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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. IRON MOUNTAIN MINES, INC. and T.W. ARMAN, Defendants.	Civil No. S-91-0768 JAM-JFM (Consolidated for all purposes with Civil No. S-91-1167 JAM-JFM)
STATE OF CALIFORNIA, On behalf of the California Department of Toxic Substances Control and the California Regional Water Quality Control Board for the Central Valley Region, Plaintiff, v. IRON MOUNTAIN MINES, INC. and T.W. ARMAN, Defendants. AND RELATED COUNTER- AND THIRD-PARTY CLAIMS	**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT FOR RESPONSE COSTS** Date: October 21, 2009 Time: 1:30 p.m. Courtroom No. 6 Hon. John A. Mendez

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INTRODUCTION

The Plaintiff United States moves for partial summary judgment, pursuant to section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), and Fed. R. Civ. P. 56, for costs paid by the United States Environmental Protection Agency ("EPA") and other agencies[1/] for responding to releases and threatened releases of hazardous substances from the Iron Mountain Mine Superfund Site ("Site"). EPA's response actions included investigation and analysis of the hazards, development and evaluation of alternative remedies, selection of preferred cleanup alternatives, the holding of public meetings, solicitation of comments on all alternatives, review of comments, revision of the preferred alternatives as appropriate, final remedy selections, design of the selected remedies, and implementation of the remedies.

This Court previously granted plaintiffs' motion for partial summary judgment and found the defendants liable under CERCLA Section 107(a), 42 U.S.C. § 9607(a). *See United States v. Iron Mountain Mines, Inc.*, September 30, 2002 Order granting plaintiffs' motion for partial summary judgment on liability, at p. 2 (Dkt. 1241, filed Oct. 1, 2002). Summary judgment followed this Court's prior approval of a settlement with the defendants' predecessors in interest who had performed approximately $150 million in cleanup work, and paid over $140 million for an insurance policy for pay the future operation and maintenance costs for the cleanup facilities on the Site, along with other multi-million dollar payments for Site damages and cleanup. *See* November 15, 2000 Plaintiffs' Memorandum of Points and Authorities in Support of the Joint Motion for Entry of Consent Decree at p. 17 n.32.

Consistent with the proposal made by the plaintiffs at the status conference held

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[1] EPA paid $26,843,733.59 to contractors, other Federal agencies, and to the State of California for cleanup activities at the Iron Mountain Mine Superfund Site. Two other Federal agencies incurred costs which were paid directly from the Superfund, ATSDR ($13,013.56) and NOAA ($111,387.69). *See* Section VII.B (Costs Sought), *infra*. EPA documents and reports those costs in its Cost Summary Report, Motion Exhibit A.

April 25, 1996, and in order to avoid the need to reopen discovery, this motion seeks judgment only for response costs incurred and paid through February 1996. *See* Transcript of April 25, 1996 Proceedings at 42.[2] *See also* Dkt. 330, April 17, 1996 Status Conference Brief of Plaintiffs, at 18 (filed April 18, 1996). Costs incurred after that time may be addressed in future proceedings. The United States at this time seeks judgment only for 1) costs EPA incurred[3] (through February 1996) for work performed by outside contractors and vendors, and by other federal and state agencies acting under an Interagency Agreement or State Cooperative Agreement ("IAG costs" and "SCA costs," respectively) (collectively, along with contract costs, "extramural costs"), together with allocated (or "overhead") costs attributable to those activities, and 2) prejudgment interest on all such costs.

In the interest of judicial economy, the United States is also not presently seeking summary judgment on costs that EPA has incurred for in-house activities ("intramural costs"), which would include payroll and travel expenses and associated indirect costs (indirect costs being EPA overhead). Nor is the United States moving for costs incurred by the U.S. Department of Justice in bringing and prosecuting this enforcement action.[4]

The United States respectfully submits that, based on the law and the Undisputed

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[2] The United States committed to limit any initial request for costs to costs incurred through February 29, 1996, in order that defendants might obtain discovery on all costs the United States would seek to recover. As of April 25, 1996, the Court had imposed a series of deadlines for different forms of discovery which ran from June 13, 1996, for interrogatories and document production requests, through February 10, 1997 for expert discovery. *See* March 11, 1996 Order at page 2 (Dkt. 323, filed March 14, 1996). *See also* Transcript of April 25, 1996 Proceedings at 114 and 116 (fact discovery to end September 9, 1996; expert discovery to end February 10, 1997).

[3] *See* p.1, n1, *supra*. Ninety-nine and one-half percent (99.54 %) of the costs that the United States seeks to recover were incurred and paid for by EPA. *See* Motion Exhibit A, Section 2 (Itemized Cost Summary).

[4] Enforcement costs are recoverable under CERCLA Sections ¶¶ 101(25) and 107(a). *See* 42 U.S.C. §§ 9601(25), 9607(a)(4)(A).

Facts, the Court should grant the government's Motion and enter judgment for the United States. The total costs, through February 1996, plus interest accrued through the end of the present Fiscal Year (September 30, 2009), will be $57,139,669.53.

I. A BRIEF HISTORY OF IRON MOUNTAIN MINE AND SUPERFUND SITE

A. The Iron Mountain Mine and Past Mining

Iron Mountain Mine is comprised of several inactive underground, surface, and open pit mines located on Iron Mountain approximately nine miles northwest of Redding, California, and above the nearby Keswick Reservoir. *See United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1233, 1235 (E.D. Cal. 1997). At different times between the 1890s and 1963, Iron Mountain was mined for iron, zinc, copper, silver, gold, and pyrite ores. *See id.*; Exhibit B, Declaration of Rick Sugarek ("Sugarek Decl.") ¶ 47. That mining activity exposed sulfide deposits to the elements, resulting in the generation of acid mine drainage, as well as creating waste rock and tailings piles. *See United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1233, 1235 (E.D. Cal. 1997). Mining ceased in 1962, but the mine owners continued to extract copper and other chemicals from waste on the Site. *See id.* at 1235 & 1237. For a description of ownership and mining between 1894 and the late 1960s, *see generally United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1233, 1235-1238 (E.D. Cal. 1997) (ruling on successor liability).

In late 1976, Stauffer Chemical Company conveyed most of the parcels comprising Iron Mountain Mines to a predecessor of defendant, Iron Mountain Mines, Inc. *See* April 4, 2002 Plaintiffs' Statement of Material Facts in Support of Motion for Partial Summary Judgment on Liability (Dkt. 1207, filed April 5, 2002, hereinafter "2002 Statement of Facts"), paragraph 1 (citing defendants' Answer, paragraph 13, and First Responses to Requests for Admissions, paragraph 2). After a series of conveyances, defendant Iron Mountain Mines, Inc. acquired the parcels on July 15, 1977. *See id.*, paragraphs 2 and 3 (citing defendants' First

Responses to Requests for Admissions, paragraphs 3 and 4). In December of 1980, Stauffer conveyed five additional parcels to defendant Iron Mountain Mines, Inc. ("IMMI"). *See id.*, paragraph 4 (citing defendants' Answer, paragraph 13, and First Responses to Requests for Admissions, paragraph 5).

After approximately June of 1977, defendant Ted Arman was the president, chief executive officer, chief financial officer, sole shareholder, agent for service of process, and one of two directors of IMMI; defendant Arman was secretary of IMMI after approximately October 14, 1990. *See* 2002 Statement of Facts, paragraph 10 (citing First Responses to Requests for Admissions, paragraph 7, and August 12, 1996 deposition of defendant Arman, Vol. 1 at 10:18 - 12:2). Under Arman's management, IMMI continued to extract metals from the waste on the Site using the copper cementation plants. *See United States v. Iron Mountain Mines, Inc.*, September 30, 2002 Order granting plaintiffs' motion for partial summary judgment on liability, at p. 2 (Dkt. 1241, filed Oct. 1, 2002). For a description of the cementation plant and of its operation, *see United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1233, 1235 n.4 (E.D. Cal. 1997). In addition to the extraction of metals from waste at the Iron Mountain Mine Site, defendants Arman and IMMI contracted to sell tailings materials from the Site, conducted mining operations at the large magnetite pile located between Brick Flat Pit and Slickrock Creek, conducted exploratory drilling of sulfide deposits, contracted to have a pilot facility constructed to extract metals on-site, and leased areas of the Site to third parties for exploratory drilling and other development activities. *See* 2002 Statement of Facts, paragraphs 7 - 9 (citing defendant Arman depositions of May 28, 1992 (475:18 - 476:11; 478:2-24; 570:7 - 571:11), August 12, 1996 (33:18 - 34:1; 34:32 - 35:5; 48:7; 71:3 - 72:24; 93:18 -98:18; 118:23 - 119:5), August 13, 1996 (479:8; 479:12 - 481:8), and August 14, 1996 (576:18 - 589:13)).[5/]

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[5] Cleanup activities by Potentially Responsible Parties, *i.e.*, Rhône-Poulenc, are described in Section V (Cleanup Activities By Potentially Responsible Parties), *infra.*

B. The Iron Mountain Mine Superfund Site

The Iron Mountain Mine Superfund Site has been described as 4400 acres, of which the defendants control approximately 2800 acres. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1233, 1235, n.2 (E.D. Cal. 1997) (4400 acres); Sugarek Decl. ¶ 46 (2800 acres). However, EPA has defined the Iron Mountain Mine Superfund Site as the mine property and anywhere else hazardous substances have come to be located. Sugarek Decl. ¶ 42. Consequently, the Superfund Site has grown as more contamination has been discovered downstream. Sugarek Decl. ¶ 42.

