical examinations for religious reasons. Courts have held that this is constitutional because the state has a compelling interest in verifying that the intended recipients of the tax-produced assistance are people who are legitimately entitled to receive the benefit. Likewise, states can regulate religious practices to protect the public health. Thus, state laws requiring the vaccination of all children before they are allowed to attend school are constitutional because the laws are designed to prevent the widespread epidemic of contagious diseases. Public health protection has been deemed to outweigh any competing interest in the exercise of religious beliefs that oppose any forms of medication or immunization.

A number of cases have involved the issue of whether there is a compelling state interest to require that a blood transfusion be given to a patient whose religion prohibits such treatment. In these cases, the courts look to the specific facts of the case, such as whether the patient is a minor

or a mentally incompetent individual, and whether the patient came to the hospital voluntarily seeking help. The courts have generally authorized the transfusions in cases of minors or mentally incompetent patients in recognition of the compelling government interest to protect the health and safety of people. However, the courts are divided as to whether they should order transfusions where the patient is a competent adult who steadfastly refuses to accept such treatment on religious grounds despite the understanding that her or his refusal could result in death. As of 2003, the Supreme Court had not ruled on this issue, and therefore there was no final judicial opinion on the propriety of such orders.

The use of secular courts to determine intra-church disputes has raised issues under both the Free Exercise Clause and the Establishment Clause. The Supreme Court decided in the 1871 case of Watson v. Jones, 80 U.S. 679, 20 L. Ed. 666, that judicial intervention in cases involving ownership and control of church assets necessarily had to be limited to determining and enforcing the decision of the highest judicatory body within the particular religious group. For congregational religious groups, such as Baptists and Jews, the majority of the congregation was considered the highest judicatory body. In hierarchical religions, such as the Roman Catholicism and Russian Orthodoxy, the diocesan bishop was considered the highest judicatory authority. The Supreme Court consistently applied that principle until its 1979 decision in Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775. In that case, the Court held that the "neutral principles of law developed for use in all property disputes" could be constitutionally applied in intra-church litigation. Under this case, courts can examine the language of the church charters, real and Personal Property deeds, and state statutes relating to the control of property generally.

Religious Oaths Prohibited

The Constitution also refers to religion in Article VI, Clause 3, which provides, "No religious test shall ever be required as a qualification to any office or public trust under the United States." The provision is binding only on the federal government.

In early American history, individual states commonly required religious oaths for public officers. But after the Revolutionary War, most of these religious tests were eliminated. As of 2003, the

individual states, through their constitutions or statutes, have restrictions similar to that of the U.S. Constitution on imposing a religious oath as a condition to holding a government position.

Freedom to express religious beliefs is entwined with the First Amendment guarantee of freedom of expression. The federal or state governments cannot require an individual to declare a belief in the existence of God as a qualification for holding office (Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 [1961]).

Congress took an unprecedented step when it passed the International Religious Freedom Act of 1998. (Pub. L.105-292, 112 Stat. 2787). The law seeks to promote religious freedom worldwide. It created a special representative to the Secretary of State for international religious freedom. This representative serves on a U.S. Commission on International Religious Freedom, an advisory organization. The act gives the president authority to take diplomatic and other appropriate action with respect to any country that engages in or tolerates violations of religious freedom. In extreme circumstances, the president is empowered to impose economic sanctions on countries that systematically deny religious fr

For Gods Sake: Religious Organizations Preach Environmental Stewardship

More People See Compelling Links Between Religion and the Environment

By Larry West, About.com

http://environment.about.com/od/activismvolunteering/a/religion.htm

Dear EarthTalk: What are religious leaders and organizations doing to communicate the importance of safeguarding our natural environment? – Peter Toot, Taos, NM

Perhaps it's not surprising that those who care for God's creation take environmental issues seriously. But only in recent years have Sunday sermons and other religious services put green topics front and center.

Faith-based Environmental Programs Reflect Spiritual Teachings

Much of the credit for increases in such "faith-based" environmentalism can go to the National Religious Partnership for the Environment (NRPE), which was founded in 1993 to "weave the mission of care for God's creation across all areas of organized religion." NRPE has forged rela-

tionships with a diverse group of religious organizations, including the U.S. Catholic Conference, the National Council of Churches of Christ, the Coalition on the Environment and Jewish Life, and the Evangelical Environmental Network.

These organizations work with NRPE to develop environmental programs that mesh with their own varied spiritual teachings. For instance, some 135,000 congregations--counting Catholic parishes, synagogues, Protestant and Eastern Orthodox churches and evangelic congregations--have been provided with resource kits on environmental issues, including sermons for clergy, lesson plans for Sunday school teachers, and even conservation tips for church and synagogue building managers.

Many Religious Groups Embrace Environmental Issues

Even Evangelical Christians, known for their conservative take on most issues, are going green. The Colorado-based National Association of Evangelicals[is urging its 30 million members to pursue a “biblically balanced agenda” to protect the environment alongside fighting poverty. Indeed, it was Evangelical minister, Reverend Jim Ball, who started the influential “What Would Jesus Drive?” campaign promoting hybrid cars back in 2003. More recently Ball has worked with likeminded Evangelicals to craft a faith-based policy statement on global warming.

Another key organization is the Forum on Religion and Ecology, which holds conferences that bring religious leaders together from all over the world to discuss religion’s role in ecological matters.

Individual Congregations Take Action

Earth Ministry, an association of 90 churches around Seattle, takes a more “hands-on” approach. It organizes hikes, book parties, and volunteer support for local agricultural projects, helping to educate thousands of people along the way. Some congregations also conduct church “greenings,” like replacing church light bulbs with energy-saving compact fluorescents and virgin copier paper with recycled paper.

Some more hard-hitting environmental actions have sprung up at the congregation level as well. In Mississippi, Jesus People Against Pollution brought together local churchgoers to pressure authorities to clean-up local toxic waste sites. And in Detroit, the Sisters of the Immaculate Heart

turned a former crack house into a community vegetable garden. Meanwhile, New York's Hamburg Presbyterian Church "adopted" a nearby creek and won it designation as a protected habitat. And just like good environmentalists everywhere, Hamburg Presbyterian's parishioners continue to monitor the creek to ensure that it remains vibrant and healthy.

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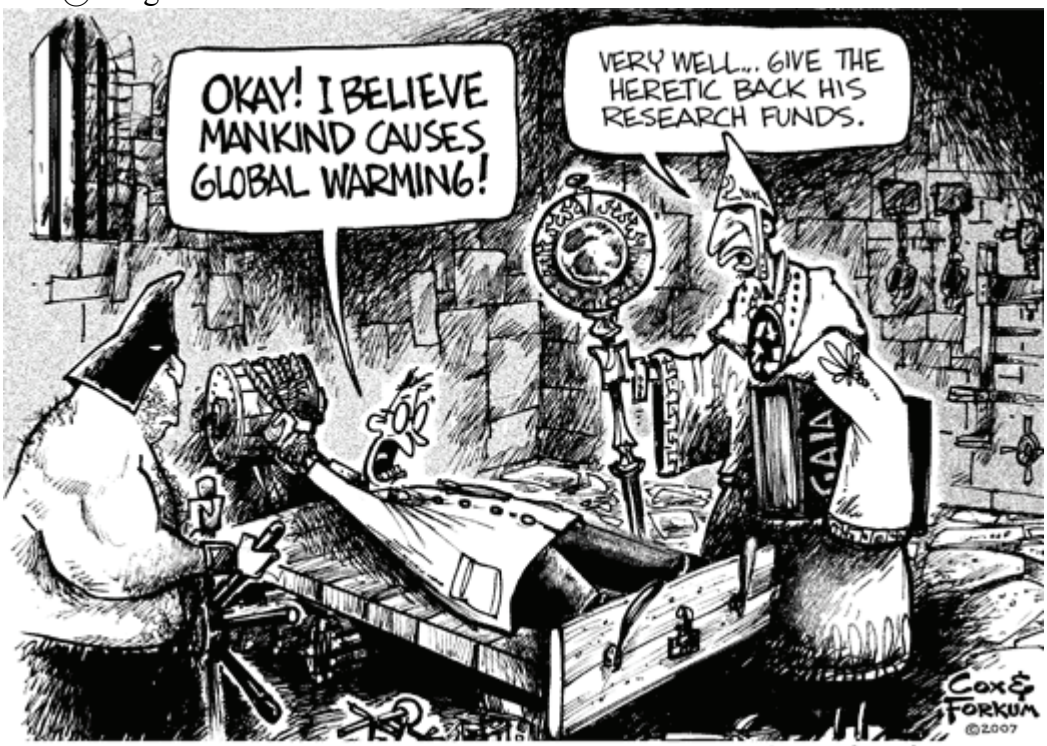

www.coxandforkum.com

The Ages of Gaia Exposed

by Lewis Loflin

In Why Fundamentalists are Beyond Reason, I made a passing comment that New Age religion and environmentalism seem inter-related. A visitor questioned the remark and I looked into the matter. While the article was aimed mainly at Christian fundamentalists, I had noticed a similar pattern of religious fundamentalism in the environmental movement that did resemble a religion or a cult. (Eden, good and evil, an authoritarian attitude, etc.) While I was aware of the Leftist politics in the movement, the level of religion and the related social patterns are astounding.

My conclusion is their scientific claims on ozone, global warming, etc. are pseudo-science and scare propaganda. Their main theme is political power and social control just like all religious fundamentalists.

A discussion of Pantheism and Deism

The Ages of Gaia and science facts they won't talk about

Let me explain how I use the term "fundamentalism." While the term is often used to describe a rigid outlook on say a religion such as Christianity or Islam, the term can have a broader meaning in that the central belief controls all aspects of life including economics, science, social issues, etc. To a Christian creation science is true because it supports a particular biblical belief, period. It's the under-pinning of the faith (truth whatever one holds it to be) must be defended. To the atheist, any notion of God in any form in science is equally taboo because science (misused) is the under-pinning of atheism. Properly used, science doesn't prove or disprove God; it just doesn't address the issue.

This is true of other beliefs or philosophies such as fascism or communism. Hitler was the godhead of Nazism, Stalin the godhead of Stalinism, etc. Science is the godhead of atheism. All forms of fundamentalism reject and often sacrifice the individual for group control. People are expendable while Gaia is not. But science is not popular with most of the public and is a poor basis for spiritualism or emotion. It doesn't deal in the things that make us feel good or answer ultimate questions most strive for. From what I've seen most of these people drift into Eastern religion or various form of New Age nonsense in a search for something their emotions can grasp.

New Age religion is not a religion as we define one with a creed or ceremony. "Unlike most formal religions, it has no holy text, central organization, membership, formal clergy, geographic center, dogma, creed, etc (It) is in fact a free-flowing spiritual movement; a network of believers and practitioners who share somewhat similar beliefs and practices. It's an ill-defined mish-mash of beliefs that result from having no creed or organization. This is what often results when irreligious or non-religious people are searching for some foundation for their lives.

New Age religion doesn't provide the structure of a church and is more limited to individuals or very small groups.

See New Age Religion.

Quoting Science under Siege by Michael Fumento, Noting that one (allegedly) scientific theory the Gaia theory actually claims that the earth is a living organism, essayist Charles Krauthammer writes that "contemporary environmentalism . . . indulges in earth worship to the point of idolatry." The godhead (or goddess head in this case) is mother earth which has become for many a spiritual being in her own right.

Quoting author and biologist Michael Crichton, "Environmentalism seems to be the religion of choice for urban atheists...If you look carefully, you see that environmentalism is in fact a perfect 21st century remapping of traditional Judeo-Christian beliefs and myths...

To quote Rex Murphy, "Save the Earth is evangelical to its green and etymological roots. We see repeated in environmentalism the great dualisms of good and evil -- the modern twin being, say, sustainability versus pollution. We see, too, in some aspects of the environmental movement that almost irresistible instinct to proselytize and "convert" that is the watermark of all the great faiths, the ferocity to persuade that only comes with the possession of an exclusive and undeniable truth...There is a lot of that mushy New-Ageism...the wild enthusiasms of mysticism..."

From Praise the green god from whom all blessings flow at www.globeandmail.com April 24, 2004

Michael Crichton Speech - Environmentalism as Religion

Extracts from Science under Siege by Michael Fumento

Now we have something with at least a form of a creed and are marketable to a large general public. It gets around all the Bible morality stuff and seems to have the support of science. Unlike New Age religion, the environmental movement goes beyond just spiritualism into politics, economics, and science. It intrudes on people in the real world sometimes good and sometimes bad. Clean air and water are certainly good, but reducing the human race to subsis-

tence agriculture and allowing/causing the deaths of millions of people is another matter. Its ranks are often filled with crackpots, disgruntled socialists, and anarchists of all types. It's a full-scale political machine opposed to traditional western culture and science.

