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UNITED STATES COURT OF APPEALS

NIINTH CIRCUIT

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

Defendants

v.

UNITED STATES OF AMERICA et al

Plaintiffs

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

Defendants

v.

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

Plaintiffs

Civil No. S-91-0768 JFM/JAM
APPEAL FROM THE EASTERN DISTRICT
PETITION FOR EMERGENCY REVIEW
CIRCUIT RULE 27-3 RULE 15
Seymour, 554 F.Supp. at 1340 (urgency of abating danger to public must be considered).

PETITION FOR REDRESS OF GREIVENCES

INTERVENTION AND RCRA CITIZEN SUIT,

BREACH OF TITLE BY PATENT DEEDS,

BREACH OF GENERAL MINING LAW,

TRESPASS, DETINUE SUR BAILMENT,

INVERSE CONDEMNATION, DECLARATION OF

ERRORS of IMPUNITY & MISCARRIAGE of JUSTICE

PETITION TO REOPEN CASE, PETITION

FOR JOINDER, PETITION FOR INJUNCTIVE

AND MISCELLANEOUS RELIEF

CAL. PUBLIC RESOURCE CODE 3940-3950
Date: Time: Courtroom No.
Hon.

INTERVENTION

1. This matter is before the Court because the Petitioner and Defendants 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 Defendants 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.

Over 40% of all copper mining today is performed by solution mining.

2. 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.

3. T.W. Arman and Iron Mountain Mines, Inc. (IMMI) entered into a joint venture for the remining of the waste with Artesian Mineral Development & Consolidated Sludge, Inc. (AMD&CSI), who have been appointed to perform all necessary work. Petitioner and Defendants were told that everything is clean and safe at Iron Mountain Mines, Inc. including the EPA Superfund facilities, by Rick Sugarek, Project Manager for the EPA, and Rudy Carver, Manager for AIG Consultants, Inc., the site operator. The EPA U.S. website reports that Iron Mountain Mines is OK, and safe for entry. Petitioner and Defendants developed processes for the beneficiation of the High Density Sludge waste materials and the Acid Mine Drainage.

Petitioner and Defendants were told that the sludge was safe, but the mine water required special handling. Petitioner and Defendants met with Rick Sugarek, Project Manager for the EPA.

Petitioner and Defendants submitted a work plan. Petitioner and Defendants submitted additional proposals and recommendations.

Petitioner and Defendants have business plans to sell and transport these materials for processing, and Iron Mountain Mines, Inc. and T.W. Arman have entered into a Joint Venture agreement to perform mining operations on this private property with Title by Patent Deed.

This mineral conveyance has been upset because the high density sludge that Rick Sugarek and 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.

These wastes will require significant precautions and care in handling that will greatly increase the cost of recycling and reuse.

These wastes continue to accumulate unnecessarily at the rate of 60 to 80 million lbs a year. Furthermore, Petitioner and Defendants 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.

Petitioner and Defendants demand that the Court issue an injunction to protect the Petitioner, the Defendants, 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). Petitioner and Defendants demand financing of equipment from Battelle Memorial Institute for their Best Value technologies LLX™, Iron Mountain Mines, Inc. requires two pilot plants for $24 million and $10 million for Project Management, to be paid for from the remaining $800 million of Trust Funds.

This represents an expenditure of the equivalent of less than 5 years funding for current Operations and Maintenance, eliminates the lime treatment plant, eliminates over 100 thousand tons of CO2 emissions per year, and eliminates the further accumulation of acutely toxic hazardous waste in a land disposal unit that is in violation of state and federal land disposal restrictions.

Many important strategic metals and beneficial products will be produced.

Petitioner and Defendants business plan includes clean up of the 2 billion lbs. of acutely toxic hazardous waste sludge negligently disposed upon Defendants property, but the EPA continues to interfere with these remedies and expects Defendants to provide additional financial assurances beyond the $800 million left of the “billion dollar settlement”.

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 Defendants constitutionally protected Rights to Due Process and Equal Protection.

Defendants 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 Defendants 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 Detinue Sur Bailment, it is a Breach of Title by Patent Deed, it is an Inverse Condemnation, it is a Negligent Endangerment, it is a Fraud upon the Court.

The EPA has levied a lien in the amount of $51 million against the Defendants properties to recover “unrecovered past response costs” that Defendants allege 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 Defendants 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.

Defendants further allege 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 Petitioner and Defendants civil rights and in violation of the Constitution of the United States.

CITATIONS

4. “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

5. 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.

6. 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”.

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

“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.

8. Grub-stake contracts will be enforced by the courts, but only as other contracts; that is to say, it is not enough for parties to assert that they have rights, in order to secure legal protection, but they must be able to prove in each case a clear and definite contract, and that by the terms and conditions of such contract, and compliance therewith on their part, rights have become vested.

Cisna v. Mallory (C.C.) 84 Fed. 851, 854.

9. The common-law rule is that the lessee of real property may work already opened mines, but cannot open new ones. But the lease may expressly, or by implication from express powers, give the right to take the minerals, the instrument is a genuine lease.

Oshoon v. Bayaud 123 N.Y. 298. 25 N.E. 376

10. On the other hand, if an attempt is made by the instrument to pass title to the minerals in place, there is really a sale of the mineral.

Plummer v. Hillside Coal & Iron Co. 104 Fed. 208, 43 C.C. A. 490

11. 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.

12. 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) Joinder of State of California.

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.”)

1 John Locke, The Second Treatise of Civil Government § 123, at 184, in Two Treatises of Government (Thomas I. Cook ed., 1947) (1690).

2 Thomas Hobbes, The Leviathan ch. 18, at 234 (C.B. MacPherson ed., Penguin Books 1968) (1651).

3 Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

4 See generally, e.g., Joseph L. Sax, Property Rights and the Economy of Nature: Understanding Lucas v. S. C. Coastal Council, 45 Stan. L. Rev. 1433 (1993).

5 533 U.S. 606 (2001).

6 Subsequent to the writing of this Article, the Supreme Court issued an opinion in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002), which held in a self-described "narrow" decision that a development moratorium that temporarily deprives an owner of all use of property does not constitute a categorical temporary regulatory taking because some value remained and because there was no physical invasion. See Id. at 1470 (noting that the opinion is of "narrow scope"); id. at 1484 (rejecting categorical rule).

7 Locke, supra note 1, § 201, at 224, § 222, at 233–34. Lock explained: "Whenever the legislators endeavor to take away and destroy the property of the people, . . . they put themselves into a state of war with the people who are thereupon absolved from any further obedience . . . ." Id. § 222, at 233 (emphasis added).

8 See generally Hobbes, supra note 2, at ch. 13–19, at 183–239. In contrast to Locke's "war with the people," Hobbes wrote: "[W]ithout a common Power to keep them all in awe [i.e. government], they are in that condition which is called Warre; and such a warre, as is of every man against every man. . . . And the life of man, solitary, poore, nasty, brutish, and short." Id. ch. 13, at 185–86. Thus, it is "necessary[] to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe." Id. ch. 14, at 190 (emphasis omitted).

9 See, e.g., Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 315 (1996) (stating that Madison "regarded all decisions of economic policy as implicating questions of justice and thus of private rights").

10 See id. at 314 (asserting that Madison's "concern about the security of private rights was rooted in a palpable fear that economic legislation was jeopardizing fundamental rights of property"). See, e.g., 2 H. Grotius, De Jure Belli Et Pacis, ch. XIV, § VII (William Whewell trans., Cambridge Univ. Press. 1853) ("When ownership, or any other right, has been legitimately acquired by any one, that it may not be taken away from him without cause, is a matter of Natural Law."). See generally, e.g., Bernard H. Siegan, Property Rights: From Magna Carta to the Fourteenth Amendment (2001); This natural law tradition of preserving property against the sovereign is reflected throughout the Continental and British legal tradition. Furthermore, when property is taken "by the Force of Eminent Dominion, there is required . . . public utility . . . and . . . if possible, compensation . . . at the common expense." Id. See also WILLIAM Blackstone, Commentaries, The Rights of Persons, ch. 1, § III, at 135 (Wayne Morrison ed., 2001) (1783) ("So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community . . . [unless] by giving him a full indemnification and equivalent for the injury thereby sustained.").

11 Locke, supra note 1, §§ 28–51, at 134–46. While this description is admittedly a simplistic gloss of a theory of property rights, it is important for anyone dealing with a property rights argument to have a basic understanding of the fundamentals of that right. This could be especially relevant when arguing that something on the outer limits of property rights theory is or is not a protected property right.