The Site contains four watersheds: Boulder Creek, Flat Creek, Spring Creek, and Slickrock Creek. Sugarek Decl. ¶ 43. Mine-contaminated water flows off the Site and into two federally owned and operated reservoirs located about four miles downstream – first into the Spring Creek Reservoir and then into Keswick Reservoir, a dammed stretch of the Sacramento River.[6/] Sugarek Decl. ¶ 44. *See also United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1266 (E.D. Cal. 1997). Keswick Reservoir serves as the afterbay for power house operations for water released from the much larger Shasta Lake (a reservoir formed behind Shasta Dam), located about nine miles upstream of Keswick Dam on the Sacramento River. The Spring Creek, Keswick and Shasta Dams are owned and operated by the U.S. Bureau of Reclamation ("USBR") as part of the Central Valley Project ("CVP").

The State of California Regional Water Control Board (now a co-plaintiff in this case) brought the Iron Mountain Mine Site to EPA's attention after the passage of CERCLA. EPA completed a preliminary site assessment for the Iron Mountain Mine in May 1980, and performed a site investigation in September 1981. Sugarek Decl. ¶ 55. Prior to EPA's undertaking actions to clean up the site, during drought, acid mine drainage from the Site

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[6] *See* Motion Exhibit E, a demonstrative exhibit consisting of Figure 1, an Site Location Map, and Figure 3, a Site schematic "Conceptual Model," both from the ROD 5 Administrative Record. (ROD 5 is not relevant to the present Motion but the map and schematic are illustrative of the descriptions contained in this Motion.)

contained an average of 260 pounds of Copper, 1100 pounds of Zinc, 10,000 pounds of Iron, and approximately 8.6 pounds of Cadmium *daily*. Sugarek Decl. ¶ 56. During normal and high water conditions, the Site discharged more metals. *Id.* In 1982, EPA ranked the Site, using the Hazard Ranking System. *Id.* ¶ 57. On September 8, 1983, EPA promulgated amendments to the National Contingency Plan ("NCP") which added the Site to the National Priorities List ("NPL"). 48 Fed. Reg. 40658 *et seq.* (Sept. 8, 1983). EPA's investigations and cleanup actions are described below, after the following discussion of CERCLA procedures EPA employs.[7/]

C. Site Litigation

The Iron Mountain Mine Superfund Site has been the subject of litigation since the United States first sued the defendants to gain access to the Site in 1987. *See United States v. Iron Mountain Mines, Inc.*, 1987 WL 46792, 28 ERC 1454 (E.D. Cal. Sept. 18, 1987). The United States filed the present lawsuit in 1991. Since then, this litigation has generated no fewer than eight published opinions and numerous other orders. *See, e.g., United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528 (E.D. Cal. 1992) (ruling on numerous defenses);[8/] *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995) (ruling on numerous counterclaims and third-party claims); *United States v. Iron Mountain Mines, Inc.*, 952 F. Supp. 673 (E.D. Cal. 1996) (ruling on State defenses); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1233 (E.D. Cal. 1997) (finding then-defendant Rhône-Poulenc was a corporate successor and a responsible party); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1244 (E.D. Cal. 1997) (ruling law of the case barred relitigation of whether EPA responded to

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[7] The Court has described the Site and the history of EPA's remedial efforts at Iron Mountain in some detail. *See United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1253-54 (E.D. Cal. 1997) (ruling on record review); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1244, 1246 (E.D. Cal. 1997) (ruling on "naturally occurring substances" and law of the case); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1266 (E.D. Cal. 1997) (describing site streams).

[8] This Court's decision on application of the Bevill Amendment was effectively overruled by the Ninth Circuit in *Louisiana-Pacific Corp. v. Asarco Inc.*, 24 F.3d 1565 (9th Cir. 1994).

naturally occurring substances); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250 (E.D. Cal. 1997) (review limited to administrative record); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263 (E.D. Cal. 1997) (ruling United States not responsible for contamination, nor liable as an owner; and that mine-owner's hydrology modeling costs duplicated EPA costs and were not recoverable);[9/] *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1277 (E.D. Cal. 1997) (United States' encouragement of mining during WWII did not make it an operator); December 8, 2000 Consent Decree (with former defendants) (Dkt. 1185); September 30, 2002 Order (Dkt. 1241, docketed October 1 – granting partial summary judgment on liability of defendants IMMI and Arman); January 2, 2009 Order (Dkt. 1275, docketed January 5 – striking all papers defendants and John Hutchens filed in 2008).

II. CERCLA AND NCP PROCEDURES, AND TERMINOLOGY USED BY EPA

Before describing EPA's work on the Iron Mountain Mine Site, a description of EPA procedures and terminology is in order.

A. CERCLA

Section 104 of CERCLA, 42 U.S.C. § 9604, authorizes the President (acting through delegated agencies such as EPA), consistent with the National Contingency Plan, to respond to releases and substantial threats of releases of hazardous substances into the environment. The President may also issue such orders as may be necessary to protect the public health and welfare and the environment, for example, by ordering responsible parties to undertake response measures. *See* CERCLA Section 106(a), 42 U.S.C. § 9606(a). The President has delegated his authority to EPA. *See* 52 Fed. Reg. 2923 (January 29, 1987) (Executive Order 12580 (January 23, 1987)).

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[9] In its decision, this Court also declined to decide whether costs of investigating and sampling throughout the entire region of the Keswick Reservoir and Sacramento River were consistent with the NCP. *See United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1271 n.15 (E.D. Cal. 1997).

Actions to protect the environment under CERCLA are described as removal actions or remedial actions. CERCLA contains overlapping definitions of removal and remedial actions, but both encompass actions to prevent, contain, and clean up releases of hazardous substances into the environment. *See* 42 U.S.C. § 9601 (23) and (24) (defining "removal" and "remedial," respectively). The distinction between a removal action and a remedial action is relevant to the procedural requirements imposed on each, and to the availability of Superfund money.

> . . . Removal actions are typically described as time-sensitive responses to public health threats for which the EPA is granted considerable leeway in structuring the cleanup.
>
> • • •
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> Remedial actions, on the other hand, are often described as permanent remedies to threats for which an urgent response is not warranted. . . .
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> . . . "the requirements for remedial actions are much more detailed and onerous.' . . . remedial actions are only eligible for Superfund financing when the site is listed on the National Priorities List.

United States v. W.R. Grace & Co., 429 F.3d 1224, 1227-29 (9th Cir. 2005) (citations omitted). *See also id.* at 1226 ("a remedial action requires certain analysis of the costs and effectiveness of the remediation"); 40 C.F.R. § 300.425(b)(1) (1990 NCP) ("Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action."); 40 C.F.R. § 300.66(c)(2) (1985 NCP) (same). Collectively, removal and remedial actions may be referred to as responses or response actions. *See* CERCLA Section 101(25), 42 U.S.C. § 9601(25) (definition of "respond" or "response").

Section 107 of CERCLA authorizes the United States to recover from liable parties "all costs of removal or remedial action incurred by the United States . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). Section 107 is the genesis of this lawsuit.

B. NATIONAL CONTINGENCY PLAN (NCP)

EPA's response actions are guided by, and conducted pursuant to the NCP.[10/] The NCP establishes methods and criteria for responding to releases of hazardous substances, and is codified at 40 C.F.R. Part 300. The first NCP to effectuate the purposes of CERCLA was issued in 1982, 47 Fed. Reg. 31180, 31202-43 (Jul. 16, 1982) ("1982 NCP"). That NCP was revised in 1985, 50 Fed. Reg. 47912, 47950-79 (Nov. 20, 1985) ("1985 NCP").[11/] In March of 1990, EPA further revised the NCP, 55 Fed. Reg. 8666, 8813-65 (Mar. 8, 1990) ("1990 NCP"). For hazardous substance response, the 1990 version is currently mostly in effect.[12/] Unless otherwise stated, citations are to the current version of the NCP codified in the Code of Federal Regulations.

The NCP processes remained quite similar in the successive iterations of the NCP.[13/] As noted above, the procedures for more time-sensitive (or time-critical) removal actions are less extensive than for remedial actions. EPA has conducted several removal actions at the Iron Mountain Site, *e.g.*, construction of the water treatment plants for treatment of

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[10] The NCP's full title is the "National Oil and Hazardous Substances Pollution Contingency Plan (NCP)," but in CERCLA and in common usage, it is referred to simply as the National Contingency Plan or NCP. *Compare*, e.g., CERCLA Section 107(1)(4)(A), 42 U.S.C. § 9607(a)(4)(A) *with* 40 C.F.R. § 300.1.

[11] The NCP was originally developed in compliance with the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq., to address releases of oil and hazardous substances under that statute. *See* 42 U.S.C. § 9605(a); 33 U.S.C. § 1321(a)(22); 40 C.F.R. § 300.2.