The problem is just like Creation Science (Genesis) the science facts don't jive well with the belief system. How to sell it without some form of Hell or damnation for the non-believers that won't observe the truth? As the Nazis were very fond of saying, tell a lie long enough and it will be believed. As one Christian calls it "a combination of pseudo-science, new age mysticism, paganism, and socialism which serves as a combination of political philosophy and religion. This is clearly an attempt to replace America's historic secular culture with a new religion -- a pagan religion." To me it's also an odd alliance of those that oppose some or all parts of our traditional Judeo-Christian, capitalist, and Enlightenment civilization. Sort of like the Democratic Party being an alliance of anti-Republicans.

There are often socialist and anti-Western themes in general in the environmental movement. Under the National Religious Partnership for the Environment (NRPE) and their funding of hard-Left Fenton Communications, environmental fundamentalists are pursuing a dangerous political/religious theology which is attempting to merge pagan and New Age religion, statist politics, socialism, and environmental fanaticism. In the political area, this merging of environmental religion into national politics is a violation of separation of church and state and should be treated as such.

James Lovelock is the father of environmental religion and has melded an earth-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. Modem 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 amateur in modem 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 disci-

pline 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 40 years before plate tectonics was accepted by the scientific community.

Now perhaps you see why I work at home supporting myself and my family by whatever means come to hand.

It would be difficult after spending nearly twenty years developing a theory of the Earth as a living organism—where the evolution of the species and their material environment are tightly coupled but still evolve by natural selection—to avoid capturing views about the problems of pollution and the degradation of the natural environment by humans.

Gaia theory forces a planetary perspective. It is the health of the planet that matters, not that of some individual species of organisms. This is where Gaia and the environmental movements, which are concerned first with the health of people, part company. The health of the Earth is most threatened by major changes in natural ecosystems.

Agriculture, forestry, and to a lesser extent fishing are seen as the most serious sources of this

kind of damage with the inexorable increase of the greenhouse gases, carbon dioxide, methane, and several others coming next. Geophysiologists do not ignore the depletion of the ozone layer in the stratosphere with its concomitant risk of increased irradiation with short-wave ultraviolet, or the problem of acid rain. These are seen as real and potentially serious hazards but mainly to the people and ecosystems of the First World—from a Gaian perspective, a region that is clearly expendable.

It was buried beneath glaciers, or was icy tundra, only 10,000 years ago. As for what seems to be the greatest concern, nuclear radiation, fearful though it is to individual humans is to Gaia a minor affair. It may seem to many readers that I am mocking those environmental scientists whose life work is concerned with these threats to human life. This is not my intention. I wish only to speak out for Gaia because there are so few who do, compared with the multitudes who speak for the people.

Because of this difference in emphasis, a concern for the planet rather than for ourselves, I came to realize that there might be the need for a new profession, that of planetary medicine. I am indebted to the historian Donald McIntyre for writing to tell me that it was James Hutton who first introduced the idea of planetary physiology in the eighteenth century. Hutton was a physician as well as a geologist.

Physiology was the first science of medicine, and one of the aims of this book is to establish "geophysiology" as a basis for planetary medicine...Since 1982 the United Nations University, through its program officer, Walter Shearer, has provided moral and material support especially for the notion of planetary medicine.

Extracts from the Chapter God and Gaia. P. 203-223 by James Lovelock.

When I wrote the first book on Gaia I had no inkling that it would be taken as a religious book. Although I thought the subject was mainly science, there was no doubt that many of its readers found otherwise. Two-thirds of the letters received, and still coming in, are about the meaning of Gaia in the context of religious faith. This interest has not been limited to the laity; a most interesting letter came from Hugh Montefiore, then Bishop of Birmingham. He asked which I

thought came first, life or Gaia.

My attempts to answer this question led to a correspondence, reported in a chapter of his book The Probability of God. I suspect that some cosmologists are similarly visited by enquires from those who imagine them to be at least on nodding terms with God. I was naive to think that a book about Gaia would be taken as science only.

So where do I stand about religion? While still a student I was asked seriously, by a member of the Society of Friends, if I had ever had a religious experience. Not understanding what he meant, imagining that he referred to a manifestation or a miracle, I answered no. Looking back from 45 years on, I now tend to think that I should have said yes. Living itself is a religious experience. At the time, however, the question was almost meaningless because it implied a separation of life into sacred and secular parts. I now think that there can be no such division.

My thoughts about religion when a child grew from those of my father and the country folk I knew. It was an odd mixture, composed of witches, May trees, and the views expressed by Quakers, in and outside the Sunday school at a Friends' meeting house. Christmas was more of a solstice feast than a Christian one. We were, as a family, well into the present century, yet still amazingly superstitious. So ingrained was my childhood conditioning about the power of the occult that in later life it took a positive act of will to stop touching wood or crossing fingers whenever some hazard was to be faced. Christianity was there not so much as a faith, rather as a set of sensible directions on how to be good...

What about God? I am too committed to the scientific way of thinking to feel comfortable when enunciating the Creed or the Lord's Prayer in a Christian Church. The insistence of the definition “I believe in God the Father Almighty, Maker of Heaven and Earth” seems to anesthetize the sense of wonder, as if one were committed to a single line of thought by a cosmic legal contract.

I have kept my doubts in a separate place for too long. Now that I write this chapter, I have to try somehow to explain, to myself as well as to you, what is my religious belief. I am happy with the thought that the Universe has properties that make the emergence of life and Gaia in-

evitable. But I react to the assertion that it was created with this purpose. It might have been; but how the Universe and life began are ineffable questions.

When a scientist colleague uses evidence about the Earth eons ago to explain his theory of the origins of life it stirs a similar sense of doubt. How can the events so long ago that led to the emergence of anything so intricate as life be treated as a fact of science? It is human to be curious about antecedents, but expeditions into the remote past in search of origins is as supremely unimportant as was the hunting of the snark.

The greater part of the information about our origins is with us here and now; so let us rejoice in it and be glad to be alive.

At a meeting in London recently, a wise man, Dr. Donald Braben, asked me: "Why do you stop with the Earth? Why not consider if the Solar System, the Galaxy, or even the Universe is alive?" My instant answer was that the concept of a living Earth, Gaia, is manageable. We know that there is no other life in this Solar System, and the nearest star is utterly remote. There must be other Gaias circling other docile long-lived stars but, curious though I may be about them and about the Universe, these are intangible—concepts for the intellect, not the senses. Until, if ever, we are visited from other parts of the Universe we are obliged to remain detached.

Many, I suspect, have trodden this same path through the mind. Those millions of Christians who make a special place in their hearts for the Virgin Mary possibly respond as I do. The concept of Yahweh as remote, all-powerful, all-seeing is either frightening or unapproachable. Even the sense of presence of a more contemporary God, a still, small voice within, may not be enough for those who need to communicate with someone outside. Mary is close and can be talked to.

She is believable and manageable. It could be that the importance of the Virgin Mary in faith is something of this kind, but there may be more to it. What if Mary is another name for Gaia? Then her capacity for virgin birth is no miracle or parthenogenetic aberration, it is a role of Gaia since life began. Immortals do not need to reproduce an image of themselves; it is enough

to renew continuously the life that constitutes them. Any living organism a quarter as old as the Universe itself and still full of vigor is as near immortal as we ever need to know. She is of this Universe and, conceivably, a part of God. On Earth she is the source of life everlasting and is alive now; she gave birth to humankind and we are a part of her.

This is why, for me, Gaia is a religious as well as a scientific concept, and in both spheres it is manageable. Theology is also a science, but if it is to operate by the same rules as the rest of science, there is no place for creeds or dogma. By this I mean theology should not state that God exists and then proceed to investigate his nature and his interactions with the Universe and living organisms. Such an approach is prescriptive, presupposes his existence, and closes the mind to such questions as:

What would the Universe be like without God? How can we use the concept of God as a way to look at the Universe and ourselves? How can we use the concept of Gaia as a way to understanding God? Belief in God is an act of faith and will remain so. In the same way, it is otiose to try to prove that Gaia is alive. Instead, Gaia should be a way to view the Earth, ourselves, and our relationships with living things.

The life of a scientist who is a natural philosopher can be deeply religious. Curiosity is an intimate part of the process of loving. Being curious and getting to know the natural world leads to a loving relationship with it. It can be so deep that it cannot be articulated, but it is nonetheless good science.

Creative scientists, when asked how they came upon some great discovery, frequently state, “I knew it intuitively, but it took several years work to prove it to my colleagues.” Compare that statement with this one by William James, the nineteenth-century philosopher and psychologist, in The Varieties of Religious Experience:

The truth is that in the metaphysical and religious sphere, articulate reasons are cogent for us only when our inarticulate feelings of reality have already been impressed in favor of the same conclusion. Then, indeed, our intuitions and our reason work together, and great world ruling systems, like that of the Buddhist or of the Catholic philosophy, may grow up.

Our impulsive belief is here always what sets up the original body of truth, and our articulately verbalized philosophy is but a showy translation into formulas. The unreasoned and immediate assurance is the deep thing in us, the reasoned argument is but a surface exhibition. Instinct leads, intelligence does but follow.

This was the way of the natural philosophers in James Hutton's time in the eighteenth century and is still the way of many scientists today. Science can embrace the notion of the Earth as a super organism and can still wonder about the meaning of the Universe.

How did we reach our present secular humanist world? In times that are ancient by human measure, as far back as the earliest artifacts can be found, it seems that the Earth was worshipped as a goddess and believed to be alive. The myth of the great Mother is part of most early religions. The Mother is a compassionate, feminine figure; spring of all life, of fecundity, of gentleness. She is also the stern and unforgiving bringer of death. As Aldous Huxley reminds in The Human Experience:

In Hinduism, Kali is at once the infinitely kind and loving mother and the terrifying Goddess of destruction, who has a necklace of skulls and drinks the blood of human beings from a skull. This picture is profoundly realistic; if you give life, you must necessarily give death, because life always ends in death and must be renewed through death.

At some time not more than a few thousand years ago the concept of a remote master God, an overseer of Gaia, took root. At first it may have been the Sun, but later it took on the form we have with us now of an utterly remote yet personally immanent ruler of the Universe. Charlene Spretnak, in her moving and readable book, The Spiritual Dimensions of Green Politics, attributes the first denial of Gaia, the Earth goddess, to the conquest of an earlier Earth-centered civilization by the Sun- worshipping warriors of the invading Indo-European tribes.

Picture yourself as a witness of that decisive moment in history, that is, as a resident of the peaceful, artful, Goddess- oriented culture in Old Europe. (Don't think “matriarchy”! It may have been, but no one knows, and that is not the point.) It is 4,500 BC. You are walking along a high ridge, looking out across the plains to the east. In the distance you see a massive wave

of horsemen galloping towards your world on strange, powerful animals. (The European ancestor of the horse had become extinct.)

They brought few women, a chieftain system, and only a primitive stamping technique to impress their two symbols, the sun and a pine tree. They moved in waves first into southeastern Europe, later down into Greece, across all of Europe, also into the Middle and Near East, North Africa and India. They brought a sky god, a warrior cult, and patriarchal social order. And that is where we live today—in an Indo-European culture, albeit one that is very technologically advanced.

The evolution of these horsemen to the modern men who ride their infinitely more powerful machines of destruction over the habitats of our partners in Gaia seems only a small step. The rest of us, in the cozy, comfortable hell of urban life, care little what they do so long as they continue to supply us with food, energy, and raw materials and we can continue to play the game of human interaction.

In ancient times, belief in a living Earth and in a living cosmos was the same thing. Heaven and Earth were close and part of the same body. As time passed and awareness grew of the vast distances of space and time through such inventions as the telescope, the Universe was comprehended and the place of God receded until now it hides behind the Big Bang, claimed to have started it all. At the same time, as population increased so did the proportion forced to lead urban lives out of touch with Nature. In the past two centuries we have nearly all become city dwellers, and seem to have lost interest in the meaning of both God and Gaia. As the theologian Keith Ward wrote in the Times in December 1984:

It is not that people know what God is, and have decided to reject him. It seems that very few people even know what the orthodox traditional idea of God, shared by Judaism, Islam and Christianity. is. They have not the slightest idea what is meant by the word God. It just has no sense or possible place in their lives.

Instead they either invent some vague idea of a cosmic force with no practical implications at all; or they appeal to some half- forgotten picture of a bearded super-person constantly interfer-

ing with the mechanistic laws of Nature.

I wonder if this is the result of sensory deprivation. How can we revere the living world if we can no longer hear the bird song through the noise of traffic, or smell the sweetness of fresh air? How can we wonder about God and the Universe if we never see the stars because of the city lights? If you think this to be exaggeration, think back to when you last lay in a meadow in the sunshine and smelt the fragrant thyme and heard and saw the larks soaring and singing. Think back to the last night you looked up into the deep blue black of a sky clear enough to see the Milky Way, the congregation of stars, our Galaxy.