From Hobbes to Locke to Marx to Nozick, many individuals have proposed new theories on the relationships between property and society. There are more recent writings on property theory available to the interested reader. See generally, e.g., Robert Nozick, Anarchy, State, and Utopia (1974) (providing a libertarian approach that augments Locke's labor theory with a historical expectations theory); Richard Pipes, Property and Freedom (1999); Siegan, supra note 10 (tracing the history of property rights in the law); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

12 See generally, e.g., City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) (upholding

award of $1.45 million for the temporary taking of 37.5 acres of oceanfront property); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (upholding $2.6 million damage award for wetlands takings); Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991) (awarding $60 million, plus interest, for taking of coal deposit); Cooley v. United States, 46 Fed. Cl. 538 (2000) (awarding $2,065,200.42, plus interest, for taking of thirty-three acres); Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21 (1999) (awarding $752,444, plus interest, from the date of taking); E. Minerals Int'l., Inc. v. United States, 39 Fed. Cl. 621 (1997) (awarding $19.6 million for loss of leasehold interest in coal deposit), judgment rev'd, appeal dismissed sub nom. Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001), cert. denied sub nom. E. Minerals Int'l, Inc. v. United States, 122 S. Ct. 1960 (2002).

13 This is reflected, for example, in modern due process jurisprudence where some courts hold that no due process protection attaches until a permit is vested. See, e.g., Triomphe Investors v. City of Northwood, 49 F.3d 198, 203 (6th Cir. 1995) (stating that the right must be vested for due process to attach); RRI Realty Corp., v. Inc. Vill. of Southhampton, 870 F.2d 911 (2d Cir. 1989). But see DeBlasio v. Zoning Bd. of Adjustment, 53 F. 3d 592 (3d Cir. 1995) (concluding that ownership of property gives rise to due process protection).

14See, e.g., Website of Environmental Policy Project, at http://www.envpoly.org/index. htm.

15 See Policy Guide on Takings: Land Use Regulations and the "Takings" Challenge (2001), at http://www.plannings.org/policyguides/takings.html (discussing how "takings" doctrine is evolving law).

16 533 U.S. 606 (2001).

17 Id. at 607–09.

18 For a more complete rendition of the facts with citations to the record, the reader is invited to examine the briefs. These facts are derived from Petitioner's Brief on the Merits, 2000 WL 1742033, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047) [hereinafter Petitioner's Brief on the Merits].

19 Coastal Res. Mgmt. Council, Biologist's Field Report, reprinted in Joint Appendix at 21, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

20 Palazzolo, 533 U.S. at 613.

21 See id.

22 Id. at 606.

23 See Miller v. Coastal Res. Mgmt., C.A. No. PC 89-2726, 1991 WL 789931, at *3 n.3 (R.I. Super. Ct. Dec. 13, 1991).

24 See id. (emphasis added).

25 See Petitioner's Brief on the Merits, supra note 18, at *5.

26 Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 86-1496, 1995 WL 941370, at *3 (R.I. Super. Ct. Jan. 5, 1995) (quoting the decision of the Rhode Island Department of Natural Resources).

27 See Palazzolo v. Rhode Island, 533 U.S. 606, 614 (2001).

28 Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 716 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

29 Id. at 711.

30 Id. at 714.

31 Palazzolo, 533 U.S. at 614–15; Tavares, 746 A.2d at 711.

32 Tavares, 746 A.2d at 711.

33 See Coastal Res. Mgmt. Council, Decision on the Petition of Anthony Palazzolo, reprinted in Joint Appendix at 27, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

34 Palazzolo, 533 U.S. at 615 (quoting CRMP § 130(A)(1)).

35 Id. at 616.

36 Id.

37 Tavares, 746 A.2d at 714.

38 Id. In fact, the beach club application sought to fill 11.4 acres.

39 Id.

40 Id. at 714–18.

41 Id. at 716.

42 Id. at 717.

43 Tavares, 746 A.2d at 716.

44 Id. at 711, 715.

45 Id. at 715.

46 Petitioner's Brief on the Merits, supra note 18, at *i; Tavares, 746 A.2d 707, cert. granted, 531 U.S. 923 (2000) (mem.).

47 Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001).

48 Id.

49 U.S. Const. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

50 San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)) (alterations in original) (also noting that this is the "principal" rationale for the Takings Clause).

51 447 U.S. 255, 260 (1980) (emphasis added) (citation omitted); accord Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 1987); see also Penn Cent., 438 U.S. at 127.

52 In Eide v. Sarasota County, 908 F.2d 716, 721 (11th Cir. 1990), the court characterized takings under the first prong of Agins as "due process takings" claims, as distinguished from other types of takings. Unlike straight due process claims, however, the Court in Nollan made it clear that a heightened level of scrutiny would apply in the context of a takings analysis. See 483 U.S. at 834 n.3. Although the Court has not generally characterized it as such, this test creates a categorical rule: if a regulation which injures a property right does not advance a legitimate governmental interest there will always be a taking. See Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622, 625 (Fla. 1990). But see Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994) (stating that the first prong is really a due process issue); but see also Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 614 (11th Cir. 1997) (harmonizing the Eleventh Circuit's previous and somewhat tortured categorization of takings claims including what it called "due process takings claim"). In Villas we now

learn that the "Court in recent decisions has likewise abandoned the distinction between takings claims and a due process takings theory." But see City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (rejecting federal amici attempt to revisit this takings test and finding that certain jury instructions were consistent with "the requirement that a regulation substantially advance legitimate public interests").

53 Nollan, 483 U.S. at 834, 837. Nollan struck down a regulatory fiat which required a property owner to give up beach front property in exchange for a building permit. The Court found that the requirement was an "out-and-out plan of extortion" and did not advance a legitimate regulatory goal. Accord Dolan v. City of Tigard, 512 U.S. 374, 398 (1994) (finding that Fifth Amendment's nexus requirement calls for "individualized" determination of "rough proportionality" between condition and impact from land use). There are examples of courts striking down a regulation because it did not substantially advance a legitimate interest. See Del., Lackawanna & W. R.R. Co. v. Town of Morristown, 276 U.S. 182, 195 (1928) (concluding that the taking of railroad property for a taxi stand failed to advance a legitimate governmental interest); Richardson v. City of Honolulu, 124 F.3d 1150, 1164 (9th Cir. 1997) (striking down a condominium land rent control ordinance because it failed to substantially advance a legitimate governmental interest); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1065 (N.Y. 1989) (overturning restrictions against converting single–room occupancy hotel rooms). See generally Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (reviewing each reason given for a permit denial and finding inadequate justification for the permit denial, leading to the conclusion that there had been a taking), aff'd, 526 U.S. 687 (1999); Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479 (N.Y. 1994) (striking down housing regulation on alternate "substantially advance" and "economic impact" prongs). But see Armendariz v. Penman, 75 F.3d 1311, 1325–26 (9th Cir. 1996) (finding that no due process remedy exists if takings remedy available); Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999); Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971, 974–76 (N.Y. 1999) (equating "substantially advance" standard with more deferential due process standard). But see generally Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal.

1997) (finding that allegations that rent control law failed to substantially advance any legitimate governmental interests does not create a cause of action under takings doctrine so long as a due process remedy might exist).

54 482 U.S. 304, 315 (1987).

55 Agins, 447 U.S. at 260–61.

56 438 U.S. 104, 124 (1978); accord Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

57 Penn Cent., 438 U.S. at 124.

58 505 U.S. 1003, 1015, 1017, 1019 (1992).

59 See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982) (finding a taking where a cable television wire was placed on an apartment building); Kaiser Aetna, 444 U.S. at 179–80 (finding a taking where regulation allowed trespasses onto property); Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166 (1871) (finding a taking where water from government dam backs upon private property). The existence of a "physical invasion" relates to the "character" prong of the Penn Central test. See 438 U.S. at 124.

60 A 100 percent loss of the beneficial or productive use is a classic example of a regulation that deprives an owner of economically viable use. See Lucas, 505 U.S. at 1015. By "categorical taking" the Supreme Court meant that the other Penn Central balancing factors need not be considered. Id. But see Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) (holding that an alleged loss of all economically viable use did not obviate a need to consider "investment-backed expectations").

61 505 U.S. at 1028.

62 Not only did the state court in South Carolina follow this theory in Lucas v. South Carolina Coastal Council, but up until the time of the Supreme Court's decision, it was becoming the standard in other states as well. See 404 S.E.2d 895, 900 (S.C. 1991), rev'd 505 U.S. 1003 (1992). For example, in Presbytery of Seattle v. King County, 787 P.2d 907, 912–14 (Wash. 1990), the Washington Supreme Court held that there could be no taking if a regulation "prevented harm" because only regulations that "enhance a publicly owned right in property" could

give rise to a taking. This analysis could not have survived Lucas, although it was repeated in Margola Associates v. City of Seattle, 854 P.2d 23, 34 n.7 (Wash. 1993). See also Guimont v. Clarke, 854 P.2d 1, 11 n.5 (Wash. 1993).