[12] Some organizational requirements of the NCP have been revised since 1990. *See, e.g.*, 40 C.F.R. Subparts A, B, and H (revised 1994). Subparts B and H are not relevant to this discussion. The changes to Subpart A (Definitions), which include an expansion of the definition of "facility" are not material. *Compare* 59 Fed. Reg. 47384, 47416, 47417-47424 (Sept. 15, 1994) *with* 55 Fed. Reg. 8866, 8813, 8814-8819 (March 8, 1990).

[13] Consistency with the NCP is to be measured against the version of the NCP in effect at the time the response costs in question were incurred. *United States v. Chapman*, 146 F.3d 1166, 1170 n.3 (9th Cir. 1998).

drainage from the Richmond Portal. However, the following discussion describes the more extensive sequence of events specified by the NCP for remedial actions, and the unique terminology that CERCLA and the NCP apply to each step.

1. **Preliminary Assessment (PA) and Site Inspection (SI) –** A preliminary assessment is a "review of existing information . . . to determine if a release may require . . . action." 40 C.F.R. § 300.5 (definition).[14/] Typically, EPA will send a team to collect data, review existing information, and to perform a site inspection with which to do an assessment. *See, e.g.*, Sugarek Decl. ¶ 55.

2. **National Priority Listing (NPL) and Hazard Ranking System (HRS) –** CERCLA requires the President to evaluate threats to human health and environment in accordance with the Hazard Ranking System to determine whether a site may be listed on the National Priority List ("NPL"). CERCLA Section 105(d), 42 U.S.C. § 9605(d). The Hazard Ranking System ("HRS") is a process for calculating a numeric score for various threats and combining the scores into a single site score. *See* 40 C.F.R. Part 300, Appendix A (The Hazard Ranking System). The remedial preliminary assessment is performed, in part, to gather data for evaluation of the Site pursuant to the HRS. *See* 40 C.F.R. § 300.420(b)(iv). *See also* 40 C.F.R. § 300.66(a) (1982); 40 C.F.R. § 300.66(a)(2) (1985) ("preliminary assessments and site inspections to gather appropriate information to determine if a release warrants response and, if so, its priority for response"). Based on a sufficiently high HRS score, a site may be listed on the NPL, and the Iron Mountain Site was. 40 C.F.R. § 300.425(c)(1); 48 Fed.Reg. 40658, *et seq.* (Sept. 8, 1983 listing of Iron Mountain Mine Superfund Site). *See also* 40 C.F.R. § 300.66(e) (1982); 40 C.F.R. § 300.66(c) (1985). The significance of listing on the NPL is that Superfund money may then be used for remedial measures undertaken on the site. *See* 40 C.F.R. 300.425

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[14] Earlier versions of the NCP did not define a preliminary assessment but did have requirements for them. *See* 40 C.F.R. § 300.64 (1982) (Phase II – Preliminary assessment); 40 C.F.R. § 300.64 (1985) (Preliminary assessment for removal actions).

(b)(1) ("Only those releases included on the NPL shall be considered eligible for Fund-financed remedial action."); 300.5 (Fund means Hazardous Substances Superfund).

3. **Remedial Investigation (RI), Feasibility Study (FS) and RI/FS –** In order to plan appropriate cleanup actions at sites on the NPL, EPA needs to understand the nature and extent of the contamination. The investigation of conditions at a site is called a Remedial Investigation ("RI"). *See* 40 C.F.R. § 300.430(d). *See also* 40 C.F.R. § 300.68(d) (1982). 40 C.F.R. § 300.68(d) (1985). Using the RI data, EPA undertakes studies to identify actions that could be implemented to remedy the contamination. The study is called a Feasibility Study ("FS"). The purpose of the FS is to develop a range of feasible remedial options, and to discuss the advantages and disadvantages of each option. *See* 40 C.F.R. § 300.430(e). *See also* 40 C.F.R. § 300.68(f) (1985) and 300.68(g) (1982). The FS may identify a need for more data, requiring further Remedial Investigation. As a practical matter, the RI and the FS are often an iterative process, with the FS identifying a need for more data (RI), which in turn generates further study (FS). Consequently, the Remedial Investigation and Feasibility Study stages are often spoken of as one, the "RI/FS." *See, e.g.*, 40 C.F.R. 300.430 (titled "Remedial Investigation/feasibility study and selection of remedy").

As part of the RI/FS process, EPA frequently prepares two or more complementary assessments to identify the contaminants and contaminant pathways of concern: an Ecological Assessment and a Human Health Risk Assessment. Sugarek Declaration ¶ 61 and 96. The assessments are important elements of the FS and inform EPA's determination of remedial action objectives for the cleanup. Cleanup alternatives are developed in the FS to meet the remedial action objectives by identifying pathways which the cleanup alternatives must break in order to protect human health and the environment from contamination.

4. **Proposed Plan for Preferred Alternative –** The NCP defines criteria for evaluating alternatives under review, and for selecting a Proposed Plan, such as protection of health and environment, attainment of applicable environmental requirements under federal and

state law, long-term effectiveness, reduction of toxicity, implementability, cost, and state and community acceptance. *See* 40 C.F.R. § 300.430(e)(9)(iii) ("Nine criteria for evaluation") and (f) ("Selection of Remedy"). *See also* CERCLA Section 121, 42 U.S.C. § 9621 (Cleanup standards); 40 C.F.R. § 300.68(h-k) (1982); 40 C.F.R. § 300.68(g-j) (1985). At the conclusion of its remedial investigation and feasibility study for a site, EPA identifies a Preferred Alternative to remedy the contamination at the site and which best meets the evaluating criteria. *See* 40 C.F.R. § 300.430(f)(2). EPA develops a Proposed Plan to implement the Preferred Alternative. The Proposed Plan also describes the other alternatives considered and the information used to select the Preferred Alternative. *Id.*

5. **Public Hearing(s) –** EPA publishes the Proposed Plan to the public and solicits comments, both in writing and at one or more public hearings. *See* 40 § C.F.R. 300.430(f)(3). *See also*, 40 C.F.R. § 300.67(d) (1985). Public comments include comments from potentially responsible parties liable for the contamination and clean up, such as the defendants to this case. *See* Sugarek Decl. ¶¶ 129 and 130 (ROD 1), ¶ 169 (ROD 2), ¶ 182 (ROD 3), and ¶ 199 (ROD 4).

6. **Review of Public Comments –** The NCP requires EPA to summarize and respond to comments received. 40 C.F.R. § 300.430(f)(3)(i)(F). *See also* 40 C.F.R. § 300.67(e) (1985). The NCP also requires EPA to reassess its Proposed Plan in light of the comments. *See* 40 C.F.R. 300.430(f)(4) ("Final remedy selection"). In response to public comments, EPA may elect to reconsider its Proposed Plan and to renew its RI/FS process, as it did for its plan to enlarge the Spring Creek Debris Dam (ROD 4, the cleanup plan having changed from an enlarged dam to creation of a retention reservoir in response to comments). Sugarek Decl. ¶¶ 65, 186, 189-193. If EPA makes significant changes to its Proposed Plan, EPA may decide to hold new public meetings, as it did in the case of ROD 4. *See* 40 C.F.R. 300.430(f)(3)(ii)(B) (specifying circumstances requiring new public comment period); Sugarek Decl. ¶ 65.

7. **Record of Decision (ROD) –** The NCP requires documentation of all

facts, analyses and site-specific policies considered in selecting the final remedy, along with an explanation for how the "nine criteria for evaluation" of remedies were used in selecting the remedy, and how the remedy meets other statutory and regulatory goals. 40 C.F.R. § 300.430(f)(5)(i) and (ii). *See also* 40 C.F.R. § 300.68(a) (1982); 40 C.F.R. § 300.68(a) (1985). The documentation shall also discuss significant changes made in response to comments, and describe the performance goals the selected remedy is expected to achieve. 40 C.F.R. § 300.430(f)(5)(iii). This documentation is called a Record of Decision ("ROD"),[15/] and often the term is used to refer to the decision itself, as was done in the preceding paragraph. *See United States v. Iron Mountain Mines, Inc.,* 987 F.Supp. 1244, 1246 (E.D. Cal. 1997) (the ROD is the "vehicle by which EPA selects remedies to be implemented"). There have been five RODs for five distinct Iron Mountain Site remedy selections, and a sixth remedy selection and ROD are in progress. Sugarek Decl. ¶ 80. Only the first four RODs are relevant to this motion because all costs for later RODS were incurred and paid after the February 29, 1996 deadline for costs which the United States seeks in this Motion.