The attraction of the city is seductive. Socrates said that nothing of interest happened outside its walls and, much later, Dr. Johnson expressed his view of country living as “One green field is like another.” Most of us are trapped in this world of the city, an everlasting soap opera, and all too often as spectators, not players. It is something to have sensitive commentators like Sir David Attenborough bring the natural world with its visions of forests and wilderness to the television screens of our suburban rooms. But the television screen is only a window and only rarely clear enough to see the world outside; it can never bring us back into the real world of Gaia.

City life reinforces and strengthens the heresy of humanism, that narcissistic devotion to human interests alone. The Irish missionary Sean McDonagh wrote in his book, To Care for the Earth: “The 20 billion years of God's creative love is either seen simply as the stage on which the drama of human salvation is worked out, or as something radically sinful in itself and needing transformation.”

The heartlands of the great religions are now in the last bastions of rural existence, in the Third World of the tropics. Elsewhere God and Gaia that once were joined and respected are now divorced and of no account. We have, as a species, almost resigned from membership in Gaia and given to our cities and our nations the rights and responsibilities of environmental regulation. We struggle to enjoy the human interactions of city life yet still yearn to possess the natural world as well. We want to be free to drive into the country or the wilderness without pollut-

ing it in so doing; to have our cake and eat it.

Human and understandable such striving may be, but it is illogical. Our humanist concerns about the poor of the inner cities or the Third World, and our near-obscene obsession with death, suffering, and pain as if these were evil in themselves—these thoughts divert the mind from our gross and excessive domination of the natural world. Poverty and suffering are not sent; they are the consequences of what we do. Pain and death are normal and natural; we could not long survive without them. Science, it is true, assisted at the birth of technology. But when we drive our cars and listen to the radio bringing news of acid rain, we need to remind ourselves that we, personally, are the polluters. We, not some white-coated devil figure, buy the cars, drive them, and foul the air. We are therefore accountable, personally, for the destruction of the trees by photochemical smog and acid rain. We are responsible for the silent spring that Rachel Carson predicted.

There are many ways to keep in touch with Gaia. Individual humans are densely populated cellular and endosymbiont collectives, but clearly also identities. Individuals interact with Gaia in the cycling of the elements and in the control of the climate, just like a cell does in the body. You also interact individually in a spiritual manner through a sense of wonder about the natural world and from feeling a part of it. In some ways this interaction is not unlike the tight coupling between the state of the mind and the body. Another connection is through the powerful infrastructures of human communication and mass transfer.

We as a species now move a greater mass of some materials around the Earth than did all the biota of Gaia before we appeared. Our chattering is so loud that it can be heard to the depths of the Universe. Always, as with other and earlier species within Gaia, the entire development arises from the activity of a few individuals. The urban nests, the agricultural ecosystems, good and bad, are all the consequences of rapid positive feedback starting from the action of an inspired individual.

A frequent misunderstanding of my vision of Gaia is that I champion complacence, that I claim feedback will always protect the environment from any serious harm that humans might do. It

is sometimes more crudely put as “Lovelock's Gaia gives industry the green light to pollute at will.” The truth is almost diametrically opposite.

Gaia, as I see her, is no doting mother tolerant of misdemeanors, nor is she some fragile and delicate damsel in danger from brutal mankind. She is stern and tough, always keeping the world warm and comfortable for those who obey the rules, but ruthless in her destruction of those who transgress. Her unconscious goal is a planet fit for life. If humans stand in the way of this, we shall be eliminated with as little pity as would be shown by the micro-brain of an intercontinental ballistic nuclear missile in full flight to its target.

What I have written so far has been a testament built around the idea of Gaia. I have tried to show that God and Gaia, theology and science, even physics and biology are not separate but a single way of thought. Although a scientist, I write as an individual, and my views are likely to be less common than I like to think. So now let me tell you something of what the scientific community has to say on this subject.

In science, the more discovered, the more new paths open for exploration. It is usual in science, when things are vague and unclear, for the path to be like that of a drunkard wandering in a zigzag. As we stagger back from what lastly dawns upon our befuddled wits is the wrong way, we cross over the true path and move nearly as far to the, equally wrong, opposite side. If all goes well, our deviations lessen and the path converges towards, but never completely follows, the true one. It gives a new insight to the old tag in vino veritas. So natural is this way to find the truth that we usually program our computers to solve problems too tedious to do ourselves by setting them to follow the same trial-and-error, staggering, stumbling walk.

The process is dignified and mystified by calling it “iteration,” but the method is the same. The only difference is that, so quickly is it done, the eye never sees the fumbling.

We have lost the instinctive understanding of what life is and of our place within Gaia. Our attempts to define life are much in the stage of the drunkard's walk. The two opposing verges representing the extremes of iteration are illustrated by a splendid philosophical debate that has gone on for the past twenty years between the molecular biologists on the one side and the new

school of thermodynamics on the other.

Jacques Monod's Chance and Necessity, although first published in 1970, most clearly and beautifully conveys the clear, strong, and rigorous a approach of solid science based firmly in a belief in a materialistic and deterministic Universe. The other verge is represented by those, like Erich Jantsch, who believe in a self-organizing Universe. It is concerned with the thermodynamics of the unsteady state of which dissipative structures such as flames, whirlpools, and life itself are examples. Although the participants are all well known and respected in the English-speaking world, most of this entertaining debate has gone on in French, so many of us have missed the fun.

The essence of this contest is a rerun of the ancient battle between the holists and the reductionists. As Monod reminds us:

Certain schools of thought (all more or less consciously or confusedly influenced by Hegel) challenge the value of the analytical approach to systems as complex as living beings. According to these holist schools which, phoenix like, are reborn in every generation, the analytic attitude (reductionitss) is doomed to fail in its attempts to reduce the properties of a very complex organization to the “sum” of the properties of its parts.

It is a very stupid and misguided quarrel which merely testifies to the holists' total lack of understanding of scientific method and the crucial role analysis plays in it. How far could a Martian engineer get if trying to understand an earthly computer, he refused on principle to dissect the machine's basic electronic components which execute the operation of propositional algebra.

These strong words were in the 1970 edition of Chance and Necessity. Maybe they are by now less extremely held, but they serve well to express what was and still is an important scientific constituency.

No one now doubts that it was plain, honest reductionist science that allowed us to unlock so many of the secrets of the Universe, not least those of the living macromolecules 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. Gibbs, L. Onsager, and K. G. Denbigh, who explored the thermodynamics of the steady state. But it was that truly great physicist, Ludwig Boltzmann, who pointed the way towards the understanding of life in thermodynamic terms. And it was by reading Schr6dinger's book What Is Life? in the early

1960s that I first realized that planetary life was revealed by the contrast between the near-equilibrium state of the atmosphere of a dead planet and the exuberant disequilibrium of the Earth.

When we cross from the sharp clarity of the real world into that nightmare land of dissipating structures, what do we learn that makes the next staggering lurch less erroneous than the last? I have gained from Prigogine's world view a confirmation of a suspicion that time is a variable much too often ignored. In particular, many of the apparent contradictions between these two schools of thought seem to resolve if viewed along the time dimension instead of in space.

We have evolved from the world of simple molecules through dissipative structures to the more permanent entities that are living organisms. The further we go from the present, either into the past or the future, the greater the uncertainty. Darwin was right to dismiss thoughts about the origins of life; as Jerome Rothstein has said, the restrictions of the second law of thermodynamics prevent us from ever knowing about the beginning or the end of the Universe.

In our guts and in those of other animals, the ancient world of the Archean lives on. In Gaia, also, the ancient chaotic world of dissipating structures that preceded life still lives on. A recent and relatively unknown discovery of science is that the fluctuations at every scale from viscosity to weather can be chaotic.

There is no complete determinism in the Universe; many things are as unpredictable as a perfect roulette wheel. An ecologist colleague of mine, C. S. Holling, has observed that the stability of large-scale ecosystems depends upon the existence of internal chaotic instabilities. These pockets of chaos in the larger, stable Gaian system serve to probe the boundaries set by the physical constraints to life. By this means the opportunism of life is insured, and no new niche remains undiscovered. For example, I live in a rural region surrounded by farmers who keep sheep.

It is impressive how adventurous young lambs, through their continuous probing of my boundary hedges, can find their way through onto the richer, ungrazed land on my side. The behavior of young men is not so different.

My reason for wandering onto the battlefield of the war between holists and reductionists was to illustrate how polarized is science itself. Let me conclude this digressionary visit and return to the theme of this chapter, God and Gaia. And let me start by reminding you of Daisyworld—a model which is reductionist and holistic at the same time. It was made to answer a criticism of Gaia, that it was teleology. The need for reduction arose because the relationships between all the living things on Earth in their countless trillions and the rocks, the air, and the oceans could never be described in full detail by a set of mathematical equations. A drastic simplification was needed.

But the model with its closed loop cybernetic structure was also holistic. This also applies to ourselves. It would be pointless to attempt to disentangle all the relationships between the atoms within the cells that go to make up our bodies. But this does not prevent us from being real and identifiable, and having a life span of at least 70 years.

We are also in an adversary contest between our allegiance to Gaia and to humanism. In this battle, politically minded humanists have made the word “reductionist” pejorative, to discredit science and to bring contumely to the scientific method. But all scientists are reductionists to some extent; there is no way to do science without reduction at some stage.

Even the analyzers of holistic systems, confronted with an unknown system, do tests, such as perturbing the system and observing the response, or making a model of it and then reducing that model. In biology it is impossible to avoid reduction, even if we wished.

The material and relationships of living things are so phenomenally complex that a holistic view is seen only when it suits the biota to exist as an identifiable entity such as a cell, a plant, a nest, or Gaia. Certainly, the entities themselves can be observed and classified with a minimum of invasion, but sooner or later curiosity will drive an urge to discover what the entities are made of and how they work.

In any case, the idea that mere observation is neutral is itself an illusion. Someone once said that the reason the Universe is running down is that God is always observing it and hence reducing it. Be this as it may, there is little doubt that a nature reserve, a wildlife park, or an eco-

system is reduced in proportion to the amount of time that we and our children perturb the wildlife by watching them.

In The Self-Organizing Universe, Erich Jantsch made a strong argument for the omnipresence of a self-organizing tendency; so that life, instead of being a chance event, was an inevitable consequence. Jantsch based his thoughts on the theories of those pioneers of what might be called the "thermodynamics of the unsteady state"—Max Eigen, Ilya Prigogine, Humberto Maturana, Francisco Varela, and their successors. As scientific evidence accumulates and theories are developed in this recondite topic, it may become possible to encompass the metaphor of a living Universe. The intuition of God could be rationalized; something of God could become as familiar as Gaia.

For the present, my belief in God rests at the stage of a positive agnosticism. I am too deeply committed to science for undiluted faith; equally unacceptable to me spiritually is the materialist world of undiluted fact. Art and science seem inter- connected with each other and with religion, and to be mutually enlarging.

That Gaia can be both spiritual and scientific is, for me, deeply satisfying. From letters and conversations I have learnt that a feeling for the organism, the Earth, has survived and that many feel a need to include those old faiths in their system of belief, both for themselves and because they feel that Earth of which they are a part is under threat. In no way do I see Gaia as a sentient being, a surrogate God. To me Gaia is alive and part of the ineffable Universe and I am a part of her.

The philosopher Gregory Bateson expressed this agnosticism in his own special way:

The individual mind is immanent but not only in the body. It is immanent also in pathways and messages outside the body; and there is a larger mind of which the individual mind is only a sub-system. This larger mind is comparable to God and is perhaps what some people mean by God, but it is still immanent in the total interconnected social systems and planetary ecology.

As a scientist I believe that Nature is objective but also recognize that Nature is not predetermined. The famous uncertainty principle that the physicist Werner Heisenberg discovered was

the first crack in the crystalline structure of determinism.

Now chaos is revealed to have an orderly mathematical prescription. This new theoretical understanding enlightens the practice of weather forecasting. Previously it was believed, as the French physicist Laplace had stated, that given enough knowledge (and, in this age, computer power) anything could be predicted.

It was a thrill to discover that there was real, honest chaos decently spread around the Universe and to begin to understand why it is impossible in this world ever to predict if it will be raining at some specific place or time. True chaos is there as the counter- part of order. Determinism is reduced to a collection of fragments, like jewels that have fallen on the surface of a bowl of pitch.

Science has its fashions, and one thing guaranteed to stir interest and start a new fashion is the exploration of a pathology. Health is far less interesting than disease. I well recall as a schoolboy visiting the Museum of the London School of Hygiene and Tropical Medicine where there were on display life-sized models of subjects stricken by tropical illnesses. Although less well crafted, they were so strange and horrible as to make tame the professional horrors of Madame Tussaud's waxworks.

The sight of full-sized models of the victims of elephantiasis or leprosy and the imagination of their suffering made bearable the adolescent agonies of a schoolboy. Contemporary science is similarly fascinated by pathologies of a mathematical kind. Theoretical ecology, as we have already discussed, is more concerned with sick than with healthy ecosystems. The vagaries of weather are more interesting than the long-term stability of climate. Continuous creation never had a chance in face of the ultimate pathology of the Big Bang.