63 Lucas, 505 U.S. at 1028.

64 Id. at 1022.

65 Id. at 1029–30.

66 Id. at 1021 n.10.

67 Id. at 1029.

68 Agins v. City of Tiberon, 447 U.S. 255, 260 (1980).

69 First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987). Such compensation may be, for example, the rental value of the property during the time in which the regulation denied use of the property. See, e.g., Yuba Natural Res., Inc. v. United States, 904 F.2d 1577 (Fed. Cir. 1990); Yuba Natural Res., Inc. v. United States, 821 F.2d 638 (Fed. Cir. 1987); see also Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987) (valuation in temporary taking found by comparing before and after fair market value and multiplying by fair rate of return), on appeal after remand, 896 F.2d 1347 (11th Cir. 1990) (calculation of temporary takings damages). In Del Monte Dunes, the Court upheld an award of damages for a temporary taking. The state had purchased the property while the legal dispute was ongoing; the purchase merely converted the permanent take into a temporary one. See generally 526 U.S. 687 (1999). For a useful discussion of temporary regulatory takings, see Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991), which analogizes the length of time a vehicle is parked on property to the significance of a temporary taking finding de minimis intrusions not to be takings, but long-term, indefinite invasions to be takings. But see Hendler v. United States, 36 Fed. Cl. 574 (1996) (finding only nominal damages on remand), aff'd,175 F.3d 1374 (Fed. Cir. 1999); Bass Enters. Prod. Co. v. United States, 133 F.3d 893 (Fed. Cir. 1998) (denial of drilling permits on leases slated for possible condemnation at some indefinite time in future may be a temporary taking; court notes that "limited duration" of taking relevant to damages but not liability). No taking was found on remand in Bass Enterprises Production

Co. v. United States, 48 Fed. Cl. 621 (2001), because drilling permits could not have been profitable. See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000) (rejecting the idea that moratoria can lead to temporary taking), reh'g denied, reh'g en banc denied, 228 F.3d 998 (9th Cir. 2000) (The five judges who joined dissenting in the denial of the rehearing en banc stated that "[t]he panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses First English . . . and adopts Justice Stevens's First English dissent."), aff'd, 122 S. Ct. 1465 (2002).

70 Other courts have offered extensive discussions of valuation in the context of regulatory takings. See generally E. Minerals Int'l, Inc. v. United States, 39 Fed. Cl. 621 (1997) (leasehold interest), judgment rev'd, appeal dismissed sub nom. Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001), cert. denied sub nom. E. Minerals Int'l, Inc. v. United States, 122 S. Ct. 1960 (2002); Fla. Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990), judgment entered by 23 Cl Ct. 653 (1991), vacated, 18 F.3d 1560 (Fed. Cir. 1994); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990), aff'd, 28 F.3d 1171 (Fed. Cir. 2994); Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394 (1989), opinion corrected by 20 Cl. Ct. 324 (1990), aff'd, 926 F.2d 1169 (Fed. Cir. 1991); cf. William W. Wade, Penn Central's Economic Failings Confounded Takings Jurisprudence, 31 Urb. Law. 277 (1999); William S. Walter, Appraisal Methods and Regulatory Takings, New Directions for Appraisers, Judges, and Economists, 63 Appraisal J. 331 (1995). In analyzing whether a wetland permit denial destroyed the value of property (thereby giving rise to a taking), the Claims Court in Formanek v. United States found that an offer of purchase from the Nature Conservancy was insufficient as a matter of law in refuting a taking presumably because the economic return from using the lands as a nature preserve was unlikely to equal its value for development. See 18 Cl. Ct. 785, 797 (1989). It follows that such an offer would not be useful in establishing fair market value of the property once it is decided that compensation must be paid. See Olson v. United States, 292 U.S. 246, 257 (1934) (speculative value of property does not necessarily determine fair market value); see also United States v. 117,763.00 Acres of Land, 410 F. Supp. 628 (S.D. Cal. 1976), aff'd sub nom. United States v. Shewfelt Invest. Co., 570 F.2d 290 (9th Cir. 1977).

71 See Lucas, 505 U.S. at 1015.

72 Id. at 1019.

73 See id. at 1034 (Kennedy, J., concurring).

74 Id. at 1015.

75 The Court in Lucas expressly deferred consideration of the issue of awarding compensation for partial takings. Id. at 1016 n.7; see Part VIII.C infra. However, in Hodel v. Irving, 481 U.S. 704 (1987), a statute which purported to extinguish certain inheritance rights in Native American allotments was found to be a taking of that particular property right. Accord Youpee v. Babbitt, 519 U.S. 234 (1997) (similar statute struck down). Similarly, First English may be considered as affirmation of a partial taking in time, that is a taking of the property for the period in which a regulation is in effect. 482 U.S. 304, 319 (1987). But see Tahoe-Sierra, 122 S. Ct. at 1483 (rejecting "disaggregating" property into temporal segments"). The Tahoe-Sierra Court did not dispute that damages must be paid for temporary takings, but it did cast doubt on whether a temporary regulation could effect a taking. Lastly, in "physical invasion" cases, even where only a small portion of property is destroyed, the state's action has always been considered to be a taking. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

76 Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). For an example of a case where a wetland regulation did not destroy all value of property, but a taking was found nevertheless, see Formanek v. United States, 26 Cl. Ct. 332 (1992). See also Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21 (1999) (finding a 73 percent diminution a taking and awarding $752,000, plus interest, from 1980); infra notes 274, 278.

77 Hage v. United States, 35 Fed. Cl. 147, 150 (1996) (citation omitted). For an extended treatment of the role of the courts in regulatory takings litigation, see Bernard H. Siegan, Property and Freedom, the Constitution, the Courts, and Land-Use Regulation 47–74 (1997).

78 See generally Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (finding a taking under the Tucker Act).

79 Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 1 (1990). The Tucker Act is codified

at 28 U.S.C. § 1491(a)(1) (2001). It is an exclusive remedy for takings claims over $10,000. Id.; see also Gunn v. U.S. Dep't of Agric., 118 F.3d 1233, 1239–40 (8th Cir. 1997). An exception applies for mining claims located within national parks. Such suits may be brought in federal district court. See Mining in the Parks Act, 16 U.S.C. § 1607 (2001).

80 This rule may be observed more in the breach than reality. See, e.g., Bay View, Inc. ex rel. Alaska Native Vill. Corps. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997):

> The Supreme Court is partly to blame for this confusion, as it has sometimes reached the merits of takings claims against the United States and at other times refused. . . . Adding to the confusion, many courts have viewed the Tucker Act as a jurisdictional hurdle against the payment of damages but not as an impediment to equitable relief. . . . This, of course, is totally wrong.

Id. at 1285–86 (citations omitted); see also Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670, 672 (7th Cir. 1992) (proper remedy to requirement to destroy salmonella infected birds that allegedly takes the birds is suit in the Court of Federal Claims, not having the regulation overturned in district court). In an unusual turn of events, in Cooley v. United States, the government granted the landowner a scaled back development permit, after it had categorically rejected the landowner's original application, and after the landowner had filed a claim for inverse condemnation. 46 Fed. Cl. 538, 539–41 (2000). The Court of Federal Claims was unimpressed by the government's attempt to avoid liability, finding that it lacked the authority to grant the permit that had never been sought. Id. at 547–49.

81 E. Enters. v. Apfel, 524 U.S. 498, 520–22 (1998) (O'Connor, J., plurality opinion for four Justices) (5-4 decision).

82 See 28 U.S.C. § 2402 (2000). But see Eric Grant, A Revolutionary View of the Seventh Amendment and the Just Compensation Clause, 91 Nw. U. L. Rev. 144 (1996) (arguing that the history of the Seventh Amendment, as well as the history of condemnation actions under common law, favor the use of jury trials in all inverse condemnation causes of action).

83 See Williamson County Reg'l Planning Comm. v. Hamilton Bank of Johnson City, 473 U.S. 172, 186–94 (1985). The necessity of filing a state takings claim first in state court creates certain difficulties for preserving a federal takings claim for federal court. See, e.g., Saboff v. St.