8. **Administrative Record (AR) –** The current NCP requires an Administrative Record to be created to document the bases for the final remedy selection. *See* 40 C.F.R. § 300.430(f)(5)(i); 40 C.F.R. § 300.800 *et seq.* (Subpart I). However, the Administrative Record ("AR") actually predates the final remedy selection. The NCP requires that the Administrative Record "be made available for public inspection at the commencement of the remedial investigation phase" which, as described above, is the very beginning of the process to select a remedy. *See* 40 C.F.R. § 300.815(a). It also requires the Proposed Plan and supporting materials to be included in the Administrative Record as part of the public notice soliciting comments on the Proposed Plan and alternatives. *See* 40 C.F.R. § 300.430(f)(3)(i)(B). Earlier NCPs did not spell out the requirements for an administrative record in the detail of the

[15] The 1985 NCP does not actually use the term "ROD" or Record of Decision.

current NCP, but each required documentation of all phases of EPA response to be collected. *See* 40 C.F.R. § 300.69(a) (1982 and 1985). For the Iron Mountain Mine Site, EPA made the Administrative Records available at its Headquarters in San Francisco, at the Shasta County Public Library in Redding, near the Site, and at the Meriam Library at Cal State in Chico. Sugarek Decl. ¶ 64. The Administrative Records are part of the Site File which is described below.

9. **Remedial Design (RD) and Remedial Action (RA) –** Following selection of a final remedy and issuance of the ROD, implementation of the decision occurs in two phases: first, development of the approved Remedial Design ("RD") and, second, actual construction and implementation of the Remedial Action ("RA"), including operation and maintenance ("O&M"). *See* 40 C.F.R. § 300.435 (Remedial design/remedial action, operation and maintenance).

EPA refers to the entire process of developing the technical design and contract documents as the Remedial Design ("RD"). During the RD, EPA creates detailed technical drawings, specifications, implementation plans, supporting engineering reports, and other contract documents necessary for the construction contract to implement the remedy.[16/]

Once the final RD is approved, the actual construction of the remedy begins. Sugarek Decl. ¶¶ 67-71. EPA refers to the construction phase as Remedial Action ("RA"). In practice, the RD and the RA are often performed for EPA by PRPs, by a contractor, or by a Federal agency under an agreement with EPA. Under multi-site contracts, such as were typically used at the Iron Mountain Mine Site, a work assignment to perform the RA began with issuance of a Scope of Work, which the RPM prepared, specifying what EPA wanted. Sugarek Decl. ¶¶

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[16] The 1990 NCP provides that RD/RA activities shall include "the development of the actual design of the selected remedy and implementation of the remedy through construction" and "shall be in conformance with the remedy selected and set forth in the ROD or other decision document for that site." 40 C.F.R. § 300.435(a), (b). The 1982 and 1985 NCPs did not expressly address RD/RA activities.

15, 67-71. The RPM often discussed the Scope of Work with the contractor which would perform the remedial action, and the contractor prepared a Work Plan, which EPA approved. Sugarek Decl. ¶¶ 17-20. The contractor then performed the elements of the Scope of Work to complete the remedial action. EPA inspected the completed cleanup and approved the Final Remedial Action. *See, e.g.*, Sugarek Decl. ¶ 23.

10. **Unit (OU) –** Cleanup of large, complex sites can often be better managed in phases. The NCP refers to each phase as an "operable unit" or "OU". *See, e.g.*, 40 C.F.R. § 300.430(a)(1)(ii)(A) (encouraging use of operable units); 40 C.F.R. § 300.68(c) (1985). An operable unit is "a discrete action that comprises an incremental step towards comprehensively addressing site problems." 40 C.F.R. § 300.5 (definition). *See also* 40 C.F.R. § 300.6 (1985) ("*Operable Unit* is a discrete part of the entire response action that decreases a release, threat of release, or pathway of exposure.") The procedural stages specified by the NCP are repeated for each operable unit. Each Iron Mountain ROD is an operable unit. Sugarek Decl. ¶ 72. Each Iron Mountain Mine ROD documents the remedy selection decision for sources of contamination in an operable unit. Sugarek Decl. ¶ 73.

11. **Site File** – Throughout its work on a site such as Iron Mountain Mine, EPA maintains a Site File which contains all documents created, received or used by EPA for its site work. The file includes the Administrative Record, described above, and the cost documents, including the cost package, along with documents recording the design and implementation of the selected remedial actions. Sugarek Decl. ¶ 77.

12. **Cost Package –** In anticipation of seeking to recover its costs in a response action (removal, remedial, or both), EPA prepares a Cost Package. The typical Cost Package consists of a computer generated Cost Summary Report and a collection of supporting documents. The Cost Package for Iron Mountain Mine Site is described in more detail below. *See* Section VII.A ("Cost Package"), *infra.*

III. EPA RESPONSE (CLEANUP WORK) AT IRON MOUNTAIN MINE SITE

All work at the Site was directed at reducing or eliminating acid mine drainage discharges from the Site that were harmful to human health or to the environment. Generally, actions considered and undertaken were of four types: 1) source control, meaning restricting the creation of contaminants; 2) containment of the contaminants; 3) control of discharges of the contaminants so as to keep concentrations below harmful levels; and 4) treatment to reduce or eliminate the contaminants. Sugarek Decl. ¶ 82.

EPA has undertaken a number of response (cleanup) actions at the Site in order to control acid mine drainage. The actions are typically classified as one of five records of decision for remedial actions, or a series of emergency removal actions beginning in 1988 and extending into the early 1990s. The classification into RODs and emergency removal actions is appropriate for procedural compliance with the NCP and for cost accounting. However, data derived from the remedial investigations at Iron Mountain Mines Site often supported more than one ROD, and EPA often authorized work under more than one ROD (*e.g.*, construction of the HDS treatment plant) or Action Memorandum (*e.g.*, emergency treatment). *See* Sugarek Decl. ¶ 73. The following are brief descriptions of each EPA action, along with descriptions of entities which performed the work and predicate investigations and studies. These descriptions are taken from the more detailed descriptions contained in Exhibit B, the Declaration of Rick Sugarek.

A. 1986 ROD 1 – Partial Capping and Stream Diversions

ROD 1 called for the partial capping of areas of the mountain subject to infiltration of rainwater, and for the diversion of clean, upstream portions of Slickrock Creek and Upper Spring Creek to prevent contamination of those clean waters and, for Upper Spring Creek, to reduce the volume of water flowing into the Spring Creek Reservoir. Sugarek Decl. ¶ 115. Reducing inflows to the reservoir effectively increased its capacity, thereby reducing the likelihood that contaminated water would spill over the Spring Creek Debris Dam and into the Keswick Reservoir and the Sacramento River. Sugarek Decl. ¶ 115. ROD 1 also authorized a

study of the feasibility of sealing the Richmond Mine as a means of restricting acid mine drainage formation and flow. Sugarek Decl. ¶ 120.

ROD 1 selected two remedies which, after further study, were never implemented: 1) diversion of the South Fork of Spring Creek; and 2) enlargement of the Spring Creek Debris Dam to increase the reservoir's capacity to contain acid mine drainage. Sugarek Decl. ¶ 126. Both remedies were unselected as part of the ROD 4 process, described below. *See* Section III.E, *infra*.

B. 1988-94 — Emergency Removal Action – Treatment Plants

Responding to the threat of critical water flows during the winter of 1988-89, EPA constructed and operated a treatment plant designed to remove cadmium, copper, and zinc from a portion of the Richmond Portal drainage, which drained into Boulder Creek and ultimately into the Sacramento River. Sugarek Decl. ¶ 132. When similar flow conditions were threatened during subsequent winters, EPA issued an administrative order ("AO") requiring the responsible parties to operate an improved treatment plant to treat a greater portion of the contaminated flows from the Richmond Portal acid mine drainage, but the defendants Arman and IMMI declined. Sugarek Decl. ¶ 135.

C. 1992: ROD 2 — Waste Piles, and Lawson and Richmond AMD

Pursuant to ROD 2, several acid-producing waste piles were excavated, consolidated, and capped. Sugarek Decl. ¶ 163. ROD 2 also addressed the two largest sources of acid mine drainage at the Site, the Richmond and Lawson Adits. Under ROD 2, drainage from these two adits was piped to a new, larger treatment plant, where it was neutralized and the metals captured in a sludge. Sugarek Decl. ¶ 152. The sludge was disposed of in a lined fill area within a former open pit mine (Brick Flat Pit) located at the top of Iron Mountain. Sugarek Decl. ¶ 160. Treated water was discharged into Spring Creek. Sugarek Decl. ¶ 162.

In the course of selecting the remedies to be implemented under ROD 2, EPA also investigated a PRP proposal to flood the Richmond Mine as a means of depriving it of the

oxygen necessary to form AMD. Sugarek Decl. ¶ 144. (The proposal differed from an earlier study, under ROD 1, which found it infeasible to seal the Richmond Mine with low density concrete.) EPA found that mining had fractured the rock too much for sealing the Portal to be effective as a plug. Sugarek Decl. ¶ 150.

D. 1993: ROD 3 – Addition of Old Mine and #8 Mine AMD to Treatment Plant

ROD 3 called for the collection and conveyance of AMD to the new treatment plant from a single seep fed by two mines buried by a landslide, the Old Mine and the Number 8 Mine (or #8 Mine). Sugarek Decl. ¶ 172. ROD 3 was effectively an expansion and continuation of the ROD 2 acid mine drainage treatment remedy for these similarly highly contaminated and concentrated discharges. Sugarek Decl. ¶ 173.