Interest in the pathologies of science has a curious link with religion. Mathematicians and physicists are, without seeming aware of it, into demonology. They are found investigating “catastrophe theory” or “strange attractors.” They then seek from their colleagues in other sciences examples of pathologies that match their curious models. Perhaps I should explain that in mathematics, an attractor is a stable equilibrium state, such as a point at the bottom of a smooth

bowl where a ball will always come to rest.

Attractors can be lines, planes, or solids as well as points, and are the places where systems tend to settle down to rest. Strange attractors are chaotic regions of fractional dimensions that act like black holes, drawing the solutions of equations to their unknown and singular domains. Phenomena of the natural world—such as weather, disease, and ecosystem failures— are characterized by the presence of these strange attractors in the clockwork of their mathematics, lurking like time bombs as harbingers of instability, cyclical fluctuations, and just plain chaos. The remarkable thing about real and healthy living organisms is their apparent ability to control or limit these destabilizing influences. It seems that the world of dissipating structures, threatened by catastrophe and parasitized by strange attractors, is the foreworld of life and of Gaia and the underworld that still exists. The tightly coupled evolution of the physical environment and the autopoietic entities of pre-life led to a new order of stability; the state associated with Gaia and with all forms of healthy life. Life and Gaia are to all intents immortal, even though composed of entities that at least include dissipative structures. I find a curious resemblance between the strange attractors and other denizens of the imaginary world of mathematical constructs and the demons of older religious belief.

A parallel that goes deep and includes an association with sickness not health, famine not plenty, storm not calm. A saint of this fascinating branch of mathematics is the Frenchman, Benoit Mandelbrot. From his expressions in fractional dimensions it is possible to produce graphic illustrations of all manner of natural scenes: coastlines, mountain ranges, trees, and clouds, all startlingly realistic. But when Mandelbrot's scientific art is applied to strange attractors we see, in graphic form, the vividly colored image of a demon or a dragon.

Gaia theory may seem to be dull in comparison with these exotica. A thing, like health, to be taken for granted except when it fails. This may be why so few scientists and theologians are interested in it; they prefer the exploration of the Universe, or of the origins of life, to the exploration of the natural world that surrounds them. I find it difficult to explain to my colleagues why I prefer to live and work alone in the depths of the country. They think that I must be

missing all the excitement of exploration.

I prefer a life with Gaia here and now, and to look back only to that part of her history which is knowable, not to what might have been before she came into being.

The point of the fable is to argue that it is not necessary to know the intricate details of the origin of life itself to understand the evolution of Gaia and of ourselves. In a similar way, the contemplation of those other remote places before and after life, Heaven and Hell, may be irrelevant to the discovery of a seemly way of life. We may well have been assisted by the nature of the Universe to cheat chaos and evolve spontaneously, on some Hadean shore, into our ancestral form of life.

It seems unlikely that we come from a life form planted here by visitors from elsewhere; or even arrived clinging to some piece of cometary debris from outer space. I like to think that Darwin dismissed enquires about the origins of life not merely because the information available in his time was so sparse that the search for life's origin would have had to remain speculative, but, more cogently, because he recognized that it was not necessary to know the details of the origin of life to formulate the evolution of the species by natural selection. This is what I mean by the concept of Gaia being manageable.

The belief that the Earth is alive and to be revered is still held in such remote places as the west of Ireland and the rural parts of some Latin countries. In these places, the shrines to the Virgin Mary seem to mean more, and to attract more loving care and attention, than does the church itself. The shrines are almost always in the open, exposed to the rain and to the sun, and surrounded by carefully tended flowers and shrubs.

I cannot help but think that these country folk are worshipping something more than the Christian maiden. There is little time left to prevent the destruction of the forests of the humid tropics with consequences far-reaching both for Gaia and for humans. The country folk, who are destroying their own forests, are often Christians and venerate the Holy Virgin Mary. If their hearts and minds could be moved to see in her the embodiment of Gaia, then they might become aware that the victim of their destruction was indeed the Mother of humankind and the

source of everlasting life.

What does Al Gore say about the science behind global warming?

"As it happens, the idea of social justice is inextricably linked in the Scriptures with ecology."

Deism	Christianity	Judaism	Islam	Gnosticism	Unitarianism
Zoroastrianism	Pantheism	Fundamentalism	Evolution	Original Sin	Trinity
End Times	Apostle Paul	Apostle John	John Calvin	St. Augustine	Pelagius
Martin Luther	Real Jesus	Identity	Willie Martin	Royal Race	Pat Robertson

Also see New Age Religion and What is paganism?

What is New age Religion?

New Age Religion is not a religion at all, but a vast syncretism (or mixing) of numerous religious and philosophical ideas. This has been going on since the time of Alexander the Great, but was snuffed out under Christianity and its enforced dogma starting around 325 AD. Alexander's vast empire opened the door for Eastern religion and mysticism to move West, while Greek philosophy and reason moved East. Today the same process continues, but on a global scale in particular with the internet.

It has some similarities to ancient Gnosticism adopting both its methods and its individual nature. Most often rejecting reason and science, New Age religion more than anything is emotional, filing in a void left by a secular culture and discontent with traditional religious beliefs. Modern environmentalism could be broadly classified into New Age religion becuase of its treatment as a pseudo-religion and diefication of Nature. See the links below.

Introduction

The New Age Movement is in a class by itself. Unlike most formal religions, it has no holy text, central organization, membership, formal clergy, geographic center, dogma, creed, etc. They often use mutually exclusive definitions for some of their terms. The New Age is in fact a free-flowing spiritual movement; a network of believers and practitioners who share somewhat similar beliefs and practices. Their book publishers take the place of a central organization; seminars, conventions, books and informal groups replace of sermons and religious services. Quoting John Naisbitt (1):

"In turbulent times, in times of great change, people head for the two extremes: fundamentalism and personal, spiritual experience...With no membership lists or even a coherent philosophy or dogma, it is difficult to define or measure the unorganized New Age movement. But in every major U.S. and European city, thousands who seek insight and personal growth cluster around a metaphysical bookstore, a spiritual teacher, or an education center."

The New Age is definitely a heterogeneous movement of individuals; most graft some new age beliefs onto their regular religious affiliation. Recent surveys of US adults (2) indicate that many Americans hold at least some new age beliefs:

8% believe in astrology as a method of foretelling the future

7% believe that crystals are a source of healing or energizing power

9% believe that Tarot Cards are a reliable base for life decisions

about 1 in 4 believe in a non-traditional concept of the nature of God which are often associated with New Age thinking:

11% believe that God is "a state of higher consciousness that a person may reach"

8% define God as "the total realization of personal, human potential"

3% believe that each person is God

The group of surveys cited above (2) classify religious beliefs into 7 faith groups. Starting with the largest, they are: Cultural (Christmas and Easter) Christianity, Conventional Christianity, New Age Practitioner, Biblical (Fundamentalist, Evangelical) Christianity, Atheist/Agnostic, Other, and Jewish, A longitudinal study from 1991 to 1995 shows that New Agers represent a steady 20% of the population, and are consistently the third largest religious group.

New Age teachings became popular during the 1970's as a reaction against what some perceived as the failure of Christianity and the failure of Secular Humanism to provide spiritual and ethical guidance for the future. Its roots are traceable to many sources: Astrology, Channeling, Hinduism, Gnostic traditions, Neo-paganism, Spiritualism, Theosophy, Wicca, etc. The movement started in England in the 1960's where many of these elements were well established. Small groups, such as the Findhorn Community in Inverness and the Wrekin Trust formed. The movement quickly became international. Early New Age mileposts in North America were a "New Age Seminar" ran by the Association for Research and Enlightenment, and the establishment of the East-West Journal in 1971. Actress Shirley MacLaine is perhaps their most famous current figure.

During the 1980's and 90's, the movement came under criticism from a variety of groups. Channeling was ridiculed; seminar and group leaders were criticized for the fortunes that they made from New Agers. Their uncritical belief in the "scientific" properties of crystals was exposed as groundless. But the movement has become established and become a stable, major force in North American religion during the past generation. As the millennium comes to a close, the New Age is expected to expand, promoted by the social backlash against logic and science.

The "New Age" That Does Not Exist

Major confusion about the New Age has been generated by academics, counter-cult groups, Fundamentalist and other Evangelical Christians and traditional Muslim groups, etc. Some examples are:

Many of the above groups have dismissed Tasawwuf (Sufism) as a New Age cult. In reality, Sufism has historically been an established mystical movement within Islam, which has always existing in a state of tension with the more legalistic divisions within Islam. It has no connection with the New Age.

Some conservative Christians believe that a massive, underground, highly coordinated New Age organization exists that is infiltrating government, media, schools and churches. No such entity exists. Some conservative Christians do not differentiate among the Occult, Satanism, Wicca, other Neo-pagan religions. And they seem to regard all as forms of Satanism who perform horrendous criminal acts on children. In fact, the Occult, Satanism, Neo-pagan religions are very different phenomena, and essentially unrelated. Dr. Carl Raschke, professor of Religious Studies at the University of Denver describes New Age practices as the spiritual version of AIDS; it destroys the ability of people to cope and function." He describes it as "essentially, the marketing end of the political packaging of occultism...a breeding ground for a new American form of fascism."

New Age Beliefs

A number of fundamental beliefs are held my many New Age followers; individuals are encouraged to "shop" for the beliefs and practices that they feel most comfortable with:

Monism: All that exists is derived from a single source of divine energy.

Pantheism: All that exists is God; God is all that exists. This leads naturally to the concept of the divinity of the individual, that we are all Gods. They do not seek God as revealed in a sacred text or as exists in a remote heaven; they seek God within the self and throughout the entire universe.

Panentheism: God is all that exists. God is at once the entire universe, and transcends the universe as well.

Reincarnation: After death, we are reborn and live another life as a human. This cycle repeats itself many times. This belief is similar to the concept of transmigration of the soul in Hinduism.

Karma: The good and bad deeds that we do adds and subtracts from our accumulated record, our karma. At the end of our life, we are rewarded or punished according to our karma by being reincarnated into either a painful or good new life. This belief is linked to that of reincarnation and is also derived from Hinduism

An Aura is believed to be an energy field radiated by the body. Invisible to most people, it can be detected by some as a shimmering, multi-colored field surrounding the body. Those skilled in detecting and interpreting auras can diagnose an individual's state of mind, and their spiritual and physical health.

Personal Transformation A profoundly intense mystical experience will lead to the acceptance and use of New Age beliefs and practices. Guided imagery, hypnosis, meditation, and (sometimes) the use of hallucinogenic drugs are useful to bring about and enhance this transformation. Believers hope to develop new potentials within themselves: the ability to heal oneself and others, psychic powers, a new understanding of the workings of the universe, etc. Later, when sufficient numbers of people have achieved these powers, a major spiritual, physical, psychological and cultural planet-wide transformation is expected.

Ecological Responsibility: A belief in the importance of uniting to preserve the health of the earth, which is often looked upon as Gaia, (Mother Earth) a living entity.

Universal Religion: Since all is God, then only one reality exists, and all religions are simply different paths to that ultimate reality. The universal religion can be visualized as a mountain, with many sadhanas (spiritual paths) to the summit. Some are hard; others easy. There is no one correct path. All paths eventually reach the top. They anticipate that a new universal religion which contains elements of all current faiths will evolve and become generally accepted worldwide.

New World Order As the Age of Aquarius unfolds, a New Age will develop. This will be a utopia in which there is world government, and end to wars, disease, hunger, pollution, and poverty. Gender, racial, religious and other forms of discrimination will cease. People's allegiance to their tribe or nation will be replaced by a concern for the entire world and its people.

The Age of Aquarius is a reference to the precession of the zodiac. The earth passes through each of the signs of the zodiac approximately every 24,000 years. Some believe that the earth entered

the constellation Aquarius in the 19th Century, so that the present era is the dawning of the age of Aquarius. Others believe that it will occur at the end of the 20th century. It is interesting to note that the previous constellation changes were:

from Aries to Pisces the fish circa 1st century CE. This happened at a time when Christianity was an emerging religion, and many individuals changed from animal sacrifice in the Jewish temple to embracing the teachings of Christianity. The church's prime symbol at the time was the fish.

from Taurus to Aries the ram circa 2,000 BCE. This happened at a time when the Jews engaged in widespread ritual sacrifice of sheep and other animals in the Temple

from Gemini to Taurus the bull circa 4,000 BCE. During that sign, worshiping of the golden calf was common in the Middle East.