John's River Water Mgmt. Dist., 200 F.3d 1356, 1359–61 (11th Cir. 2000), reh'g en banc denied, 211 F.3d 596 (11th Cir. 2000) (table decision), cert. denied, 531 U.S. 823 (2000) (discusses need to "reserve" federal claims in state court); Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 284 (4th Cir. 1998) (applying Burford abstention in case characterized by court as having "passed through procedural purgatory and wended its way to procedural hell"); Dodd v. Hood River County, 59 F.3d 852, 862 (9th Cir. 1995) (federal claims properly reserved in state proceeding, but collateral estoppel may apply); Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993); Palomar Mobilehome Park Ass'n v. City of San Marcos, 989 F.2d 362, 364–65 (9th Cir. 1993) (applying res judicata to state takings claim). These issues are addressed by Thomas E. Roberts in Procedural Implications of Williamson County/First English in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata, 31 Envtl. L. Rep. 10,353 (2001).

For articles discussing the practical difficulties of ripeness in federal court, see generally Michael M. Berger, Supreme Bait and Switch: The Ripeness Ruse in Regulatory Takings, 3 Wash. U. J.L. & Pol'y 99 (2000); Timothy V. Kassouni, The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights, 29 Cal. W. L. Rev. 1 (1992); Gregory Overstreet, The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases, 10 J. Land Use & Envtl. L. 91 (1994); and Gregory M. Stein, Regulatory Takings and Ripeness in the Federal Courts, 48 Vand. L. Rev. 1 (1995).

84 See, e.g., Williamson County, 473 U.S. 186–87.

85 Id. at 172; MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986). A requirement to sell transferable development credits is not a prerequisite for filing a takings claim. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 739–40 (1997).

86 City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709–11 (1999).

87 926 F.2d 1169, 1178 (Fed. Cir. 1991).

88 Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 417 app. (1989), opinion corrected

by 20 Cl. Ct. 324 (1990), aff'd 926 F.2d 1169 (Fed. Cir. 1991).

89 See generally George W. Miller, Regulatory Takings Claims: The Litigation Process, in Inverse Condemnation and Related Government Liability 205 (A.L.I.-A.B.A. Course of Study, Oct. 17, 1996), available in Westlaw, SB14 ALI-ABA 205.

90 16 Cl. Ct. 42 (1988).

91 In geologic terms, a calcareous fen bog is a wetland in limestone topography. See id. at 43 n.2.

92 See Dean Robuffoni, Owner's Victory Over Land-Use, Minn. Star Tribune, Feb. 24, 1992.

93 31 Fed. Cl. 37 (1994).

94 Id. at 43–4.

95 Id. at 53.

96 28 F.3d 1171 (Fed. Cir. 1994).

97 45 Fed. Cl. 21 (1999).

98 46 Fed. Cl. 538 (2000).

99 16 U.S.C. ⁂ 1531–1544 (2001).

100 Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 317–20 (2001). But see In re Water Use Permit Applications, 9 P.3d 409, 497 (Haw. 2000) (no taking when water rights denied).

101 Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 714 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

102 473 U.S. 172, 194 (1985).

103 Id. at 194–97.

104 Tavares, 746 A.2d at 714.

105 526 U.S. 687 (1999).

106 This is indicated in the exchange between the Court and the counsel for the petitioner-city, George Yuhas:

MR. YUHAS: . . . This case is not atypical in some respects. The city was faced with a complex decision it had to reconcile competing interests, sift through facts, and exercise its discretion and judgment, and it did so.

QUESTION: Five times.

MR. YUHAS: It did so, Your Honor. It was a complicated project . . . .

QUESTION: This was the fifth plan presented, right? Each one was successively rejected for a different reason each time?

MR. YUHAS: The initial rejections were for density, and the fifth one was rejected down for two reasons only. There was access, and there was the restoration plan, and that was the first time that—in fact, the city council had faced the question as to whether there was an adequate recommended plan.

QUESTION: And this is typical, you say?

Transcript of Oral Argument, City of Del Monte v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (No. 97-1253), 1998 WL 721087, at *4, (Oct. 7, 1998).

107 See Williamson County, 473 U.S. at 191.

108 Id.

109 477 U.S. 340 (1986).

110 Id. at 348.

111 Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997) (quoting Williamson County, 473 U.S. at 191) (fourth alteration in original).

112 447 U.S. 255, 260–61 (1980) (holding that enactment of zoning scheme alone does not take property and the owner must apply for permits).

113 474 U.S. 121, 127 (1985) (finding that designation of property as a wetland is not, in and of itself, a taking; the landowner must first apply for permits).

114 See generally 477 U.S. 340 (finding a taking only after a final administrative decision has been rendered).

115 See, e.g., Calprop Corp. v. City of San Diego 91 Cal. Rptr. 2d 792, 800–01 (Cal. Ct. App. 2000) (holding futility exception to be read narrowly; landowners must pursue permit process);

Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368, 1375 (Conn. 1991) (citing MacDonald, 477 U.S. at 353 n.9) (finding landowner's driveway permit application too "grandiose"); Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 714 (R.I. 2000) (holding landowner actually had to complete permitting process despite belief permit would probably be denied), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Alegria v. Keeney, 687 A.2d 1249, 1253 (R.I. 1997) (holding even though wetlands permit denied, other uses still possible).

116 520 U.S. 725 (1997).

117 Id. at 732.

118 Id. at 740–42. But see Good v. United States, 39 Fed. Cl. 81. 108 (1997), aff'd, 189 F.3d 1355 (Fed. Cir. 1999). In Good, the Court of Federal Claims stated that Suitum held that the existence of transferable development rights was relevant to determine whether there had been a taking. However, the Court in Suitum expressly said that it was not reaching that particular issue. 520 U.S. at 728.

119 Palazzolo, 533 U.S. at 619, 221.

120 Id. at 623.

121 Telephone Interview with Anthony Palazzolo (Aug. 30, 2001).

122 Id.

123 See Palazzolo, 533 U.S. at 620–21.

124 See id.

125 See id. at 620 (emphasis added).

126 Id.

127 Id. at 625.

128 See 526 U.S. 687 (1999).

129 134 F.3d 1468 (Fed. Cir. 1998).

130 Id. at 1470–71.

131 Id. at 1471 n.4.

132 See id. at 1471–72.

133 Id. at 1472.

134 30 Fed. Cl. 63 (1993), aff'd, 39 F.3d 1197 (Fed. Cir. 1994) (table decision).

135 Id. But see City Nat'l Bank of Miami v. United States, 33 Fed. Cl. 224 (1995) (no taking because local agency would have denied permits); City Nat'l Bank of Miami v. United States, 30 Fed. Cl. 715 (1994) (takings claim cognizable even without state permits because the Army Corps of Engineers would have denied permit with or without the permits); Formanek v. United States, 26 Cl. Ct. 332 (1992) (taking found despite lack of state permits because the evidence was clear that such permits would have been granted if applied for).

136 Plantation Landing Resort, 30 Fed. Cl. at 69 (citing Connolly v. Pension Benefit Guar. Corp., 475 U.S. 224, 224–25 (1986)).

137 30 Fed. Cl. 715.

138 Id. at 720.

139 791 F.2d 893, 904–05 (Fed. Cir. 1986).

140 Fla. Rock Indus., Inc. v. United States, No. 266-82 L, 2000 WL 331830, at *9–*15 (Fed. Cl. Mar. 28, 2000).

141 30 Fed. Cl. at 720–21.

142 Id.

143 Id.

144 City Nat'l Bank of Miami v. United States, 33 Fed. Cl. 224 (1995).

145 See, e.g., Hochne v. County of San Bernadino, 870 F.2d 529, 532 (9th Cir. 1989) (stating that "the final decision requirement can be avoided if attempts to comply with that request would be futile").

146 35 Fed. Cl. 147 (1996).

147 Id. at 164 (citations omitted).

148 693 A.2d 114 (N.J. Super. Ct. App. Div. 1997).

149 Id. at 122. But since the developer had not begun a meaningful application process his claim was not ripe. Id. at 121–22; accord Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001). The Court went further stating that "[g]overnment authorities, of course, may not burden prop-

erty by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." Palazzolo, 533 U.S. at 621 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999)).

150 Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 405 (9th Cir. 1996)."To satisfy this requirement, a California landowner must submit to local decision-makers at least one meaningful application for a development project and a variance." Id. (quoting S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 503 (9th Cir. 1990)).

151 City Nat'l Bank of Miami v. United States, 33 Fed. Cl. 224, 227–28 (1995).

152 46 Fed. Cl. 538 (2000).

153 Id. at 541.

154 Id. at 549–51.

155 Lakewood Assocs. v. United States, 45 Fed. Cl. 320, 333–34 (1999).

156 Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 716 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

157 Id. at 717.

158 Id. at 716.

159 Id. at 716–17.

160 See, e.g., Providence Steam-Engine Co. v. Providence & Stonington S.S. Co., 12 R.I. 348, 363–64 (1879) (upholding right to wharf out and fill wetlands and tidal waters).