E. 1997: ROD 4 — Slickrock Creek Retention Reservoir

EPA initiated the process leading to ROD 4 to investigate alternatives to an enlargement of the Spring Creek Debris Dam, which ROD 1 had authorized but which design work was showing would be much more costly than originally estimated. Sugarek Decl. ¶¶ 183, 186, 189, and 190. In the end, the remedy EPA selected in ROD 4 was a different remedy, that being construction of a dam in Slickrock Creek to capture and contain contaminated water from area sources which had not been captured and treated under RODs 2 and 3. Sugarek Decl. ¶¶ 191-193. Some of the studies for ROD 4, including design of the Spring Creek Debris Dam, took place before March of 1996, but all design and construction of the Slickrock Creek dam took place after March 1996. Sugarek Decl. ¶¶ 196-197. Consequently, EPA seeks to recover only part of the costs it incurred under ROD 4, those it incurred and paid before March 1996.

F. 2004: ROD 5 – Sediment Cleanup in Keswick Reservoir

On September 30, 2004, EPA issued ROD 5 calling for cleanup of contaminated sediments in the Spring Creek Arm of the Keswick Reservoir. All costs that EPA incurred to study and implement ROD 5 were incurred after March 1996. Consequently, at this time, EPA seeks no costs incurred or paid for ROD 5.

IV. CLEANUP WORK PERFORMED FOR WHICH EPA INCURRED COSTS

EPA performs most work on Superfund sites through contractors and other agencies with expertise. Sugarek Decl. ¶ 86. The primary contractors and agencies working on the Iron Mountain Mine Site were CH2M Hill, the United States Bureau of Reclamation ("BuRec"), and the United States Geologic Service ("USGS"). Sugarek Decl. ¶ 86; Motion Exhibit A, Cost Summary Report, Section 2 (Itemized Cost Summary). Lesser amounts of work were performed by other contractors and agencies, including private contractors Riedel and Planning Research Corporation, and by the National Oceanographic and Atmospheric Administration ("NOAA"). *Id.*

CH2M Hill served as EPA's prime contractor for engineering services for the entire time EPA had a technical and engineering services contractor on the Site. Sugarek Decl. ¶¶ 106-107. CH2M Hill has served as prime contractor under a series of multi-year competitively bid contracts. Sugarek Decl. ¶¶ 100-105. As prime contractor, CH2M Hill has assisted EPA with initial data collection and studies for the RI/FS process for each ROD. Sugarek Decl. ¶ 107. CH2M Hill helped coordinate with the public by providing technical support for informational materials, preparing presentations, and handling logistics for public meetings, and it provided EPA technical support in reviewing and responding to public comments. Sugarek Decl. ¶ 107. CH2M Hill assisted EPA with initial data collection and field investigation for each RI/FS. Sugarek Decl. ¶ 107. CH2M Hill often designed the selected remedy, and often provided oversight of construction by subcontractors. Sugarek Decl. ¶ 108. CH2M Hill also provided technical support to assist EPA enforcement activities, such as preparing the technical requirements for Scopes of Work for remedial activities that PRPs were to perform pursuant to EPA Administrative Orders, and providing EPA with technical support in negotiations with PRPs. Sugarek Decl. ¶ 109. CH2M Hill provided EPA with day to day oversight of the Site, and of work performed by PRPs. Sugarek Decl. ¶ 110.

In addition to technical support and oversight, CH2M Hill also designed or

constructed a number of remedies on the Site and structures to assist in investigation, including: design and construction of the partial capping of the Brick Flat Pit and seven subsidence areas on Iron Mountain; repair and reinforcement of 1500 feet of the underground Richmond Adit to provide safe entry to the Mine for examination and geologic investigation; and design and construction of the High Density Sludge facility to concentrate the new water treatment plant waste in order to reduce the volume and extend the life of the disposal area. Sugarek Decl. ¶¶ 117, 122, and 158.

BuRec designed and constructed the Slick Rock Creek diversion to prevent clean waters from becoming contaminated. Sugarek Decl. ¶ 118. BuRec designed the Upper Spring Creek diversion, and oversaw of its construction by PRPs. Sugarek Decl. ¶ 119. BuRec also provided oversight of the CH2M Hill rehabilitation of the Richmond Adit, and of its construction of the HDS facilities at the treatment plant. Sugarek Decl. ¶¶ 122 and 158. BuRec assisted EPA in evaluating proposed changes to the approved remedial designs during construction. Sugarek Decl. ¶ 4088. In addition, BuRec designed a diversion of the South Fork of Spring Creek and an enlargement of the Spring Creek Debris Dam, albeit neither were built because EPA identified better, less costly solutions as part of its later, ROD 4 process. Sugarek Decl. ¶ 126.

USGS assisted EPA with investigations of Site geology and AMD on the site. Sugarek Decl. ¶ 89. The USGS assisted with the study of the feasibility of sealing the Richmond Mine. Sugarek Decl. ¶ 124. The USGS conducted a geologic reconnaissance in order to assess the geologic conditions in the mine and to determine whether the generation of AMD was taking place at discrete locations or was widely distributed. *Id.* Using the access gained by rehabilitation of the Richmond Adit, the USGS visited the Haulage and Grizzly levels of the Richmond Mine, took samples, and analyzed them. *Id.* Because of the unique and extremely acidic conditions, USGS had to develop new analytical methods, and it had to both collect and analyze samples in oxygen free environments. Sugarek Decl. ¶ 148.

Riedel sized, installed and operated the original, emergency water treatment plant

on the Site. Sugarek Decl. ¶¶ 95, and 134.

Planning Research Corporation (PRC) prepared an endangerment assessment to evaluate the potential threat to human health and to the environment posed by contaminant sources at the Iron Mountain Mine Site. Sugarek Decl. ¶ 96. PRC later updated the Human Health Risk Assessment. Sugarek Decl. ¶ 96. PRC performed the title searches for the Site. Sugarek Decl. ¶ 97. To assist EPA's response to comments on the Proposed Plan for Operable Unit 1 (that resulted in ROD 1), PRC performed a technical review of an *in situ* leaching mining proposal developed by the defendants. Sugarek Decl. ¶ 98.

NOAA served as the lead Federal Agency for coordination with EPA and with other Sate and Federal trustee agencies regarding natural resource issues, including impacts to fish, wildlife, habitat, and other natural resources (*e.g.*, water). Sugarek Decl. ¶ 90.

Many other contractors and agencies also worked on the Site, but their cumulative costs were less than three percent of the total costs. *See* Motion Exhibit A, Cost Summary Report, Section 2.

V. CLEANUP ACTIVITIES BY POTENTIALLY RESPONSIBLE PARTIES

A. Rhône-Poulenc[17/]

Rhône-Poulenc undertook cleanup activities at the Site pursuant to EPA administrative orders and on behalf of itself and the predecessors in interest to the current defendants Arman and Iron Mountain Mines, Inc. Among the cleanup activities which Rhône-Poulenc undertook were the following.

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[17] Rhône-Poulenc has undergone name changes during the pendency of this case. At the time of the entry of the consent decree settling its liability, its name had changed to Aventis CropScience USA Inc. *See* December 8, 2000 Consent Decree (Dkt. 1185), Section I.A. In addition, at the time of the settlement, Rhône-Poulenc (Aventis) was represented in this case by Stauffer Management Company, not to be confused with Stauffer Chemical, the immediate predecessor in interest to the current defendants Arman and Iron Mountain Mines, Inc. *See id.*, Section I.E.

- Construction of the Upper Spring Creek diversion in order to protect the waters from contamination. Sugarek Decl. ¶ 119.
- Additional rehabilitation of the Richmond Adit in order to provide access for site investigation teams. Sugarek Decl. ¶ 123.
- Construction and operation of the 60 gpm water treatment plant for treatment of drainage from the Richmond Portal. Sugarek Decl. ¶¶ 135 and 136.
- Upgrading of the water treatment plant to 120 gpm capacity. Sugarek Decl. ¶ 138.
- Design and Construction of repairs and improvements to the Site infrastructure. Sugarek Decl. ¶ 141.
- Excavation, consolidation, and capping of acid-producing waste piles on the Site. Sugarek Decl. ¶ 163.

The estimated cost of cleanup activities by Rhône-Poulenc through the year 2000 was $150 million. *See* November 15, 2000 Memorandum of Points and Authorities in Support of Joint Motion for Entry of Consent Decree at p.17, n.32 (Dkt. 1178 or 1179, filed Nov. 16, 2000). In settling with the plaintiffs in December 2000, Rhône-Poulenc paid an estimated additional $142 million for an insurance policy to cover operation and maintenance of future cleanup activities; and another $8 million for Site cleanup activities not covered by the insurance policy. *See id.*; Sugarek Decl. ¶ 202. In addition, Rhône-Poulenc paid $10 million for natural resource damages. *See id.* In short, it was estimated that Rhône-Poulenc paid a total of $300 million for Site cleanup, and an additional $10 million for natural resource damages. All those costs were separate from costs incurred by EPA, and EPA paid for none of them. Having settled, Rhône-Poulenc is no longer a party in this case.