New Age Practices

Many practices are common amongst New Agers. A typical practitioner is active in only a few areas:

Channeling A method similar to that used by Spiritists in which a spirit of a long dead individual is conjured up. However, while Spiritists generally believe that one's soul remains relatively unchanged after death, most channelers believe that the soul evolves to higher planes of existence. They usually try to make contact with a single, spiritually evolved being. That being's consciousness is channeled through the medium and relays guidance and information to the group, through the use of the medium's voice. Channeling has existed since the 1850's and many groups consider themselves independent of the New Age movement. The popular A Course in Miracles was channeled by Jesus through a New Age psychologist, Dr. Helen Schucman over an 8 year period.

Crystals Crystals are materials which has its molecules arranged in a specific, highly ordered internal pattern. This pattern is reflected in the crystal's external structure which typically has symmetrical planar surfaces. Many common substances, from salt to sugar, from diamonds to quartz form crystals. They can be shaped so that they will vibrate at a specific frequency and are widely used in radio communications and computing devices. New Agers believe that crystals posses healing energy.

Meditating A process of blanking out the mind and releasing oneself from conscious thinking. This is often aided by repetitive chanting of a mantra, or focusing on an object.

New Age Music A gentle, melodic, inspirational music form involving the human voice, harp, lute, flute, etc. It is used as an aid in healing, massage therapy and general relaxation.

Divination The use of various techniques to foretell the future, including I Ching, Pendulum movements, Runes, Scrying, Tarot Cards. Astrology The belief that the orientation of the planets at the time of one's birth, and the location of that birth predicts the individual's future and personality. Belief in astrology is common amongst New Agers, but definitely not limited to them.

Holistic Health This is a collection of healing techniques which have diverged from the traditional medical model. It attempts to cure disorders in mind, body and spirit and to promote wholeness and balance in the individual. Examples are acupuncture, crystal healing, homeopathy, iridology, massage, various meditation methods, polarity therapy, psychic healing, therapeutic touch, reflexology, etc.

Human Potential Movement (a.k.a. Emotional Growth Movement) This is a collection of therapeutic methods involving both individualized and group working, using both mental and physical techniques. The goal is to help individuals to advance spiritually. Examples are Esalen Growth Center programs, EST, Gestalt Therapy, Primal Scream Therapy, Transactional Analysis, Transcendental Meditation and Yoga.

The Canadian Census (1991) recorded only 1,200 people (0.005%) who identify their religion as being New Age. However, this in no way indicates the influence of new age ideas in the country. Many people identify with Christianity and other religions, but incorporate many new age concepts into their faith.

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LinkLight is a New Age site whose goal is to "create a spiritual connection between everyone on this Planet, and in this way raise the Consciousness of the Planet." They are at: http://www.linklight.com ;http://www.sullivan-county.com/nf0/nov_2000/new_age_rel.htm

RELIGION & ENVIRONMENT

What's so important about the potentially powerful influence of conservative evangelical Christians on environmental issues, especially global warming? For years, many of these evangelicals have been charging environmentalists-and those progressive Christians who support environmentalism-with idolatry for lavishing worship on "God's creation" rather than God. Moreover, they have been skeptical, if not downright hostile, toward government-mandated protection of the environment.

So as President Bush early in his administration initiated efforts to roll back a slew of federal environmental regulations-including safeguards on clean air and water and protections against commercial logging and drilling on public lands, among others-and withdrew American support for the Kyoto treaty on global warming, he knew he could count on conservative evangelicals to remain firmly in his corner.

But changes are afoot. In February 2006, a group of 86 respected evangelical Christian leaders from across the nation unveiled a campaign for environmental reform and put out a statement calling on all Christians to push for federal legislation that would reduce carbon dioxide emissions in an effort to stem global warming. This Evangelical Climate Initiative, which has helped publicly solidify a nascent environmentalism in the evangelical community, also intends to lobby federal legislators, hold environmental meetings at churches and colleges, and run television and radio ads that link drought, starvation, and hurricanes to global warming.

"The same love for God and neighbor that compels us to preach salvation through Jesus Christ, protect the unborn, preserve the family and the sanctity of marriage, and take the whole Gospel to a hurting world, also compels us to recognize that human-induced climate change is a serious Christian issue requiring action now," their statement read in part.

But weeks before the Climate Initiative's statement was released publicly, another group of high-profile evangelicals was working to quash it. In a January 2006 letter to National Association of Evangelicals, whose affiliated churches and ministries were considering taking a stand against global warming, these leaders warned that "global warming is not a consensus issue, and our love for the Creator and respect for His creation does not require us to take a position."

So how did conservative evangelicals, who tend to present a unified front on most matters of political significance, end up in such a public breach? And what effect might the growing commitment among evangelicals to combat global warming and other environmental perils have on the 2006 congressional races and the 2008 presidential election?

Explore these conservative evangelical issues and learn how other faiths view their obligation to the planet-and let us hear your voice-in the MOYERS ON AMERICA Religion & the Environment Citizens Class. …Bill Moyers

I would call myself a secularist, who is quite happy to tolerate the existence of all the other various religious denominations – even the relatively new, secular religion - environmentalism.

Is it fair to label environmentalism as a ‘new’ religion?

Emile Durkheim, in his famous sociological text The Elementary Forms of Religious Life, defined religion as ‘a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into one single moral community called a Church, all of those who adhere to them’. What strikes me about Durkheim’s definition is the lack of reference to God, or gods, nor does he mention spirituality, or other worlds. For Durkheim, religion is essentially the social construction of the sacred: this unites its apologists and adherents into a ‘single moral community’. The contemporary environmentalist movement has much in common with Durkheim’s definition of a ‘single moral community’.

A few weeks ago, the Secretary of State for Energy and Climate Change, Ed Miliband MP, flanked by senior Bishops announced their campaign for a ‘carbon fast’ during the next forty days of Lent. Yes, it’s a cheap eco-friendly publicity stunt, done in order to endow everyday environmental behaviour with a sense of religious authority. Such stunts highlight the fact that apologists

of environmentalist causes care less about the actual management of nature, than they do about launching moral crusades – not to alter the earth mind you, but to micro-manage human behaviour like never before.

'Carbon emission' is fast becoming the new original sin of our age, for which us humans must seek redemption. According to the Archbishop, Dr Rowan Williams, for Lent we need to 'live more simply and cherish more deeply the creation of which we are only a part'. Carbon fasting has now become a way to absolve yourself of all your 'carbon sins' - sinful rituals like driving to work, or using the dishwasher or washing machine are viewed as immoral acts to be reigned in.

William Swatos, the editor of the International Journal of Research on Religion argues that environmentalism, as an ideology, has the potential to 'serve as an implicit religion'. Ian Plimer, a professor of Geology argued recently that environmentalism is on par with 'Creationism'.

Peter Beyer, the author of Religion and Globalization makes the point that what we are currently witnessing is the steady rise, and rise, and 'upsurge', of what he describes as 'contemporary religious environmentalism'. According to Beyer, there are at least three different styles of 'eco-religiosity', that he claims were born during the hazy, hippy days of Woodstock.

The author, Michael Crichton goes further, he argues that environmentalism is 'one of the most powerful religions in the Western World'. Crichton makes a rather good point when he reminds his readers of past environmental predictions that have had serious factual flaws – like, for example the banning of DDT. Crichton aptly describes the banning as one of the 'most disgraceful episodes in the twentieth century' – and I agree. The ban has directly caused the death of millions of African people, mainly children – all in the name of environmentalism. Environmentalism must be a religion – indeed, why else would environmentalists be in such denial over the millions of deaths they caused due to the ban?

Dr David Orrell, a Canadian based mathematician, argues that when it comes to making future predictions based on models the 'track record of any kind of long-distant prediction is really bad'. Orrell added that 'scientists cannot even write the equation of a cloud, let alone make a workable model of the climate'.

Instead of putting forward proposals for more investment in research and innovation, environmentalists and Church leaders appear happier to moralise about our varied lifestyles and habits – and of course, none of this desperate search for moral coherence will actually help to improve the environment.

The New Holy Wars

Economic Religion Versus Environmental Religion in Contemporary America

By Robert H. Nelson

392 pages | 6.125 x 9.25 | 2010

ISBN 978-0-271-03581-9 | cloth: $39.95 tr

"Nelson makes an overwhelmingly persuasive case that in our times the leading secular religion was once economics and is now environmentalism. . . . Out of that utterly original idea for scholarly crossovers—good Lord, an economist reading environmentalism and even economics itself as theology!—come scores of true and striking conclusions. . . . It's a brilliant book, which anyone who cares about the economy or the environment or religion needs to read. That's most of us."—Deirdre McCloskey, University of Illinois at Chicago

"Nelson compellingly argues that religion is a powerful force in economic and social life, . . . even if that fact is seldom recognized by most academics and policy makers. The dominant religious influences are secularized versions of Catholicism and Protestantism, not because the leading scholars are piously trying to advance their faith by other means, but because their intellectual horizons have been shaped by worldviews that have framed their consciousness. He convinces me that unless these presuppositions are acknowledged, examined, broadened, and revised, the eco-

nomic and ecological crises that the world now faces will not be understood or met at their deeper levels."—Max L. Stackhouse, Princeton Theological Seminary

"Robert Nelson argues that environmentalism is a religion. . . . This provocative thesis raises hard and embarrassing questions about the bases of environmentalism that every serious student of the subject must confront."—Dan Tarlock, Director of the Program in Environmental and Energy Law, Chicago-Kent College of Law

"Anyone who wants to understand twenty-first century politics should begin with The New Holy Wars, which makes clear the fundamental conflict between how economists and environmentalists see the world."—Andrew P. Morriss, H. Ross and Helen Workman Professor of Law and Business, University of Illinois, Urbana-Champaign

The present debate raging over global warming exemplifies the clash between two competing public theologies. On one side, environmentalists warn of certain catastrophe if we do not take steps now to reduce the release of greenhouse gases; on the other side, economists are concerned with whether the benefits of actions to prevent higher temperatures will be worth the high costs. Questions of the true and proper relationship of human beings and nature are as old as religion. Today, environmentalists regard human actions to warm the climate as an immoral challenge to the natural order, while economists seek to put all of nature to maximum use for economic growth and other human benefits.

Robert Nelson interprets such contemporary struggles as battles between the competing secularized religions of economics and environmentalism. The outcome will have momentous consequences for us all. This deep book probes beneath the surface of the two movements rhetoric to uncover their fundamental theological commitments and visions.

Environmentalism as Religion: Michael Crichton

In 2003 Michael Crichton sent the Ecology industry into a rage by exposing them as a religion. He can get away with it because he has both the science background and enough money not to be silenced by the eco-lobby. In fact environmentalism is as much a fundamentalist' religion as that of

Pat Robertson. He is correct about the religious undertones, but it's also a political movement as he points out.

In 2008 global warming has fallen off the radar as the presidential election, high energy costs, and the Wall Street meltdown have dominated the news. But this one article seems to have been left out of the discussion. Besides reports of such record cold in Mongolia killing people and livestock, the December 19, 2007 Washington Times reports:

"In Buenos Aires (Argentina), snow fell for the first time since the year 1918. Dozens of homeless people died from exposure. In Peru, 200 people died from the cold...(in 2007) Johannesburg, South Africa, had the first significant snowfall in 26 years. Australia...New Zealand...weather turned so cold..."

To quote former Vice President Al Gore, in his book entitled Earth in the Balance,

"The richness and diversity of our religious tradition throughout history is a spiritual resource long ignored by people of faith, who are often afraid to open their minds to teachings first offered outside their own systems of belief. But, the emergence of a civilization in which knowledge moves freely and almost instantaneously through the world has spurred a renewed investigation of the wisdom distilled by all faiths. This pan religious perspective may prove especially important where our global civilization's responsibility for the earth is concerned."

Remarks to the Commonwealth Club by Michael Crichton San Francisco September 15, 2003 (Extract)

I have been asked to talk about what I consider the most important challenge facing mankind, and I have a fundamental answer. The greatest challenge facing mankind is the challenge of distinguishing reality from fantasy, truth from propaganda. Perceiving the truth has always been a challenge to mankind, but in the information age (or as I think of it, the disinformation age) it takes on a special urgency and importance.

We must daily decide whether the threats we face are real, whether the solutions we are offered will do any good, whether the problems we're told exist are in fact real problems, or non-problems. Every one of us has a sense of the world, and we all know that this sense is in part given to us by what other people and society tell us; in part generated by our emotional state, which we

project outward; and in part by our genuine perceptions of reality. In short, our struggle to determine what is true is the struggle to decide which of our perceptions are genuine, and which are false because they are handed down, or sold to us, or generated by our own hopes and fears.

As an example of this challenge, I want to talk today about environmentalism. And in order not to be misunderstood, I want it perfectly clear that I believe it is incumbent on us to conduct our lives in a way that takes into account all the consequences of our actions, including the consequences to other people, and the consequences to the environment. I believe it is important to act in ways that are sympathetic to the environment, and I believe this will always be a need, carrying into the future. I believe the world has genuine problems and I believe it can and should be improved. But I also think that deciding what constitutes responsible action is immensely difficult, and the consequences of our actions are often difficult to know in advance. I think our past record of environmental action is discouraging, to put it mildly, because even our best intended efforts often go awry. But I think we do not recognize our past failures, and face them squarely. And I think I know why.