161 Preseault v. United States, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (finding there is an expectation to be compensated for a physical occupation of one's property by the government).

162 Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1030 (1992).

163 See K & K Constr., Inc. v. Dep't of Natural Res., 551 N.W.2d 413, 418 (Mich. Ct. App. 1996), rev'd on other grounds, 575 N.W.2d 531 (Mich. 1998). In a case where ownership was acquired via a complicated trust ownership, an intermediate appellate court had found that such a change in ownership did not implicate the notice rule. Id.

164 483 U.S. 825 (1987).

165 See id. at 841–42.

166 Id. at 859 (Brennan & Marshall, JJ., dissenting).

167 Id. at 840–42.

168 Id. at 860 (Brennan & Marshall, JJ., dissenting).

169 Id.

170 Nollan, 483 U.S. at 833 n.2.

171 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985).

172 Soon Duck Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); In re Gazza v. N.Y. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997); In re Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997); Basile v. Town of Southampton, 678 N.E.2d 489 (N.Y. 1997).

173 City of Virginia Beach v. Bell, 98 S.E.2d 414 (Va. 1998).

174 Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999); Forest Props., Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999).

175 Dist. Intown Prop. Ltd. P'ship v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999), cert denied, 531 U.S. 812 (2000).

176 Store Safe Redlands Assocs. v. United States, 35 Fed. Cl. 726, 735 (1996).

177 See Steven J. Eagle, The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law," 42 N.Y.L. Sch. L. Rev. 345 (1998).

178 Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

179 Id.

180 Id.

181 Id. at 627.

182 Id.

183 See id. at 609, 629–30.

184 505 U.S. 1003, 1030 (1992).

185 See Palazzolo, 533 U.S. at 625–26.

186 See id. at 629.

187 Id. at 629–30.

188 United States v. Gen'l Motors Corp., 323 U.S. 373, 378 (1945).

189 United States v. Willow River Power Co., 324 U.S. 499, 502 (1945) (stating there was no legally protected property interest in maintaining specific water levels in reservoir).

190 See Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1031–32 (1992). Once a mining claim is determined to constitute a valid property interest, then state law will control how it can be sold, transferred, inherited, and the like—unless any particular aspect of that property right is preempted by federal law. See Duguid v. Best, 291 F.2d 235, 239, 242 (9th Cir. 1961).

191 See Lucas, 505 U.S. at 1031–32.

192 480 U.S. 470, 519 (1987) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)) (alterations in original). See also Palazzolo, 533 U.S. at 630; Lucas, 505 U.S. at 1016 n.7; Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 20–24 (1990) (providing a detailed articulation of the principle that state law defines the nature of property rights); Kinross Copper Corp. v. Oregon, 981 P.2d 833 (Or. App. 1999) (denying a waste water discharge permit for mining on federal mining claims not a taking because there is no right to pollute), cert. denied, 531 U.S. 960 (2000).

193 See, e.g., M & J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir. 1995) (discussing the impact of federal law of navigational servitude and submerged lands on property definitions); see also Lucas, 505 U.S. at 1029 (discussing the submerged lands and navigational servitude); Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (defining property rights in the context of submerged lands); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (navigational servitude), aff'd, 231 F.3d 1354 (Fed. Cir. 2000), reh'g en banc denied, 231 F.3d 1365 (Fed. Cir. 2000). In Palm Beach Isles, the court found that a permit denial for environmental reasons, rather than navigational reasons, did not invoke the navigational servitude "background principle." Id. at 1384.

194 978 F.2d 1269, 1276 (D.C. Cir. 1992).

195 Id. at 1275–76.

196 Id. at 1277–87.

197 278 F.2d 842, 847 n.4 (9th Cir. 1960) (citing United States ex rel. Tenn. Valley Auth. v.

Powelson, 319 U.S. 266, 279 (1943)); see also Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1330 (9th Cir. 1977) (holding that federal courts are not bound by state law but look to it for aid in discerning the scope of property interests). These formulations may be inconsistent with Justice O'Connor's dissent in Preseault, 494 U.S. at 20–24.

198 Adaman, 278 F.2d at 847.

199 Id.

200 See id.

201 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1030 (1992) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

202 See id. at 1028–29.

203 See, e.g., Schneider v. Cal. Dep't. of Corr., 151 F.3d 1194, 1200–01 (9th Cir. 1998).

> The . . . Court's recognition of the unremarkable proposition that state law may affirmatively create constitutionally protected "new property" interests in no way implies that a State may by statute or regulation roll back or eliminate traditional "old property" rights. As the Supreme Court has made clear, "the government does not have unlimited power to redefine property rights." . . . Rather, there is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny.

Id. at 1200 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). Justice Marshall, in his concurrence in Pruneyard Shopping Center v. Robins, noted:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. . . . Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

The Ninth Circuit observed:

"[T]here is, we think, a 'core' notion of constitutionally protected property," and a state's power to alter it by legislation "operates as a one-way ratchet of sorts," allowing the states to create new property rights but not to encroach on traditional property rights." . . . [W]ere the rule otherwise, States could unilaterally dictate the content of—indeed altogether opt out of the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.

Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1108 (9th Cir. 2001) (quoting Schneider, 151 F.3d at 1200–01), reh'g, 271 F.3d 835, 841 (9th Cir. 2001) (en banc), cert. granted, 122 S. Ct. 2355 (2002) (No. 01-1325).

Lawrence H. Tribe writes:

To the degree that private property is to be respected in the face of republican and positivist visions, it becomes necessary to resist even an explicit government proclamation that all property acquired in the jurisdiction is held subject to government's limitless power to do with it what government wishes. Indeed, government must be denied the power to give binding force to so sweeping an announcement, . . . if we are to give content to the just compensation clause as a real constraint on [government] power . . . . [E]xpectations protected by the clause must have their source outside positive law.

Laurence H. Tribe, American Constitutional Law § 9-7, at 609 (2d ed. 1988).

204 854 P.2d 449 (Or. 1993).

205 Id. at 456–57.

206 Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994) (mem.) (Scalia & O'Connor, JJ., dissenting), denying cert. to 854 P.2d 449 (Or. 1993), aff'g, 835 P.2d 940 (Or. Ct. App. 1992).

207 903 P.2d 1246 (Haw. 1995).

208 Id. at 1272–73.

209 See David J. Bederman, The Curious Resurrection of Custom: Beach Access and Judicial Takings, 96 Colum. L. Rev. 1375, 1440–42 (1996). See generally David L. Callies, Custom and

Public Trust: Background Principles of State Property Law, in Inverse Condemnation and Related Government Liability, 699 (A.L.I.-A.B.A. Course of Study, Sept 30, 1999), available in Westlaw, SF64 ALI-ABA 191. See infra Part V.B.2 for further discussion of public trust doctrine.

210 See Loveladies Harbor v. United States, 28 F.3d 1171, 1182 (Fed. Cir. 1994) (discussing applicability of "nuisance exception"); Formanek v. United States, 26 Cl. Ct. 332, 340 (1992) (rejecting assertion that filling a wetlands would constitute an "extreme threat to public health"); Fla. Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 168 (1990) (use of wetlands not a nuisance, even if Congress regulated or prohibited use), vacated, 18 F.3d 1560 (Fed. Cir. 1994); Fla. Rock Indust., Inc. v. United States, 8 Cl. Ct. 160, 170 (1985) (making a nuisance exception coterminous with the police power would read the Compensation Clause "out of existence"), aff'd in part, vacated in part, 791 F.2d 893 (Fed. Cir. 1986); see also Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1177 n.10 (Fed. Cir. 1991) (rejecting nuisance defense to regulatory taking of coal mine); Yancey v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (takings damages awarded to turkey farmer who had his turkeys quarantined during an outbreak of Asian flu despite obvious nuisance implications).

211 See, e.g., McDougal v. County of Imperial, 942 F.2d 668, 678 (9th Cir. 1991) ("[E]ven in those cases where the activity restrained was akin to a public nuisance and the state's interest was admittedly substantial, the Court has gone on to weigh the claimant's showing of diminution of value to his property."). To be sure, the trial court in Palazzolo decided that the original 1983 proposal of Mr. Palazzolo to fill eighteen acres of wetlands would be a nuisance, but that conclusion was premised upon the construction of seventy-four septic systems, not the proposal to build a beach club, which was the basis of the takings claim.

212 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992). On remand, the South Carolina Supreme Court did not find a nuisance. Lucas v. S.C. Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

213 201 N.W.2d 761, 768 (Wis. 1972); accord Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).