B. Arman and Iron Mountain Mines, Inc.

Defendants Arman and Iron Mountain Mines, Inc. undertook no cleanup activities at the Site, notwithstanding EPA has issued no fewer than seven Administrative Orders requiring

both Arman and Iron Mountain Mines, Inc. to undertake cleanup activities. *See* Sugarek Decl. ¶ 140. Defendants Arman and Iron Mountain Mines, Inc. have paid nothing towards cleanup of the Site.

VI. EPA PAYMENT PROCESS FOR WORK DONE

The names of documents may differ between different kinds of contracts, and the person approving payments and the responsible offices differ for contracts and for payments to agencies. However, with the minor exception of the costs of two Federal agencies (ATSDR and NOAA),[18/] the payment process is similar for all "extramural" costs incurred. ("Extramural" costs are those external to EPA. EPA personnel, travel and overhead or "indirect" costs being called "intramural.")

Private contractors performed most Iron Mountain Mine Site work pursuant to written agreements and instructions under multi-site contracts. Sugarek Decl. ¶¶ 13-21; Exhibit C, Declaration of Sharon Johnson ("Johnson Decl.") ¶¶ 16, 20, and 22. Federal Agency work was performed pursuant to an Interagency Agreement ("IAG"). Sugarek Decl. ¶¶ 26-27; Johnson Decl. ¶ 17. There were more than one IAG with some agencies. State participation was required by CERCLA, and EPA facilitated State participation with payments made under a Multi-Site Cooperative Agreement ("MSCA") or a State Cooperative Agreement ("SCA"). Sugarek Decl. ¶ 35; Johnson Decl. ¶ 18.

Periodically, usually monthly, sometimes quarterly, the contractor or agency submitted a bill to EPA. Johnson Decl. ¶ 23. The RPM reviewed each bill. Surgarek Decl. ¶¶

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[18] Costs incurred by the Agency for Toxic Substances and Disease Registry ("ATSDR") and by National Oceanographic and Atmospheric Administration ("NOAA") are funded directly from the Superfund, and not by EPA. ATSDR and NOAA costs are costs the government incurred. Consequently, EPA includes ATSDR and NOAA costs its Cost Summary Report and includes supporting documentation in the Cost Package. Exhibit C, Declaration of Sharon Johnson ¶ 37.

25, 34, 40-41. He recommended payment in the case of contracts and SCAs. Surgarek Decl. ¶¶ 25 and 40. He approved payments under IAGs. Surgarek Decl. ¶ 32. He recommended and approved payments only for work performed on the Site and which met requirements. Surgarek Decl. ¶¶ 25, 34, and 41. Mr. Sugarek's review of work and approval of payments was guided by the NCP, and by EPA guidance documents interpreting the NCP, in order to assure consistency of the Iron Mountain Superfund Site cleanup with the NCP. *See* Sugarek Decl. ¶ 59.

The applicable EPA payment office listed each payment on a schedule of payments to be made, debited the appropriate Site accounts, and forwarded the schedule to the Department of the Treasury for payment. Johnson Decl. ¶ 28. The Department of the Treasury confirmed payment by returning to EPA the schedule number, date of payment, and the total amount of all payments on the schedule. Johnson Decl. ¶ 29.

VII. THE COST PACKAGE AND COSTS SOUGHT

A. Cost Package

When EPA seeks to recover its costs under CERCLA, it assembles a Cost Package. The Package consists of a computer generated Cost Summary Report and supporting documents. Johnson Decl. ¶ 32. The computer program which generated the Report was originally SCORES and is now SCORPIOS. Johnson Decl. ¶¶ 32, and 43. Both downloaded from the EPA Integrated Financial Management System from which the programs pulled records of financial transactions, which records EPA maintained in the ordinary course of business as the transactions occurred. Johnson Decl. ¶¶ 25, 32, and 44. The computer programs collected each payment EPA made to each contractor and agency, and listed each payment in sections in the detailed Cost Summary Report, with one section for each contract category. Johnson Decl. ¶ 33. Within each section are listed the contractor or agency name, the contract or agreement number, the contract project officer at the time of the Report, a summary of service and, for each payment, a voucher (bill) number, bill date, bill amount, the portion of the amount spent on the

Iron Mountain Mine Site (in the case of multi-site contracts, such as the CH2M Hill contract), an amount EPA had agreed to pay for overhead (called the "annual allocation"), and the schedule number and date for the payment by the Department of the Treasury. *See, e.g.*, Johnson Decl. ¶ 35. Section Two of the Report is an Itemized Cost Summary which lists the total payments for each contract, with one line of the summary corresponding to each later section of the Itemized Cost Summary. Johnson Decl. ¶ 33.

Supporting documents in the Cost Package include all bills, all approvals, Treasury Schedules confirming payment, and reports containing the calculations of the Annual Allocations Rates (which are percentages applied to the billed amounts to account for contractor overhead costs). Johnson Decl. ¶ 34. (For IAGs, the overhead costs are built into the negotiated billing rate with each agency.) Also included in the Iron Mountain Mine Site Cost Package are 'work performed' documents not normally included in Cost Packages, such as progress reports submitted by the entities performing the work. Johnson Decl. ¶ 34.b.

Once the Cost Package was assembled, EPA Cost Recovery Specialist Sharon Johnson reviewed the supporting documents for each line entry in the Cost Summary Report in order to assure that the Report entry was correct, and that the work described was properly charged to the Iron Mountain Mine Site. Johnson Decl. ¶¶ 50-54, and 65. In instances in which Ms. Johnson found errors, she had the errors corrected. In instances in which she was unable to verify that a cost was for work authorized or done at the Iron Mountain Mine Site, she deleted the cost. Johnson Decl. ¶¶ 52 and 54. In addition to checking that charges were properly allocated to the Iron Mountain Mine Site, Ms. Johnson also checked with the EPA Offices of Debarment and of the Inspector General to determine if the names of any Iron Mountain Mine Site contractors had been identified for fraud on Site contracts. Johnson Decl. ¶ 55.

In support of this Motion, Ms. Johnson and Ms. Fong of EPA prepared a new 2009 Cost Package and Cost Summary Report. The supporting documents to the new Cost Package are all taken from the 1997 Cost Package, albeit they are reorganized. Johnson Decl. ¶¶

62 and 63. The new 2009 Cost Summary Report is substantially the same as the earlier Report, with the exception of adjustments described in the following section, and with the exception of the calculation of 13 years of additional accrued interest. Johnson Decl. ¶¶ 62 -65. Ms. Johnson reviewed the supporting documents for each line entry of the new 2009 Cost Summary Report in order to assure that each entry was correct. Johnson Decl. ¶ 65.

All documents in the Cost Package were available to the defendants in discovery. Johnson Decl. ¶¶ 61 and 62. The only exception is the Cost Summary Report itself which reflects the current pre-judgment interest calculation. However, an earlier, January 28, 1997 Cost Summary Report was available to the defendants. Johnson Decl. ¶ 61. That 1997 Report was substantially the same as the new 2009 Cost Summary Report for those costs included in the 2009 Report, with the exception of the amount of accrued pre-judgment interest. Johnson Decl. ¶¶ 62 - 65.

B Costs Sought

An EPA Cost Summary Report includes all EPA costs incurred *and* paid, and the costs incurred by ATSDR and NOAA. Because the United States committed to limit its first request for costs in this Motion, the new 2009 Cost Summary Report in support of this Motion, Motion Exhibit A, stops at February 29, 1996. *See, e.g.*, Johnson Decl. ¶¶ 49 and 66; Exhibit D, Declaration of Yvonne Fong ("Fong Decl.") ¶15. At the request of counsel for the United States, for the new 2009 Cost Summary Report, EPA (Ms. Fong) made the following adjustments. Fong Decl. ¶15. *See also* Johnson Decl. ¶¶ 64, 66-75.

a. The lesser of annual allocations used to figure contractors' overhead were used, meaning that if after February 29, 1996, the annual allocation rates applicable to the period through February 1996 decreased, the decreased rate is used in the new 2009 Cost Summary Report, Motion Exhibit A, but if an annual allocation rate increased, the lower rates reported on January 28, 1997, are retained in the new 2009 Cost Summary Report.

b. The indirect cost methodology in use in 1996 was retained in the new

2009 Cost Summary Report, instead of using the current methodology used since October of 2000. The new methodology would attribute higher costs to contracts. However, because the United States has elected to not seek its "intramural costs" which include indirect costs, the indirect cost methodology used is irrelevant.

c. Additional costs which EPA incurred and paid through February 1996, but which had been omitted from the January 28, 1997 Cost Summary Report, were also omitted from the new 2009 Cost Summary Report.

d. All reimbursements and credits EPA received for costs incurred and paid prior to March 1, 1996, (costs reported in the January 28, 1997 Cost Summary Report), including those not received until after February 1996, were added so as to reduce the costs and interest.

e. All EPA personnel, travel, and indirect costs (collectively "intramural costs") were deleted so as to reduce the costs and interest.

f. All DOJ costs which EPA paid were deleted, reducing costs and interest.

In their declarations in support of the United States' Motion, Ms. Johnson and Ms. Fong explain how they produced and verified the new 2009 Cost Summary Report. *See* Motion Exhibits C and D. The total extramural costs of the United States through February 1996 are $26,968,134.84. Motion Exhibit A, Section 2, p.3.