I studied anthropology in college, and one of the things I learned was that certain human social structures always reappear. They can't be eliminated from society. One of those structures is religion. Today it is said we live in a secular society in which many people---the best people, the most enlightened people---do not believe in any religion. But I think that you cannot eliminate religion from the psyche of mankind. If you suppress it in one form, it merely re-emerges in another form. You can not believe in God, but you still have to believe in something that gives meaning to your life, and shapes your sense of the world. Such a belief is religious.

Today, one of the most powerful religions in the Western World is environmentalism. Environmentalism seems to be the religion of choice for urban atheists. Why do I say it's a religion? Well, just look at the beliefs. If you look carefully, you see that environmentalism is in fact a perfect 21st century remapping of traditional Judeo-Christian beliefs and myths.

There's an initial Eden, a paradise, a state of grace and unity with nature, there's a fall from grace into a state of pollution as a result of eating from the tree of knowledge, and as a result of our actions there is a judgment day coming for us all. We are all energy sinners, doomed to die, unless

we seek salvation, which is now called sustainability. Sustainability is salvation in the church of the environment. Just as organic food is its communion, that pesticide-free wafer that the right people with the right beliefs, imbibe.

Eden, the fall of man, the loss of grace, the coming doomsday---these are deeply held mythic structures. They are profoundly conservative beliefs. They may even be hard-wired in the brain, for all I know. I certainly don't want to talk anybody out of them, as I don't want to talk anybody out of a belief that Jesus Christ is the son of God who rose from the dead. But the reason I don't want to talk anybody out of these beliefs is that I know that I can't talk anybody out of them. These are not facts that can be argued. These are issues of faith.

And so it is, sadly, with environmentalism. Increasingly it seems facts aren't necessary, because the tenets of environmentalism are all about belief. It's about whether you are going to be a sinner, or saved. Whether you are going to be one of the people on the side of salvation, or on the side of doom. Whether you are going to be one of us, or one of them.

Am I exaggerating to make a point? I am afraid not. Because we know a lot more about the world than we did forty or fifty years ago. And what we know now is not so supportive of certain core environmental myths, yet the myths do not die. Let's examine some of those beliefs.

There is no Eden. There never was. What was that Eden of the wonderful mythic past? Is it the time when infant mortality was 80%, when four children in five died of disease before the age of five? When one woman in six died in childbirth? When the average lifespan was 40, as it was in America a century ago. When plagues swept across the planet, killing millions in a stroke. Was it when millions starved to death? Is that when it was Eden?

...In short, the romantic view of the natural world as a blissful Eden is only held by people who have no actual experience of nature. People who live in nature are not romantic about it at all. They may hold spiritual beliefs about the world around them, they may have a sense of the unity of nature or the aliveness of all things... If Eden is a fantasy that never existed, and mankind wasn't ever noble and kind and loving, if we didn't fall from grace, then what about the rest of the religious tenets? What about salvation, sustainability, and judgment day? What about the coming en-

vironmental doom from fossil fuels and global warming, if we all don't get down on our knees and conserve every day?

Well, it's interesting. You may have noticed that something has been left off the doomsday list, lately. Although the preachers of environmentalism have been yelling about population for fifty years, over the last decade world population seems to be taking an unexpected turn. Fertility rates are falling almost everywhere. As a result, over the course of my lifetime the thoughtful predictions for total world population have gone from a high of 20 billion, to 15 billion, to 11 billion (which was the UN estimate around 1990) to now 9 billion, and soon, perhaps less. There are some who think that world population will peak in 2050 and then start to decline. There are some who predict we will have fewer people in 2100 than we do today. Is this a reason to rejoice, to say halleluiah? Certainly not. Without a pause, we now hear about the coming crisis of world economy from a shrinking population. We hear about the impending crisis of an aging population. Nobody anywhere will say that the core fears expressed for most of my life have turned out not to be true...

Okay, so, the preachers made a mistake. They got one prediction wrong; they're human. So what. Unfortunately, it's not just one prediction. It's a whole slew of them. We are running out of oil. We are running out of all natural resources. Paul Ehrlich: 60 million Americans will die of starvation in the 1980s. Forty thousand species become extinct every year. Half of all species on the planet will be extinct by 2000. And on and on and on. With so many past failures, you might think that environmental predictions would become more cautious. But not if it's a religion. Remember, the nut on the sidewalk carrying the placard that predicts the end of the world doesn't quit when the world doesn't end on the day he expects. He just changes his placard, sets a new doomsday date, and goes back to walking the streets. One of the defining features of religion is that your beliefs are not troubled by facts, because they have nothing to do with facts.

...I can cite the appropriate journal articles not in whacko magazines, but in the most prestigeous science journals, such as Science and Nature. But such references probably won't impact more than a handful of you, because the beliefs of a religion are not dependant on facts, but rather are matters of faith. Unshakeable belief.

Fundamentalism

Most of us have had some experience interacting with religious fundamentalists, and we understand that one of the problems with fundamentalists is that they have no perspective on themselves. They never recognize that their way of thinking is just one of many other possible ways of thinking, which may be equally useful or good. On the contrary, they believe their way is the right way, everyone else is wrong; they are in the business of salvation, and they want to help you to see things the right way. They want to help you be saved. They are totally rigid and totally uninterested in opposing points of view. In our modern complex world, fundamentalism is dangerous because of its rigidity and its imperviousness to other ideas.

I want to argue that it is now time for us to make a major shift in our thinking about the environment, similar to the shift that occurred around the first Earth Day in 1970, when this awareness was first heightened. But this time around, we need to get environmentalism out of the sphere of religion. We need to stop the mythic fantasies, and we need to stop the doomsday predictions. We need to start doing hard science instead.

There are two reasons why I think we all need to get rid of the religion of environmentalism. First, we need an environmental movement, and such a movement is not very effective if it is conducted as a religion. We know from history that religions tend to kill people, and environmentalism has already killed somewhere between 10-30 million people since the 1970s. It's not a good record. Environmentalism needs to be absolutely based in objective and verifiable science, it needs to be rational, and it needs to be flexible...

How will we manage to get environmentalism out of the clutches of religion, and back to a scientific discipline? There's a simple answer: we must institute far more stringent requirements for what constitutes knowledge in the environmental realm. I am thoroughly sick of politicized so-called facts that simply aren't true. It isn't that these "facts" are exaggerations of an underlying truth. Nor is it that certain organizations are spinning their case to present it in the strongest way. Not at all---what more and more groups are doing is putting out is lies, pure and simple. Falsehoods that they know to be false...At this moment, the EPA is hopelessly politicized. In the wake of Carol Browner, it is probably better to shut it down and start over. What we need is a new or-

ganization much closer to the FDA. We need an organization that will be ruthless about acquiring verifiable results, that will fund identical research projects to more than one group, and that will make everybody in this field get honest fast...

So it's time to abandon the religion of environmentalism, and return to the science of environmentalism, and base our public policy decisions firmly on that.

CONSTITUTIONAL REPUDIATION AND REPRIMAND

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

Petitioners reject the Supreme Courts adoption of holism, reprimand such ruling as a reckless disregard of the Truth, deliberate ignorance of actual information, with manifestly false claims, and is therefore an unscientific, unconscionable, and unconstitutional violation of inalienable rights.

REDUCTION OF HOLISM TO RELIGION

Holism (from ὅλος holos, a Greek word meaning all, entire, total) is the idea that all the properties of a given system (physical, biological, chemical, social, economic, mental, linguistic, etc.) cannot be determined or explained by its component parts alone. Instead, the system as a whole determines in an important way how the parts behave.

The general principle of holism was concisely summarized by Aristotle in the Metaphysics: "The whole is more than the sum of its parts" (1045a10).

Reductionism is sometimes seen as the opposite of holism. Reductionism in science says that a complex system can be explained by reduction to its fundamental parts. For example, the processes of biology are reducible to chemistry and the laws of chemistry are explained by physics.

History

The term holism was introduced by the South African statesman Jan Smuts in his 1926 book, Holism and Evolution. Smuts defined holism as "The tendency in nature to form wholes that are greater than the sum of the parts through creative evolution."

The idea has ancient roots. Examples of holism can be found throughout human history and in the most diverse socio-cultural contexts, as has been confirmed by many ethnological studies. The French Protestant missionary, Maurice Leenhardt coined the term cosmomorphism to indicate the state of perfect symbiosis with the surrounding environment which characterized the culture of the Melanesians of New Caledonia. For these people, an isolated individual is totally indeterminate, indistinct and featureless until he can find his position within the natural and social world in which he is inserted. The confines between the self and the world are annulled to the point that the material body itself is no guarantee of the sort of recognition of identity which is typical of our own culture.

In science

Holism in science

In the latter half of the 20th century, holism led to systems thinking and its derivatives, like the sciences of chaos and complexity. Systems in biology, psychology, or sociology are frequently so complex that their behavior is, or appears, "new" or "emergent": it cannot be deduced from the properties of the elements alone.

Holism has thus been used as a catchword. This contributed to the resistance encountered by the scientific interpretation of holism, which insists that there are ontological reasons that prevent reductive models in principle from providing efficient algorithms for prediction of system behavior in certain classes of systems.

Further resistance to holism has come from the association of the concept with quantum mysticism. Recently, however, public understanding has grown over the realities of such concepts, and more scientists are beginning to accept serious research into the concept.

Scientific holism holds that the behavior of a system cannot be perfectly predicted, no matter how much data is available. Natural systems can produce surprisingly unexpected behavior, and it is suspected that behavior of such systems might be computationally irreducible, which means it

would not be possible to even approximate the system state without a full simulation of all the events occurring in the system. Key properties of the higher level behavior of certain classes of systems may be mediated by rare "surprises" in the behavior of their elements due to the principle of interconnectivity, thus evading predictions except by brute force simulation. Stephen Wolfram has provided such examples with simple cellular automata, whose behavior is in most cases equally simple, but on rare occasions highly unpredictable.

Complexity theory (also called "science of complexity"), is a contemporary heir of systems thinking. It comprises both computational and holistic, relational approaches towards understanding complex adaptive systems and, especially in the latter, its methods can be seen as the polar opposite to reductive methods. General theories of complexity have been proposed, and numerous complexity institutes and departments have sprung up around the world. The Santa Fe Institute is arguably the most famous of them.

In anthropology

There is an ongoing dispute as to whether anthropology is intrinsically holistic. Supporters of this concept consider anthropology holistic in two senses. First, it is concerned with all human beings across times and places, and with all dimensions of humanity (evolutionary, biophysical, socio-political, economic, cultural, psychological, etc.). Further, many academic programs following this approach take a "four-field" approach to anthropology that encompasses physical anthropology, archeology, linguistics, and cultural anthropology or social anthropology.[6]

Some leading anthropologists disagree, and consider anthropological holism to be an artifact from 19th century social evolutionary thought that inappropriately imposes scientific positivism upon cultural anthropology.[7]

The term "holism" is additionally used within social and cultural anthropology to refer to an analysis of a society as a whole which refuses to break society into component parts. One definition says: "as a methodological ideal, holism implies ... that one does not permit oneself to believe that our own established institutional boundaries (e.g. between politics, sexuality, religion, economics) necessarily may be found also in foreign societies."[8]

In ecology

Ecology is the leading and most important approach to holism, as it tries to include biological, chemical, physical and economic views in a given area. The complexity grows with the area, so that it is necessary to reduce the characteristic of the view in other ways, for example to a specific time of duration. More information are to be found in the field of systems ecology, a cross-disciplinary field influenced by general systems theory. see Holistic Community.

In economics

With roots in Schumpeter, the evolutionary approach might be considered the holist theory in economics. They share certain language from the biological evolutionary approach. They take into account how the innovation system evolves over time. Knowledge and know-how, know-who, know-what and know-why are part of the whole business economics. Knowledge can also be tacit, as described by Michael Polanyi. These models are open, and consider that it is hard to predict exactly the impact of a policy measure. They are also less mathematical.

In philosophy

Main articles: Semantic holism and confirmation holism

In philosophy, any doctrine that emphasizes the priority of a whole over its parts is holism. Some suggest that such a definition owes its origins to a non-holistic view of language and places it in the reductivist camp. Alternately, a 'holistic' definition of holism denies the necessity of a division between the function of separate parts and the workings of the 'whole'. It suggests that the key recognisable characteristic of a concept of holism is a sense of the fundamental truth of any particular experience. This exists in contradistinction to what is perceived as the reductivist reliance on inductive method as the key to verification of its concept of how the parts function within the whole. In the philosophy of language this becomes the claim, called semantic holism, that the meaning of an individual word or sentence can only be understood in terms of its relations to a larger body of language, even a whole theory or a whole language. In the philosophy of mind, a mental state may be identified only in terms of its relations with others. This is often referred to as content holism or holism of the mental.