214 201 N.W.2d at 768.

215 747 P.2d 1062, 1073 (Wash. 1987).

216 Claridge v. N.H. Wetlands Bd., 485 A.2d 287 (N.H. 1984).

217 791 F.2d 893, 904 (Fed. Cir. 1986).

218 Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 395 (1988).

219 See McQueen v. S. C. Coastal Council, 530 S.E.2d 628 (S.C. 2000) (rejecting Just and the notice rule, but ruling against landowner on "expectations" issue), cert. granted and vacated sub nom. McQueen v. S.C. Dep't of Health & Envtl. Control, 533 U.S. 943 (2001) (remanding to the Supreme Court of South Carolina in light of Palazzolo v. Rhode Island, 533 U.S. 606 (2001)); see also supra note 203 and accompanying text.

220 And, as the dissent in Lucas v. South Carolina Coastal Council suggests, the majority holding in Lucas is inconsistent with the Just principle. 505 U.S. at 1059 (Blackmun, J., dissenting).

221 The public trust doctrine was once only a shorthand way of saying that private individuals could not impose a stranglehold on the public's use of and access to navigable waterways. Thus, Illinois could not sell the waterfront without first accommodating the interest of the public in access to the commons (navigable waterways). See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–54 (1892); see also Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 481 (1988) (holding the doctrine is not confined only to navigable waters).

222 See generally Ill. Cent., 146 U.S. 387. For a comprehensive review of the legal and historical origins of the doctrine in the United States, see generally Bonnie J. McCay, Oyster Wars and the Public Trust: Property, Law, and Ecology in New Jersey History (1998).

223 Based on his early writings on the subject, Professor Sax is widely acknowledged as being the principle advocate for a modern expansion of the public trust doctrine. See, e.g., Joseph L. Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U.C. Davis L. Rev. 185 (1980); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970) [hereinafter The Public Trust Doctrine].

224 See generally Sax, supra note 4.

225 See generally 146 U.S. 387.

226 See Joseph L. Sax, The Constitution, Property Rights, and the Future of Water Law, 61 U. Colo. L. Rev. 257, 269–70 (1990) (arguing that water rights can be altered or reduced in the public interest without the payment of just compensation). See generally The Public Trust Doctrine, supra note 223. But see generally Lloyd R. Cohen, The Public Trust Doctrine: An Economic Perspective, 29 Cal. W. L. Rev. 239 (1992) (arguing that the proposed expansions of the public trust doctrine are legally and economically insupportable); John S. Harbison, Waist Deep in the Big Muddy: Property Rights, Public Values, and Instream Waters, 26 Land & Water L. Rev. 535 (1991) (arguing application of the public trust doctrine can lead to a taking); James L. Huffman, Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work, 3 J. Land Use & Envtl. L. 171 (1987) [hereinafter Myth of Public Rights]; James L. Huffman, Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson, 63 Denv. U. L. Rev. 565 (1986); Alison Rieser, Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory, 15 Harv. Envtl. L. Rev. 393 (1991) (critiquing Professors Sax and Hoffman and suggesting ecological values are clearly within the public trust).

227 See Myth of Public Rights, supra note 226, at 208–10. James L. Huffman argues that "the courts have no capacity to make the kinds of decisions which our Constitution allocates to the legislative branch of government." Id. at 209. Put another way, Huffman is concerned that activist courts are better suited to protecting private rights against the tyranny of the majority rather than protecting majoritarian public rights by "dredging from the depths of the common law waters old doctrines which function to limit private rights." Id.

228 Cohen, supra note 226, at 275.

229 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

230 See Hughes v. Washington, 389 U.S. 290, 297–98 (1967) (Stewart, J., concurring) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."); see also Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985)

(dealing with the question of whether the Hawaiian courts' new definition of water rights "takes" old existing rights), vacated and remanded on exhaustion of state remedies issue, 477 U.S. 902 (1986). But see Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 427 & n.4 (1991) (noting that reserved water rights are protected water rights but that courts are not capable of taking property).

231 W. River Bridge Co. v. Dix, 47 U.S. 507, 532 (1848) (emphasis added); see also Dows v. Nat'l Exch. Bank, 91 U.S. 618, 637 (1875) ("[T]he owner of personal property cannot be divested of his ownership without his consent, except by process of law.").

232 Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 717 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

233 438 U.S. 104, 124 (1978).

234 See infra note 236 and accompanying text.

235 Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1363 (Fed. Cir. 2000) ("When there is . . . a regulatory taking that constitutes a total wipeout, investment-backed expectations play no role."), reh'g en banc denied, 231 F.3d 1365 (Fed. Cir. 2000).

236 Penn Cent., 438 U.S. at 116.

237 See Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1014–19 (1992); Agins v. City of Tiberon, 447 U.S. 255, 260 (1980); Armstrong v. United States, 364 U.S. 40, 49 (1960).

238 189 F.3d 1355 (Fed. Cir. 1999).

239 Id. at 1357.

240 Id.

241 Id. at 1359.

242 Id. at 1358.

243 Id. at 1359.

244 Good, 189 F.3d at 1358.

245 Id. at 1359.

246 Id.

247 Id. at 1363.

248 Id. at 1361–62.

249 Id. at 1362.

250 Forest Props., Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999); accord Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154, 156 (1999) (holding that owner had actual and constructive knowledge of Clean Water Act of 1972 when property purchased in 1987); see also Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (noting that the landowner had purchased before the wetlands regulations were adopted).

251 530 S.E.2d 628 (S.C. 2000), cert. granted and vacated sub nom. McQueen v. S.C. Dep't of Health & Envt'l Control, 533 U.S. 943 (2001) (remanding to the Supreme Court of South Carolina in light of Palazzolo v. Rhode Island, 533 U.S. 606 (2001)).

252 Id. at 631.

253 Id. at 631–33.

254 Id. at 634.

255 See id.

256 McQueen v. S.C. Dep't of Health & Envt'l Control, 533 U.S. 943 (2001); Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

257 Soon Duck Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); In re Gazza v. N.Y. State Dep't of Envt'l Conservation, 679 N.E.2d 1035 (N.Y. 1997); In re Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997); Basile v. Town of Southampton, 678 N.E.2d 489 (N.Y. 1997).

258 See Anello, 678 N.E.2d 870. Anello purchased the property after a steep slope ordinance was adopted. When the application of ordinance and denial of variance precluded all use of the lot, Anello was found not to be entitled to takings damages. See generally id.

259 See generally Soon Duck Kim, 681 N.E.2d 312. Kim purchased a car wash and service station after a city passed a charter amendment creating a "duty" to provide lateral support for roadways. When road grade was raised owner had duty to sacrifice her land to provide lateral support for the raised roadway. See generally id.

260 See generally Gazza, 679 N.E.2d 1035 (purchaser of wetland not entitled to condemnation

award because when he purchased property he could not have purchased right to use wetlands contrary to potential application of regulation); Basile, 678 N.E.2d 489 (when city condemned wetlands parcel it only had to pay nominal fair market value because owner did not have right to put property to its highest and best use; the land was purchased after wetlands regulations were adopted).

261 122 S. Ct. 1465 (2002).

262 Id. at 1483. See also the discussion in Part VIII.B infra.

263 See Lopes v. City of Peabody, 629 N.E.2d 1312, 1315 (Mass. 1994) (finding that rule prohibiting purchaser from challenging existing regulations would have adverse policy impacts).

264 498 S.E.2d 414 (Va. 1998).

265 Id. at 417–18.

266 See Carson Harbor Vill., Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994), overruled on a different holding by WXM Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997); Vatalaro v. Dep't of Envtl. Regulation, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992); Karam v. State, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), aff'd, 723 A.2d 943 (N.J. 1999).

267 705 A.2d 1221.

268 Id. at 1229.

269 37 F.3d at 476–77.

270 95 F.3d 1422 (9th Cir. 1996), aff'd, 526 U.S. 687 (1999).

271 See id.

272 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992). In State, Department of Environmental Protection v. Burgess, the court declined to follow the "flawed" reasoning of Vatalaro, holding that even though Burgess purchased property before the wetlands regulations were adopted, he had no reasonable investment-backed expectations to develop this remote and isolated parcel. See 772 So. 2d 540, 542 n.1 (Fla. Dist. Ct. App. 2000), appeal denied sub nom. Burgess v. State, 791 So. 2d 1095 (Fla. 2001) (table decision), cert. denied sub nom. Fla. Dep't of Envtl. Prot. v. Burgess, 122 S. Ct. 615 (2001).