In addition to costs it incurred and paid, the United States seeks prejudgment interest on those costs. SCORES and SCORPIOS compound the interest periodically using an annual interest rate published in the Federal Register. Each day that EPA pays incurred costs, the program adds those costs to the cumulative costs plus interest and calculates the interest which accrues to the next day on which EPA pays new incurred costs. In her declaration, Ms. Fong explains how she used the SCORPIOS program to calculate prejudgment interest through the end of this Fiscal Year to September 30, 2009. Fong Decl. ¶¶ 19 - 32. The total prejudgment interest through the end of this Fiscal Year 2009 (through Sept. 30, 2009) is $30,171,534.69. Motion Exhibit A, Section 2, p.3.

VIII. ARGUMENT

A. There Being No Genuine Issue of Material Fact, Summary Judgment Must Be Granted

The Supreme Court has stated that summary judgment is both appropriate and required "upon proper showings of the lack of a genuine, triable issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
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> . . . the motion may, *and should*, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.

Id. at 322-323 (emphasis added).[19/] To defeat a motion for summary judgment, the non-moving party must present a reasonable dispute as to material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) ("By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

B. The Government is Entitled to Recover All Its Response Costs

CERCLA Section 107(a) is a strict liability statute. *See Burlington Northern v. United States*, 129 S.Ct. 1870, 1878 (2009); *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992).[20/] Section 107(a) of CERCLA provides that an owner and operator of any facility at

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[19] This Court discussed the requirements for summary judgement in *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1534 (E.D. Cal. 1992).

[20] Liability for costs under CERCLA is joint and severable unless the defendants can demonstrate a reasonable basis for apportionment of the harm. *See Burlington Northern v.*

which hazardous substances were disposed shall be liable for "all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan," including interest on the amount recoverable. 42 U.S.C. § 9607(a). *See also* 42 U.S.C. § 9601(22) ("release" includes "disposing into the environment"). This Court has held that "CERCLA liability is triggered by ownership or operation of the facility, not by responsibility for contamination." *United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1552 (E.D. Cal. 1992) (this Court also noted that IMMI and Arman conceded that their defense IMMI18-US could be stricken, the defense in which they asserted that any hazardous substances had not been disposed of by them).

The United States is not required to show its costs were necessary, or reasonable. *United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1542-43 (E.D. Cal. 1992) (finding

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United States, 129 S.Ct. 1870, 1881 (2009). This Court rejected the defendants' arguments for apportionment explicitly in its September 30, 2002 grant of partial summary judgment to the plaintiffs on liability, and implicitly in its entry of the December 8, 2000 Consent Decree approving the settlement with Rhône-Poulenc. *See* September 30, 2002 Order at 4 (Dkt. 1241, filed October 1, 2002); December 8, 2000 Consent Judgment (Dkt. 1185). The arguments this Court considered were similar to those approved by the Supreme Court in *Burlington Northern*. For example, the District Court decision which *Burlington Northern* approved considered the relative duration of occupancy of the site, relative size of the parties' parcels, and relative chemical contributions to total site contamination. *See Burlington Northern v. United States*, 129 S.Ct. at 1882-1883. In their joint memorandum in support of the Consent Decree, the settling parties observed that the settlement was fair to defendants given that (1) it left Arman and IMMI owing only twenty-two percent of the cleanup costs, (2) the defendants had owned the site for 25 years compared to 75 years for Rhône-Poulenc (then known as Aventis) and its predecessors, and (3) as a practical matter, the defendants were unlikely to pay anything close to what they owed. *See* November 15, 2000 Plaintiffs' Memorandum of Points and Authorities in Support of the Joint Motion for Entry of Consent Decree at pp. 17-19. (The argument in support of the Consent Decree was based on costs through 1999, a larger amount than the United States seeks in the present Motion.) Since entry of the Consent Decree, costs have continued to increase, but so has the relative duration of the defendants' tenancy. (The defendants own the same parcels as did their predecessors and, consequently, no distinctions are possible on the bases of relative size of parcels nor their discharges.)

no duty to mitigate costs, and no defense based on costs being "unnecessary").[21/]

> CERCLA § 107(a)(4)(A) does not limit the government's recovery to "all *reasonable* costs;" rather, it permits the government to recover "*all* costs of removal or remedial action incurred . . .. not inconsistent with the [NCP]." The NCP regulates *choice of response actions*, not costs. Costs, by themselves, cannot be inconsistent with the NCP."

United States v. Hardage, 982 F.2d 1436, 1443 (10th Cir. 1992) (emphasis in original). *See also United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1501 (6th Cir. 1989) ("As noted, section 9607(a) authorizes the government to recover all costs of removal or remedial response actions."). This court has held that the government may also recover costs it incurred before enactment of CERCLA, and before the Site was listed on the NPL. *See United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1550 (E.D. Cal. 1992).[22/]

The applicable NCP is the one in effect when EPA incurred the particular costs. *United States v. Chapman*, 146 F.3d 1166, 1170 n.3 (9th Cir. 1998). But as observed by the Tenth Circuit, it is EPA's selection of a response action which the defendant must show was inconsistent with the NCP, not the costs. *United States v. Hardage*, 982 F.2d 1436, 1442-43 (10th Cir. 1992) ("As long as the government's choice of response action is not inconsistent with the NCP, its costs are presumed to be reasonable and therefore recoverable."). Furthermore, "[w]hen the United States is seeking recovery of response costs, consistency with the NCP is presumed." *United States v. Chapman*, 146 F.3d 1166, 1170 (9th Cir. 1998). *See also United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992) ("consistency with the NCP is presumed unless the defendant can overcome this presumption by presenting evidence of inconsistency.").

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[21] The standard for private parties to recover CERCLA response costs is different than for governments. Private parties must show their costs are necessary. *See* CERCLA Section 107(a)(4)(B).

[22] The defendants withdrew their defense that their actions occurred before enactment of CERCLA and were lawful at the time and, therefore, this Court struck the defense (IMMI10-US). *See United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1551 (E.D. Cal. 1992).

C. Government's *Prima Facie* Case

The initial burden of proof is on the United States, as the moving party, to establish that it is entitled to summary judgment. The Ninth Circuit has stated that, in a CERCLA cost recovery action, the government meets its burden by establishing a *prima facie* case, at which point, the burden shifts to the defendant.

> To establish a *prima facie* case to recover its response costs under CERCLA § 107, the government has to prove: (1) the site is a "facility"; (2) a "release" or "threatened release" of a hazardous substance occurred; (3) the government incurred costs in responding to the release or threatened release; and (4) the defendant is the liable party. Once the government presents a *prima facie* case for response costs, the burden shifts to the defendant to prove the government's response action was inconsistent with the National Contingency Plan."

United States v. Chapman, 146 F.3d 1166, 1169 (9th Cir. 1998) (citations omitted).

1. The Defendants Are Liable Parties

This Court has already found that the defendants are the liable parties in its September 30, 2002 Order rejecting the defendants' innocent landowner, third-party, and divisibility defenses. Dkt. 1241, filed October 1, 2002, at 3-4. In its Order, the Court held that "IMMI is currently liable under CERCLA as a "current owner" of the facility in question," and that "Arman is an operator under CERCLA." *Id.* at 2.

2. The IMMI Site is a CERCLA "Facility"

As a site or area where hazardous substances have been disposed of, placed, or otherwise come to be located, the Iron Mountain Mine Site meets the CERCLA definition of a "facility." *See* CERCLA Section 101(9), 42 U.S.C. § 9601(9). In its September 30, 2002 Order, the Court also found that the Site is a "facility." *Id.* at 2 (stating the defendants contention that the plaintiffs did not adequately define the "facility" in question lacked merit). *See also United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1549 (E.D. Cal. 1992) (striking defense that a mine is not a covered facility under CERCLA).

3. The Site Released Hazardous Substances

CERCLA defines a "release" to include "disposal." CERCLA Section 101(22), 42 U.S.C. § 9601(22). This Court previously held that mining and discharge of AMD from the Site constitutes disposal. *United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1541-42 (E.D. Cal. 1992). This Court also found that the Site is releasing hazardous substances when it found that "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." September 30, 2002 Order at 2 (Dkt 1241, filed October 1, 2002) (quoting *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998)). In addition, hazardous substances include "hazardous waste," which this Court found to be on the Site. *Id.*; *United States v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1541-42 (E.D. Cal. 1992); 42 U.S.C. § 9601(14) (defining "hazardous substance" to include "hazardous waste").

4. The Government Incurred Costs Responding to Defendants' Releases

The only factual issue remaining to establish the government's *prima facie* case, in order to recover its response costs, is that EPA incurred costs in responding to the release or threatened release. The United States submits, in support of its Motion, a Cost Summary Report (Motion Exhibit A) which details costs EPA incurred and paid, and copies of all bills and other documents recording the costs and payments. The United States also submits in support of its Motion three declarations: one by Sharon Johnson who assembled, reviewed, and certified the Cost Package, who explains how she prepared it, and explains how she verified the accuracy of the Cost Summary Report; a second declaration by Yvonne Fong explaining that she produced the Cost Summary Report used by Ms. Johnson, and explaining how she (Ms. Fong) calculated prejudgment interest in the Report; and a third declaration by Rick Sugarek who has been the EPA Project Manager for the Site for over 20 years and who describes the Site remedial work EPA did. *See* Motion Exhibits B, C, and D.