Epistemological and confirmation holism are mainstream ideas in contemporary philosophy. Ontological holism was espoused by David Bohm in his theory on The Implicate Order.

In sociology

Main article: Gemeinschaft and Gesellschaft

Emile Durkheim developed a concept of holism which he opposed to the notion that a society was nothing more than a simple collection of individuals. In more recent times, Louis Dumont [9] has contrasted "holism" to "individualism" as two different forms of societies. According to him, modern humans live in an individualist society, whereas ancient Greek society, for example, could be qualified as "holistic", because the individual found identity in the whole society. Thus, the individual was ready to sacrifice himself or herself for his or her community, as his or her life without the polis had no sense whatsoever.

In psychology of perception

A major holist movement in the early twentieth century was gestalt psychology. The claim was that perception is not an aggregation of atomic sense data but a field, in which there is a figure and a ground. Background has holistic effects on the perceived figure. Gestalt psychologists included Wolfgang Koehler, Max Wertheimer, Kurt Koffka. Koehler claimed the perceptual fields corresponded to electrical fields in the brain. Karl Lashley did experiments with gold foil pieces inserted in monkey brains purporting to show that such fields did not exist. However, many of the perceptual illusions and visual phenomena exhibited by the gestaltists were taken over (often without credit) by later perceptual psychologists. Gestalt psychology had influence on Fritz Perls' gestalt therapy, although some old-line gestaltists opposed the association with counter-cultural and New Age trends later associated with gestalt therapy. Gestalt theory was also influential on phenomenology. Aron Gurwitsch wrote on the role of the field of consciousness in gestalt theory in relation to phenomenology. Maurice Merleau-Ponty made much use of holistic psychologists such as work of Kurt Goldstein in his "Phenomenology of Perception."

In teleological psychology

Alfred Adler believed that the individual (an integrated whole expressed through a self-consistent unity of thinking, feeling, and action, moving toward an unconscious, fictional final goal), must be understood within the larger wholes of society, from the groups to which he belongs (starting with his face-to-face relationships), to the larger whole of mankind. The recognition of our social em-

beddedness and the need for developing an interest in the welfare of others, as well as a respect for nature, is at the heart of Adler's philosophy of living and principles of psychotherapy.

Edgar Morin, the French philosopher and sociobiologist, can be considered a holist based on the transdisciplinary nature of his work.

Mel Levine, M.D., author of A Mind at a Time,[10] and co-founder (with Charles R. Schwab) of the not-for-profit organization All Kinds of Minds, can be considered a holist based on his view of the 'whole child' as a product of many systems and his work supporting the educational needs of children through the management of a child's educational profile as a whole rather than isolated weaknesses in that profile.

In theological anthropology

In theological anthropology, which belongs to theology and not to anthropology, holism is the belief that the nature of humans consists of an ultimately divisible union of components such as body, soul and spirit.

In theology

Holistic concepts are strongly represented within the thoughts expressed within Logos (per Heraclitus), Panentheism and Pantheism.

In brain science

A lively debate has run since the end of the 19th century regarding the functional organization of the brain. The holistic tradition (e.g., Pierre Marie) maintained that the brain was a homogeneous organ with no specific subparts whereas the localizationists (e.g., Paul Broca) argued that the brain was organized in functionally distinct cortical areas which were each specialized to process a given type of information or implement specific mental operations. The controversy was epitomized with the existence of a language area in the brain, nowadays known as the Broca's area.[11] Although Broca's view has gained acceptance, the issue isn't settled insofar as the brain as a whole is a highly connected organ at every level from the individual neuron to the hemispheres.

Applications

Architecture and industrial design

Architecture and industrial design are often seen as enterprises, which constitute a whole, or to put it another way, design is often argued to be an holistic enterprise.[12] In architecture and industrial design holism tends to imply an all-inclusive design perspective, which is often regarded as somewhat exclusive to the two design professions. Holism is often considered as something that sets architects and industrial designers apart from other professions that participate in design projects. This view is supported and advocated by practising designers and design scholars alike, who often argue that architecture and/or industrial design have a distinct holistic character.

Education reform

The Taxonomy of Educational Objectives identifies many levels of cognitive functioning, which can be used to create a more holistic education. In authentic assessment, rather than using computers to score multiple choice test, a standards based assessment uses trained scorers to score open-response items using holistic scoring methods.[13] In projects such as the North Carolina Writing Project, scorers are instructed not to count errors, or count numbers of points or supporting statements. The scorer is instead, instruct to judge holistically whether "as a whole" is it more a "2" or a "3". Critics question whether such a process can be as objective as computer scoring, and the degree to which such scoring methods can result in different scores from different scorers.

Medicine

Holism appears in psychosomatic medicine. In the 1970s the holistic approach was considered one possible way to conceptualize psychosomatic phenomena. Instead of charting one-way causal links from psyche to soma, or vice-versa, it aimed at a systemic model, where multiple biological, psychological and social factors were seen as interlinked. Other, alternative approaches at that time were psychosomatic and somatopsychic approaches, which concentrated on causal links only from psyche to soma, or from soma to psyche, respectively.[14] At present it is commonplace in psychosomatic medicine to state that psyche and soma cannot really be separated for practical or theoretical purposes.[citation needed] A disturbance on any level - somatic, psychic, or social - will radiate to all the other levels, too. In this sense, psychosomatic thinking is similar to the biopsychosocial model of medicine.

Alternative medicine practitioners purport to adopt a holistic approach to healing, that emphasizes the emotional, mental, spiritual, and physical elements of the patient, and claim to treat the whole person in this context. Some examples of holistic approaches include ayurveda, chiropractic, homeopathy, traditional Chinese medicine, naturopathy, Unani and reflexology. There is a major axis of miscommunication between traditional western science and holistic practices. Most of these theories have basis in a "vital force" (or qi, ki, prana) which has been largely misinterpreted by the western world as being in direct contradiction with much of modern science In addition, the popular view of holistic practitioners is that they place little value in the microscopic analysis of individual, isolated, and separate systems within the natural world. While many holistic arts are popularized and practiced incorrectly or incompletely, traditional forms of holistic practice including various forms of meditation (zen, qigong, yoga) are based on natural phenomenon which reductionist philosophically can at this point only describe as separate phenomenon. This is largely due to the fact that though the process of isolating and defining phenomenon the western scientific paradigm has established a network of relations of these phenomenon. This conceptual map can also act as a barrier to other explanations which may not organize the phenomenon using the same established network of relations. In the case of this vital energy it can be explained on various levels of electricity and through the quantum field theory. There are also many metaphors used by various philosophies to describe the interaction of the vital energy with the body. When translated into English, many of these metaphors are often distorted. However, many researchers are currently working to establish an agreeable definition for holistic phenomenon within western scientific parameters. Acupuncture, which in a practice that is over 5000 years old and based around manipulation of qi within the body has been recognized as effective by the WHO and the AMA. Another phenomenon which plays different roles in reductionist/holistic medicine is what is know in the west as the placebo effect. In the west this refers to patients who become "cured" of their illnesses after being prescribed sugar pills in place of medicine. The active phenomenon at work here is the brain's role in physical health, holistic philosophy utilizes this mechanism within the brain in its medical practice while reductionist medicine seeks to decrease its influence as much as possible. Neither practice is wrong in its pursuit, the goals are merely different. Western medicine

seeks to establish remedies for illness using compounds while holistic medicine establishes practices which regulate the body to prevent it from becoming sick. Curative versus Preventative is a good way to describe a major difference between western and holistic medicine.

See also

Buckminster Fuller

Confirmation holism

David Bohm

Emergence

Gaia hypothesis

Gestalt

Gestalt psychology

Gross National Happiness

Holistic health

Holistic science

Holon

Howard T. Odum

Jan Smuts

Kurt Goldstein

Logical holism

Organicism

Polytely

Panarchy

Synergetics

Synergy

Systems theory

Willard Van Orman Quine

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External links
Brief explanation of Koestler's derivation of "holon"
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Stanford Encyclopedia of Philosophy article: "Holism and Nonseparability in Physics"
James Schombert of University of Oregon Physics Dept on quantum holism
Theory of sociological holism from "World of Wholeness"
Reductionism can either mean (a) an approach to understand the nature of complex things by reducing them to the interactions of their parts, or to simpler or more fundamental things or (b) a philosophical position that a complex system is nothing but the sum of its parts, and that an account of it can be reduced to accounts of individual constituents. This can be said of objects, phenomena, explanations, theories, and meanings.
THE CONSTITUTION AS AN APPLIED SCIENCE AND METHOD OF ITS USE.
Reductionism is strongly related to a certain perspective on causality. In a reductionist framework, phenomena that can be explained completely in terms of other, more fundamental phenomena, are called epiphenomena. Often there is an implication that the epiphenomenon exerts no causal agency on the fundamental phenomena that explain it.

Reductionism does not preclude emergent phenomena but it does imply the ability to understand the emergent in terms of the phenomena from and process(es) by which it emerges.

History

Reductionism dates back to ancient Greek philosophy in which some philosophers, notably Democritus, viewed the world as a mechanistic, material machine. Democritus was famous for his theory of atomism.

It was introduced later by Descartes in Part V of his Discourses (1637). Descartes argued the world was like a machine, its pieces like clockwork mechanisms, and that the machine could be understood by taking its pieces apart, studying them, and then putting them back together to see the larger picture. Descartes was a full mechanist, but only because he did not accept the conservation of direction of motions of small things in a machine, including an organic machine. Newton's theory required such conservation for inorganic things at least. When such conservation was accepted for organisms as well as inorganic objects by the middle of the 20th century, no organic mechanism could easily, if at all, be a Cartesian mechanism.

Types of reductionism

The distinction between the processes of theoretical and ontological reduction is important. Theoretical reduction is the process by which one theory is absorbed into another; for example, both Kepler's laws of the motion of the planets and Galileo’s theories of motion worked out for terrestrial objects are reducible to Newtonian theories of mechanics, because all the explanatory power of the former are contained within the latter. Furthermore, the reduction is considered to be beneficial because Newtonian mechanics is a more general theory—that is, it explains more events than Galileo's or Kepler's. Theoretical reduction, therefore, is the reduction of one explanation or theory to another—that is, it is the absorption of one of our ideas about a particular thing into another idea.

Methodological reductionism is the position that the best scientific strategy is to attempt to reduce explanations to the smallest possible entities. Methodological reductionism would thus hold that the atomic explanation of a substance’s boiling point is preferable to the chemical explanation, and that an explanation based on even smaller particles (quarks, perhaps) would be even better.

Methodological reductionism, therefore, is the position that all scientific theories either can or should be reduced to a single super-theory through the process of theoretical reduction.

Finally, ontological reductionism is the belief that reality is composed of a minimum number of kinds of entities or substances. This claim is usually metaphysical, and is most commonly a form of monism, in effect claiming that all objects, properties and events are reducible to a single substance. (A dualist who is an ontological reductionist would presumably believe that everything is reducible to one of two substances.)

Reductionism and science

Reductionist thinking and methods are the basis for many of the well-developed areas of modern science, including much of physics, chemistry and cell biology. Classical mechanics in particular is seen as a reductionist framework, and statistical mechanics can be viewed as a reconciliation of macroscopic thermodynamic laws with the reductionist approach of explaining macroscopic properties in terms of microscopic components.

In science, reductionism can be understood to imply that certain fields of study are based on areas that study smaller spatial scales or organizational units. While it is commonly accepted that the foundations of chemistry are based in physics, and microbiology is rooted in chemistry, similar statements become controversial when one considers larger-scale fields. For example, claims that sociology is based on psychology, or that economics is based on sociology and psychology would be met with reservations. These claims are difficult to substantiate even though there are clear connections between these fields (for instance, most would agree that psychology can impact and inform economics.) The limit of reductionism's usefulness stems from emergent properties of complex systems which are more common at certain levels of organization. For example, certain aspects of evolutionary psychology and sociobiology are rejected by some who claim that complex systems are inherently irreducible and that a holistic approach is needed to understand them.

Daniel Dennett defends scientific reductionism, which he says is really little more than materialism, by making a distinction between this and what he calls "Greedy reductionism": the idea that every explanation in every field of science should be reduced all the way down to particle physics or string theory. Greedy reductionism, he says, deserves some of the criticism that

has been heaped on reductionism in general because the lowest-level explanation of a phenomenon, even if it exists, is not always the best way to understand or explain it.

Some strong reductionists believe that the behavioral sciences should become "genuine" scientific disciplines by being based on genetic biology, and on the systematic study of culture (cf. Dawkins's concept of memes). In his book The Blind Watchmaker, Richard Dawkins introduced the term "hierarchical reductionism" to describe the view that complex systems can be described with a hierarchy of organizations, each of which can only be described in terms of objects one level down in the hierarchy. He provides the example of a computer, which under hierarchical reductionism can be explained well in terms of the operation of hard drives, processors, and memory, but not on the level of AND or NOR gates, or on the even lower level of electrons in a semiconductor medium.