273 Vatalaro, 601 So. 2d at 1229.

274 See id; see also Cottonwood Farms v. Bd. of County Comm'rs, 763 P.2d 551, 555 (Colo. 1988) ("The majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor . . . .").

275 See Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

276 Id. at 630.

277 Id. at 633 (O'Connor, J., concurring).

278 Id. (O'Connor, J., concurring). Justice O'Connor's focus on the continuing importance of investment-backed expectations was adopted by the Court in its dicta in Tahoe-Sierra. See 122 S. Ct. 1465, 1486 (2002).

279 Palazzolo, 533 U.S. at 635 (O'Connor, J., concurring).

280 Id. at 637 (Scalia, J., concurring) (citations omitted).

281 Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 716 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

282 Id. at 715.

283 Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

284 Tavares, 746 A.2d at 710 n.1.

285 "[O]ne of the critical questions in determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967)).

286 28 F.3d 1171 (Fed. Cir. 1994).

287 Id. at 1178, 1183.

288 Id. at 1180.

289 Id. As the Federal Circuit observed in Loveladies Harbor, Inc. v. United States:

If the tract of land that is the measure of the economic value after the regulatory imposition is defined as only that land for which the use permit is denied, that provides the easiest case for

those arguing that a categorical taking occurred. On the other hand, if the tract of land is defined as some larger piece, one with substantial residuary value independent of the wetlands regulation, then either a partial or no taking occurred. . . . This is the denominator problem.

Id.

290 Id. at 1181.

291 Id.

292 22 Cl. Ct. 310, 318–19 (1991).

293 Id. at 320. As to whether a taking had occurred, the court observed:

Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.

Id. at 318–19.

294 Id. at 320.

295 42 Fed. Cl. 340 (1998), vacated, 208 F.3d 1374 (Fed. Cir. 2000), aff'd, 231 F.3d 1354 (Fed. Cir. 2000), reh'g en banc denied, 231 F.3d 1354 (Fed. Cir. 2000). The trial court found of some significance the purchase of the property after the adoption of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2001). See id. at 361. But on appeal the Federal Circuit rejected this theory, finding that the existence of navigational servitude does not defeat takings claim because the permit was not denied in order to protect navigation. See 208 F.3d at 1385–86.

296 208 F.3d at 1381.

297 Id. The court found that:

The regulatory imposition that infected the development plans for the 50.7 acres was unrelated to [Palm Beach Isles Associates'] plans for and disposition of the 261 acres of beachfront upland on the east side of the road. The development of that property was physically and tempo-

rally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed on the lake side of the spit. Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified.

Id.

298 See 10 F.3d 796, 802 (Fed. Cir. 1993) (finding that it would not consider every lot where a permit had been denied as a separate parcel; otherwise every permit denial would result in a taking).

299 See 177 F.3d 1360, 1365–67 (Fed. Cir. 1999) (joining together nine acres of submerged lakebed with a sixty-two-acre tract of upland that the owner had already sold, as part of single development scheme).

300 See generally 693 A.2d 114 (N.J. Super. Ct. App. Div. 1997).

301 Id. at 119.

302 Id. at 128–29.

303 See, e.g., Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 643–44 (1993). Although this was a pension liability case, unrelated to real property, the Court concluded that the relevant question is whether the property taken is all or only a portion of the whole. Id. at 644; Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 138 (1978) (finding that air rights over train station not considered a separate parcel).

304 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

305 See, e.g., Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676–77 (1988). Conceptual severance refers to the division of property into its component parts in accord with common law principles of interests in property. See id. at 1676. Some criticize the idea of conceptual severance, suggesting that all such interests should be lumped together in a takings analysis. See id. at 1676–77.

306 See Raymond R. Coletta, The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis, 1 U. Pa. J. Const. L. 20, 36 (1998) (“In the vertical dimension, the relevant

parcel is viewed columnally from the depths of the earth to the heights of the sky.").

307 122 S. Ct. 1465, 1483 (2002).

308 Id.

309 Steven J. Eagle, Regulatory Takings § 64(c)(2)(iii) (1996).

310 See Daniel R. Mandelker, New Property Rights Under the Taking Clause, 81 Marq. L. Rev. 9, 19 (1997) (recognizing the inability of courts to apply a consistent theory of segmentation, this commentator suggests abandoning segmentation theory in favor of "fairness").

311 122 S. Ct. 1465, 1483 (2002).

312 See id.

313 548 N.W.2d 528 (Wis. 1996).

314 See id. at 533.

315 575 N.W.2d 531, 538 (Mich. 1998); see also Volkema v. Dep't of Natural Res., 542 N.W.2d 282 (Mich. Ct. App. 1996), aff'd in part, disapproved in part, 586 N.W.2d 231 (Mich. 1998) (table decision).

316 See 575 N.W.2d at 534, 537–38.

317 See id. at 537. The court remanded the case to determine whether a separate 9.6-acre parcel should be combined, and, if combined, whether the destruction of the use and value of the twenty-seven or twenty-eight acres out of the whole constituted a taking. Id. at 540.

318 723 A.2d 943 (N.J. 1999).

319 198 F.3d 874 (D.C. Cir. 1999), cert. denied, 531 U.S. 812 (2000).

320 Id. at 876–77.

321 Id. at 889 (Williams, J., concurring) (citing John E. Fee, Comment, Unearthing the Denominator in Regulatory Taking Claims, 61 U. Chi. L. Rev. 1535, 1557–58 (1994)). See generally Machipongo Land & Coal Co., Inc. v. Commonwealth, Dep't of Natural Res., 719 A.2d 19 (Pa. Commw. Ct. 1998), aff'd in part, rev'd in part, remanded by 799 A.2d 751 (Pa. 2002), petition for cert. filed, (U.S. Aug. 27, 2002) (No. 02-321).

322 799 A.2d at 766–68.

323 Id. at 768.

324 Id. (citing Loveladies Harbor v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).

325 935 P.2d 411 (Or. 1997). In a subsequent decision, the same court found the takings claim was not ripe. See Boise Cascade Corp. v. Oregon, 991 P.2d 563, 574 (Or. Ct. App. 1999), appeal denied sub nom. Boise Cascade Corp. v. Bd. of Forestry, 18 P.3d 1099 (Or. 2000) (table decision), cert. denied sub nom. Boise Cascade Corp. v. State ex rel. Or. State Bd. of Forestry, 532 U.S. 923 (2001).

326 Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411, 414, 415–16 (Or. 1997).

327 217 Cal. App. 3d 71, 85–88 (Cal. Dist. Ct. App. 1990).

328 See id. But see Ramona Convent of the Holy Names v. City of Alhambra, 26 Cal. Rptr. 2d 140, 145 (Cal. Dist. Ct. App. 1993) (finding no taking of 1.97-acres of a 19.17-acre parcel).

329 653 F.2d 364 (9th Cir. 1981).

330 Id. at 366–67.

331 542 N.E.2d 1059, 1060–61 (N.Y. 1989).

332 45 F. Supp. 2d 19, 31 (D.D.C. 1999) (finding a taking when a construction project prevented reasonable access to parcels).

333 Id. at 30.

334 Fee, supra note 321, at 1557. This analysis enables courts to make a rational distinction between small setbacks and more significant amounts of land.

335 719 A.2d 19, 28 n.22 (Pa. Commw. Ct. 1998), aff'd in part, rev'd in part, remanded by 799 A.2d 751 (Pa. 2002).

336 Machipongo Land & Coal Co., Inc. v. Commonwealth, Dep't of Natural Res., 799 A.2d 751, 768 (Pa. 2002).

337 See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978); supra note 303 and accompanying text.

338 Penn Cent., 438 U.S. at 137.

339 Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1277–78 (N.Y. 1977), aff'd, 438 U.S. 104 (1978).

340 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

341 For example, there was this exchange between the Attorney General of the State of Rhode Island and the Court:

QUESTION: Is it—is it your position, General Whitehouse, if someone has, say a section of land, a square mile, either—a square mile. And picks out a 10-acre plot at one edge of that and applies for zoning use and claims that it's denied, he claims to have been denied all economic use. That the fact that he has a remaining everything square mile minus 10 acres means that that has to be taken into consideration, too?

GENERAL WHITEHOUSE: Yes, I think it is, Your Honor.

QUESTION: I don't think our cases support that.

GENERAL WHITEHOUSE: Well, the most recent—I would go back to, for instance, at the earliest expression the Penn Central case, which used the term parcel-as-a-whole and from which the parcel-as-a-whole discussion has emerged and then most recently in Justice Scalia's concurring opinion in the Suitum [v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997),] decision, you referred to the relevant property as the aggregation of all the owners property subject to the regulation at least those that are contiguous.