In *Chapman*, the Ninth Circuit found just this sort of cost evidence was consistent

with the requirements of the NCP and that the government had established a *prima facie* case. *See United States v. Chapman*, 146 F.3d 1166, 1170-72 (9th Cir. 1998) (detailed cost summaries, declarations by government workers, timesheets, payroll documents, and the Administrative Record for the remedy).[23/] *See also United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992) (proof included source data for the summaries of cost data). This evidence establishes that the government incurred the costs responding to releases and threatened releases from the Site, and that the costs are consistent with the NCP.

D. The Burden Shifts to the Defendants to Show EPA's Selections of Remedies Were, on the Administrative Record, Arbitrary or Capricious

1. Burden Shifts to the Defendants

The United States has presented a *prima facie* case for recovery of costs it incurred responding to the releases of hazardous substances from the Iron Mountain Mine Site. Consequently, the burden shifts to the defendants to show that the government's selections of the remedies, for which it incurred the costs, were inconsistent with the NCP. *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1232 n.13 (9th Cir. 2005); *United States v. Chapman*, 146 F.3d 1166, 1169 (9th Cir. 1998). Defendants' burden is to show that EPA's remedy choices, its response actions, were arbitrary or capricious, not its costs.

> Once the government established this prima facie case, the burden shifted to [defendant] to demonstrate that the government's response action that gave rise to the particular cost submitted at

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[23] The United States is not seeking recovery of any EPA "intramural" costs and, consequently, is not relying upon timesheets and payroll documents.

Although the administrative record in *Chapman* contained a gap in its documentation of response actions, the court held that "declarations, contracts, and action memorandum [sic]," together with "timesheets, cost estimates, and accountant and attorney declarations" were sufficient to document actions taken during that gap, noting that documents outside the administrative record may be used to support cost recovery. *See United States v. Chapman*, 146 F.3d at 1172 & n.5 (citing 40 C.F.R. § 300.160(a)(1) (1990 NCP)). In the instant case, EPA has fully documented all response actions, as well as all costs, and there are no gaps in the IMMI Administrative Records.

> summary judgment, was inconsistent with the NCP in that the government's choice of response action was arbitrary and capricious.

United States v. Hardage, 982 F.2d 1436, 1443 (10th Cir. 1992).

> The potentially responsible party has the burden of proving inconsistency with the NCP. *Washington State DOT [v. Washington Natural Gas Co.]*, 59 F.3d [793,] at 800 [(9th Cir. 1995)]. "To prove that a response action of the EPA was inconsistent with the NCP, a defendant must prove that the EPA's response action was arbitrary and capricious." *Id.*; 42 U.S.C. § 9613(j)(2).

United States v. Chapman, 146 F.3d 1166, 1171 (9th Cir. 1998). *See also United States v. Hardage*, 982 F.2d at 1442 ("To show that the government's response action is inconsistent with the NCP, a defendant must demonstrate that the EPA acted arbitrarily and capriciously in choosing a particular response action . . .") (citing *United States v. NEPACCO*, 810 F.2d 726, 748 (8th Cir. 1986)). The defendants "must identify a particular provision in the NCP with which a specific response action is inconsistent." *United States v. American Cyanamid Co.*, 786 F. Supp. 152, 161 (D.R.I. 1992); *accord Hardage*, 982 F.2d at 1442; *United States v. Kramer*, 913 F. Supp. 848, 866 (D.N.J. 1995); *United States v. Amtreco, Inc.*, 846 F. Supp. 1578, 1584 (M.D. Ga. 1994). The United States does not believe that the defendants can meet their burden. *See, e.g.*, Sugarek Decl. ¶ 59.

2. Arbitrary and Capricious Standard of Review

Application of the arbitrary and capricious standard of review recognizes the specialized knowledge and expertise which EPA applies in selecting a remedy. EPA possesses special knowledge and expertise. The Supreme Court's explanation of the reason for applying the arbitrary and capricious standard of review is especially applicable to EPA's remedy selections.

> [R]esolution of this dispute involves primarily issues of fact. Because analysis of the relevant documents "requires a high level

> of technical expertise," we must defer to "the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).
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> . . . concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one." [*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).] When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377-78 (1989). *See also United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 748 (8th Cir. 1986) ("Because determining the appropriate removal and remedial action involves specialized knowledge and expertise, the choice of a particular cleanup method is a matter within the discretion of the EPA. The applicable standard of review is whether the agency's choice is arbitrary and capricious.").

Early in this case, this Court explained the reasons why it must apply an arbitrary and capricious standard of review and defer to EPA

> Section 113(j) of CERCLA provides that judicial review of EPA's remedy selection decisions must be based on the administrative record, applying the arbitrary and capricious standard.
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> The statutory rule of deference reflects Congress' judgment that, unlike a reviewing court, the EPA has the specialized knowledge and expertise needed to choose the appropriate cleanup method.
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> • • •
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> "The ultimate selection of a response action depends upon a balancing, by the agency, of a number of factors, including cost, technology, reliability, and public health, welfare and environmental effects."

United States v. Iron Mountain Mines, Inc., 987 F.Supp. 1250, 1254-56 (E.D. Cal. 1997)

(citations omitted) (quoting *United States v. Rohm & Haas Co., Inc.*, 669 F.Supp. 672, 680-81 (D.N.J. 1987)).

3. Review Is On the Administrative Record

Section 113(j)(1) of CERCLA, 42 U.S.C. § 9613(j)(1), states that "judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record." (Emphasis added.) Accordingly, in these instances where the NCP leaves room for EPA to exercise judgment and discretion in deciding how to proceed in a particular area, review of EPA's decision is limited to the administrative record, under the "arbitrary and capricious" standard.

This Court has already ruled, in accordance with section 113(j) of CERCLA, 42 U.S.C. § 9613(j), that major remedy selection decisions, such as those memorialized in a ROD, are to be reviewed on the administrative record, with defendants bearing the burden of demonstrating that the remedy selected was arbitrary or capricious. *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1254 (E.D. Cal. 1997) (citations omitted) ("Section 113(j) of CERCLA provides that judicial review of EPA's remedy selection decisions must be based on the administrative record, applying the arbitrary and capricious standard."). In other words, defendants must demonstrate, on the record, that EPA's evaluation of the relevant NCP factors in selecting the remedy was arbitrary or capricious.

CERCLA Section 113(j) is not limited to decisions expressed in RODs. Section 113(j) applies to any documented selection of any response action, including removal actions. Both the statute and the NCP contemplate that EPA may exercise discretion in planning and directing implementation of response actions selected in a ROD. Because the NCP requires only that the RD/RA be "in conformance with the remedy selected and set forth in the ROD or other decision document[,]" 40 C.F.R. § 300.435(b)(1), the decisions made by EPA in implementing a remedy must be upheld as consistent with the NCP, as long as the RD/RA is a rational extension

of the ROD.[24/]

IX. CONCLUSIONS

EPA went to the Iron Mountain Mine Superfund Site and undertook response actions to contain and reduce the contamination caused by hazardous substances released by past mining activities on the Site. EPA incurred costs in its response actions. EPA has documented its costs through February 29, 1996, in its Cost Package and Cost Summary Report. All EPA's actions for which it incurred costs were "not inconsistent with the National Contingency Plan." CERCLA Section 107 provides that the defendants are liable for all costs of response actions not inconsistent with the NCP, as this Court has previously held. This Court previously granted partial summary judgment against defendants Arman and IMMI on liability. Consequently, the United States is entitled to recover from the defendants all costs documented in its Cost Summary Report.

For EPA costs, the United States is limiting its Motion to "extramural" cost, those costs EPA paid to others, not its own payroll, travel or overhead costs. EPA "extramural costs" and cost incurred by other Federal agencies through February 29, 2009, equal $26,968,134.84.

For all these reasons, the United States respectfully requests that this Court enter partial summary judgment in the government's favor for response costs through February 1996 in the amount of $26,968,134.84, plus prejudgment interest. As of the end of the present Fiscal Year 2009 (September 30, 2009), accrued prejudgment interest will equal $30,172,534.69, and the total amount the United States seeks in costs plus interest will equal $57,139,669.53.

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[24] The Court has not yet ruled on the question of whether remedy implementation decisions are reviewable on the administrative record. *See United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1250, 1262-63 (E.D. Cal. 1997) (declines to rule on hypothetical issue).

Dated: August 28, 2009

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on August 28, 2009, I caused Plaintiffs' Notice of Motion, MOTION FOR PARTIAL SUMMARY JUDGMENT FOR RESPONSE COSTS, Proposed Order, Statement of Undisputed Facts, and supporting Brief and Exhibits to be filed electronically using the Court's ECF system, which will send notice of such filings to all registered counsel of record.

/s/ Larry Martin Corcoran
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