Both Dennett and Steven Pinker argue that too many people who are opposed to science use the words "reductionism" and "reductionist" less to make coherent claims about science than to convey a general distaste for the endeavor, saying the opponents often use the words in a rather slippery way, to refer to whatever they dislike most about science. Dennett suggests that critics of reductionism may be searching for a way of salvaging some sense of a higher purpose to life, in the form of some kind of non-material / supernatural intervention. Dennett terms such aspirations "skyhooks," in contrast to the "cranes" that reductionism uses to build its understanding of the universe from solid ground.

Others argue that inappropriate use of reductionism limits our understanding of complex systems. In particular, ecologist Robert Ulanowicz says that science must develop techniques to study ways in which larger scales of organization influence smaller ones, and also ways in which feedback loops create structure at a given level, independently of details at a lower level of organization. He advocates (and uses) information theory as a framework to study propensities in natural systems. Ulanowicz attributes these criticisms of reductionism to the philosopher Karl Popper and biologist Robert Rosen.

Reductionism in mathematics

In mathematics, reductionism can be interpreted as the philosophy that all mathematics can (or ought to) be built off a common foundation, which is usually axiomatic set theory. Ernst Zermelo was one of the major advocates of such a view, and he was also responsible for the development of much of axiomatic set theory. It has been argued that the generally accepted method of justifying mathematical axioms by their usefulness in common practice can potentially undermine Zermelo's reductionist program.

As an alternative to set theory, others have argued for category theory as a foundation for certain aspects of mathematics.

Ontological reductionism

Ontological reductionism is the claim that everything that exists is made from a small number of basic substances that behave in regular ways (compare to monism). Ontological reductionism denies the idea of ontological emergence, and claims that emergence is an epistemological phenomenon that only exists through analysis or description of a system, and does not exist on a fundamental level.

Ontological reductionism takes two different forms: Token ontological reductionism is the idea that every item that exists is a sum item. For perceivable items, it says that every perceivable item is a sum of items at a smaller level of complexity. Type ontological reductionism is the idea that every type of item is a sum (of typically less complex) type(s) of item(s). For perceivable types of item, it says that every perceivable type of item is a sum of types of items at a lower level of complexity. Token ontological reduction of biological things to chemical things is generally accepted. Type ontological reduction of biological things to chemical things is often rejected.

Michael Ruse has criticized ontological reductionism as an improper argument against vitalism.

Reductionism in linguistics

Linguistic reductionism is the idea that everything can be described in a language with a limited number of core concepts, and combinations of those concepts. The most known form of reductionist constructed language would be Esperanto (Also See Basic English and the constructed language Toki Pona).

Limits of reductionism

A contrast to the reductionist approach is holism or emergentism. Holism recognizes the idea that things can have properties as a whole that are not explainable from the sum of their parts (emergent properties). The principle of holism was concisely summarized by Aristotle in the Metaphysics: "The whole is more than the sum of its parts".

The term Greedy reductionism, coined by Daniel Dennett, is used to criticize inappropriate use of reductionism. Other authors use different language when describing the same thing.

In philosophy

The concept of downward causation poses an alternative to reductionism within philosophy. This view is developed and explored by Peter Bøgh Andersen, Claus Emmeche, Niels Ole Finnemann, and Peder Voetmann Christiansen, among others. These philosophers explore ways in which one can talk about phenomena at a larger-scale level of organization exerting causal influence on a smaller-scale level, and find that some, but not all proposed types of downward causation are compatible with science. In particular, they find that constraint is one way in which downward causation can operate. The notion of causality as constraint has also been explored as a way to shed light on scientific concepts such as self-organization, natural selection, adaptation, and control

In science

Phenomena such as emergence and work within the field of complex systems theory pose limits to reductionism. Stuart Kauffman is one of the advocates of this viewpoint. Emergence is strongly related to nonlinearity. The limits of the application of reductionism become especially evident at levels of organization with higher amounts of complexity, including culture, neural networks, ecosystems, and other systems formed from assemblies of large numbers of interacting components. Symmetry breaking is an example of an emergent phenomenon. Nobel laureate P.W.Anderson used this idea in his famous paper in Science in 1972, 'More is different'[13] to expose some of the limitations of reductionism. The limitation of reductionism was explained as follows. The sciences can be arranged roughly linearly in a hierarchy as particle physics, many body physics, chemistry, molecular biology, cellular biology, ..., physiology, psychology and social sciences. The elementary entities of one science obeys the laws of the science that precedes it in the

above hierarchy. But, this does not imply that one science is just an applied version of the science that precedes it. Quoting from the article, "At each stage, entirely new laws, concepts and generalizations are necessary, requiring inspiration and creativity to just as great a degree as in the previous one. Psychology is not applied biology nor is biology applied chemistry."

Sven Erik Jorgensen, an ecologist, lays out both theoretical and practical arguments for a holistic approach in certain areas of science, especially ecology. He argues that many systems are so complex that it will not ever be possible to describe all their details. Drawing an analogy to the Heisenberg uncertainty principle in physics, he argues that many interesting and relevant ecological phenomena cannot be replicated in laboratory conditions, and thus cannot be measured or observed without influencing and changing the system in some way. He also points to the importance of interconnectedness in biological systems. His viewpoint is that science can only progress by outlining what questions are unanswerable and by using models that do not attempt to explain everything in terms of smaller hierarchical levels of organization, but instead model them on the scale of the system itself, taking into account some (but not all) factors from levels both higher and lower in the hierarchy.

Disciplines such as cybernetics and systems theory strongly embrace a non-reductionist view of science, sometimes going as far as explaining phenomena at a given level of hierarchy in terms of phenomena at a higher level, in a sense, the opposite of a reductionist approach.

In decision theory

In decision theory, a nonlinear utility function for a quantity such as money can create a situation in which all relevant decisions to be made in a given time period must to be considered simultaneously in order to maximize utility, if all relevant decisions act on utility only through this quantity. In such a situation, the optimal choice for a given decision depends on the possible outcomes of all other decisions, including those which may have no causal relationship to the decision at hand. Breaking such a problem apart into individual decisions and optimizing each smaller decision can lead to drastically sub-optimal decisions. Such nonlinear utility functions for money are used in economics and are necessary in order to satisfy reasonable assumptions about rational behavior.

Such decision making situations are the norm, rather than the exception, in many business settings.

In religion

Certain religious beliefs or doctrines assign supernatural original causes to phenomena. In this context, even if a given system appears to operate by causes and effects that can be explained within a strict reductionist framework, belief or doctrine might hold that its true genesis and placement within larger (and typically unknown) systems is bound up with an intelligence or consciousness that is beyond normal or uninvited human perception. Some such beliefs constitute a form of teleology, a perspective which is generally in conflict with reductionism.

Benefits of reduction

An ontological reduction reduces the number of ontological primitives that exist within our ontology. Philosophers welcome this, because every ontological primitive demands a special explanation for its existence. If we maintain that life is not a physical property, for example, then we must give a separate explanation of why some objects possess it and why others do not. This is more often than not a daunting task, and such explanations often have the flavor of ad hoc contrivances or deus ex machina. Also, since every ontological primitive must be acknowledged as one of the fundamental principles of the natural world, we must also account for why this element in particular should be considered one of those underlying principles. (To return to an earlier example, it would be extremely difficult to explain why planets are so fundamental that special laws of motion should apply to them.) This is often extremely hard to do, especially in the face of our strong preference for simple explanations. Pursuing ontological reduction thus serves to unify and simplify our ontology, while guarding against needless multiplication of entities in the process.

At the same time, the requirements for satisfactorily showing that one thing is reducible to another are extremely steep. First and foremost, all features of the original property or object must be accounted for. For example, lightning would not be reducible to the electrical activity of air molecules if the reduction explained why lightning is deadly, but not why it always seeks the highest point to strike. Our preference for simple and unified explanations is a strong force for re-

ductionism, but our demand that all relevant phenomena be accounted for is at least as strong a force against it.

Alternatives to reductionism

In recent years, the development of systems thinking has provided methods for tackling issues in a holistic rather than a reductionist way, and many scientists approach their work in a holistic paradigm. When the terms are used in a scientific context, holism and reductionism refer primarily to what sorts of models or theories offer valid explanations of the natural world; the scientific method of falsifying hypotheses, checking empirical data against theory, is largely unchanged, but the approach guides which theories are considered. The conflict between reductionism and holism in science is not universal--it usually centers on whether or not a holistic or reductionist approach is appropriate in the context of studying a specific system or phenomenon.

In many cases (such as the kinetic theory of gases), given a good understanding of the components of the system, one can predict all the important properties of the system as a whole. In other cases, trying to do this leads to a fallacy of composition. In those systems, emergent properties of the system are almost impossible to predict from knowledge of the parts of the system. Complexity theory studies such systems.

See also

Physicalism

Eliminativism

Theology

Aristotle

Philosophy of Mind

Holism

Emergentism

Systems theory

Symmetry breaking

Antireductionism

Certain religious beliefs or doctrines assign supernatural original causes to phenomena. In this context, even if a given system appears to operate by causes and effects that can be explained within a strict reductionist framework, belief or doctrine might hold that its true genesis and placement within larger (and typically unknown) systems is bound up with an intelligence or consciousness that is beyond normal or uninvited human perception. Some such beliefs constitute a form of teleology, a perspective which is generally in conflict with reductionism.

FURTHER EVIDENCE OF FALSE CLAIMS AND DEMONIZING IRON MOUNTAIN

World's `Worst Water' Found Near Redding

Acidity at Iron Mountain mine stuns scientists

Carl T. Hall, Chronicle Science Writer

Thursday, March 23, 2000

(03-23) 04:00 PDT Redding -- In an odd chemical fluke that has astonished scientists, the world's most acidic water has been found deep inside the polluted remnants of an abandoned mine just west of this Shasta County city.

Already ranked among the worst pollution sites in the country, the vast underground web of mining operations at Iron Mountain, a federal Superfund cleanup site, now has a dubious new claim to fame.

``It's the world's worst water," said Charles Alpers, a research chemist at the U.S. Geological Survey who has been sampling Iron Mountain runoff since the early 1970s.

But he and other scientists insisted that the water posed no threat to human health because it is found in tiny quantities, is safely diluted and scrubbed clean before it reaches the tributaries of the Sacramento River downstream, the main source of drinking water for Redding.

The acidic water, they say, is more a scientific curiosity.

Excerpt from SFGate, part of the San Francisco Chronicle, June 12, 2009

Rick Sugarek knows not to splash through the puddles inside "the mouth of the beast."

That is what he calls the gaping wound near Redding known to everybody else as the Iron Mountain Mine, which is widely regarded by scientists as one of the most polluted places in the world.

The project manager for the Environmental Protection Agency said he once dropped a pen in some running water inside the mine and when he recovered it, it was coated in copper. The water is so acidic that droplets eat holes in blue jeans and dissolve the stitching on boots, much like battery acid.

Sugarek stood Thursday in a shaft once known as the Richmond Mine. It is the source of the toxic stew that has polluted the Sacramento River and its tributaries for more than a century, killed thousands of fish and turned a once-majestic mountain into a hellish breeding ground for nasty bacterial slime that helps create what geologists say is the "world's worst water."

http://sfchronicle.us/cgi-bin/object/article?f=/c/a/2009/06/12/MN9Q185QAK.DTL&o=0

JUDICIAL SWADDLING AND DEFERENCE ARE AN UNCONSTITUTIONAL VIOLATION AND ABUSE OF PROTECTIONS OF THE 1ST AMENDMENT ESTABLISHMENT CLAUSE.

EVEN IF YOU TOO HAVE BEEN MADE TO BELIEVE…

THE SUPREME COURT HAS ERRED IN DEFENSE OF THE CONSTITUTION.

THE RULE MUST BE DISCHARGED!

CREATION OF THE ESSENTIAL PRODUCTS ADMINISTRATION

CREATION OF THE OFFICE OF THE WARDEN OF THE FORESTS & STANNARIES.

CREATION OF THE SPECIAL DEPUTY PRIVATE ATTORNEY GENERAL.

DETINUE SUR BAILMENT, REMISSION AND REVERSION.

writ of unspeakable errors, divide et regnes! **RELIEF: UNCONSTITUTIONAL LAW IN VIOLATIONS OF FIRST, FOURTH, AND TENTH AMENDMENT PROTECTIONS.**

§ 3729. FALSE CLAIMS; MISTAKE! PROHIBITION! EQUITABLE ESTOPPEL!

Plaintiff's Pray for Declaratory and Preliminary Injunctive Relief, Damages according to Proof. quo Warranto Incidental and Peremptory Mandamus filed under the Great Seal of the United States.

June 14, 2009 Signature:_____

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