QUESTION: We don't generally get our law out of concurring opinions.

GENERAL WHITEHOUSE: That's correct, Your Honor. But I believe—

QUESTION: But in the Chief's hypothetical, what if he then sells off all except the 10-acre plot and then reapplies, and the 10-acre plot is again denied to development, then there's been a taking. It's such a silly result. There is not in the first case, because he hasn't yet sold off the rest of the one square mile, but if he sells off the rest of the one square mile, and makes the very same application, gets the very same result, then there's been a taking. That seems to me very strange.

Transcript of Oral Argument, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047), 2001 WL 196990, at *29–30 (Feb. 26, 2001) (italics added).

342 Palazzolo v. Rhode Island, 533 U.S. 606, 631–32 (2001). Indeed, the issue of the denominator was not included in the questions presented, and only raised by counsel for Mr. Palazzolo in the brief on the merits as an analog to the doctrine of physical invasions, Petitioner's Brief

on the Merits, supra note 18, at *45, and when responding to an amicus brief that suggested no compensation is due whenever anything of value remains on the property. See Petitioner's Reply Brief, 2001 WL 57593, at *19, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

343 See generally Palazzolo, 533 U.S. 606.

344 Id. at 631 (citing Fee, supra note 321). The Palazzolo majority further stated: "Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole . . . ; but we have at times expressed discomfort with the logic of this rule, . . . a sentiment echoed by some commentators." Id. (citations omitted).

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, the Court backtracked a bit, restating in dicta the parcel-as-a-whole rule as articulated in cases like Andrus v. Allard, 444 U.S. 51 (1979), and Concrete Pipe & Products of California, Inc. v. Construction Laboreres Pension Trust, 508 U.S. 602 (1993). See 122 S. Ct. 1465, 1481–83 (2002).

345 See Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1019 n.8 (1992).

346 See id. at 1064 (Stevens, J., dissenting).

347 Id. at 1019 n.8.

348 See id. at 1015–19 nn.6–8.

349 Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 23–24 (1999).

350 21 Cl. Ct. 161 (1990), judgment entered by 23 Cl. Ct. 653 (1991), vacated and remanded by 18 F.3d. 1560 (Fed. Cir. 1994).

351 See id. at 176.

352 See Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567–68 (Fed. Cir. 1994).

353 See id. at 1563.

354 See discussion infra Part II.

355 18 F.3d 1560, 1573 (Fed. Cir. 1994).

356 See id. at 1565–66.

357 See id. at 1568–69.

358 438 U.S. 104 (1978).

359 See Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1570–71 (Fed. Cir. 1994).

360 But see Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1577 (10th Cir. 1995) (rejecting the partial takings analysis of Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), in the context of an alleged taking of big game hunting rights).

361 Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 43–44 (1999).

362 49 Fed. Cl. 248, 271–72 (2001).

363 See id. at 271 n.37.

364 No. 266-82 L, 2000 WL 331830 (Fed. Cl. Mar. 28, 2000).

365 26 Cl. Ct. 332, 332 (1992). The federal government declined to appeal this award.

366 Id. at 341.

367 Id. at 337.

368 See id. at 340.

369 Id. at 341.

370 See id. at 340.

371 801 F. Supp. 185 (N.D. Ind. 1992).

372 See id. at 187.

373 See id. at 197–98.

374 Id. at 198.

375 See id.

376 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), aff'd, 723 A.2d 943 (N.J. 1999).

377 See id. at 1228. See also East Cape May Associates v. State, New Jersey Department. of Environmental Protection, 693 A.2d 114, 124–29 (N.J. Super. Ct. App. Div. 1997), for a particularly detailed discussion of the relevant parcel issue.

378 747 A.2d 192 (Me. 2000).

379 See id. at 193–94.

380 772 So. 2d 540 (Fla. Dist. Ct. App. 2000), appeal denied sub nom. Burgess v. State, 791 So. 2d 1095 (Fla. 2001) (table decision), cert. denied sub nom. Fla. Dep't of Envtl. Prot. v. Burgess, 122 S. Ct. 615 (2001).

381 Id. at 543.

382 See, e.g., Douglas T. Kendall et al., Takings Litigation Handbook 196–204 (2000).

383 Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).

384 See, e.g., Richard J. Lazarus, Putting the Correct "Spin" on Lucas, 45 STAN. L. REV. 1411, 1427 (1993) ("Instead, the negative implication of the category's nonapplicability will dominate the lower courts' takings analyses. These courts will likely apply the opposite presumption that no taking has occurred."). This is also, of course, what the Rhode Island Supreme Court essentially did in Palazzolo when it concluded its evaluation of economic impact upon finding that some value remained in the property. See Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 717 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); see also Plantation Landing Resort, Inc. v. United States, 30 Fed. Cl. 63, 69 (1993) (finding that the court need not explore other factors referred to in Penn Central and later cases because there was no denial of economically viable use), aff'd, 39 F.3d 1197 (Fed. Cir. 1994) (table decision).

385 See Lucas, 505 U.S. at 1012 (finding that "temporary deprivations of use are compensable"); id. at 1013 (commenting on "beneficial use of . . . land"); id. at 1014 ("If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.'" (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)); Lucas, 505 U.S. at 1015 (finding "categorical treatment appropriate where regulation denies all economically beneficial or productive use of land"); id. at 1016 ("[T]he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land'" (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)) (emphasis added)); Lucas, 505 U.S. at 1016 n.6 (commenting on "economically beneficial use of . . . land"); id. at 1016 n.7, 1017 (stating that "deprivation of all economically feasible use" and "all economically beneficial use" and "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation") (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621,

652 (1981) (Brennan, J., dissenting)); Lucas, 505 U.S. at 1018 (discussing "all economically beneficial uses" of land and "economically beneficial or productive options for its use"); id. at 1019 (commenting on "preventing developmental uses" and concluding that to "sacrifice all economically beneficial uses in the name of the common good, that is, to leave . . . property economically idle" would result in a taking); id. at 1027 (discussing "all economically beneficial use" of land); id. at 1030 (discussing "all economically productive or beneficial uses of land"); id. at 1031(noting that although "common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land").

386 Lucas, 505 U.S. at 1007 (stating that regulation has a "dramatic effect on the economic value"); id. at 1016 n.7 (discussing property interest "against which the loss of value is to be measured" and concluding that it is "unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole"); id. at 1026 (holding that regulation "wholly eliminated the value of the claimant's land").

387 Palazzolo v. ex rel. Tavares, 746 A.2d 707, 713–157 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

388 Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (quoting Lucas, 505 U.S. at 1019).

393 See, e.g., Kendall et al., supra note 382, at 197. This rationale was also adopted by the Ninth Circuit. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 781 (9th Cir. 2000) (equating "profits" with value), reh'g denied, reh'g en banc denied.

EXHIBITS:: OSWER Directive 9200.4-38 Ownership Hardrock Mine Sites.

May 1, 2008 letter from Kathleen Salyer, Region IX Site Clean-up Branch Chief for the EPA

Memorandum and Order for dismissal filed Aug 23, 1993

Notes by Rick Sugarek, EPA Superfund site Project Manager, mtg w/ Def. and Pet. On 2/19/08

No Trespassing Notice from T.W. Arman and IMMI & Warden of the Forest John F. Hutchens

Letter from Rudy Carver, Iron Mountain Operations, (AIG) March 19, 2007

PETITIONER'S DECLARATION

"LOCKE AND LODE"

13. I, John F. Hutchens, private citizen, miner, joint venturer, landscape and general building contractor, and private Warden of the Forest at the will and pleasure of T.W. Arman, Principal and Chairman, President, and CEO of Iron Mountain Mines, Inc. (sole stockholder, no parent corporation), hereby declare upon information and belief that the statements hereinafter are true and correct under penalty of perjury, so help me GOD.

14. This matter comes before the Court under the Citizen Suit provisions of the Resource Conservation and Recovery Act. This matter also comes before the Court for violation of the Equal Protection Clause and Due Process provisions of the Constitution of the United States, violation of General Mining Law, violation of the National Contingency Plan, violation of CERCLA, and for Breach of Title by Patent Deed, Trespass, Detinue Sur Bailment, Inverse Condemnation, Errors of Impunity and Miscarriage of Justice, Abuse of Discretion, Failure to Perform in accordance with the beneficial interests of the people or the environment and contrary to the General Welfare, for Fraud upon the Court, for just compensation under the Fifth Amendment for the physical taking of real property, and for Negligent Endangerment.

.15. "To no one will we sell, to no one will we refuse or delay, right or justice." Magna Carta. Petitioner declares upon information and belief that actions or inactions by the Environmental Protection Agency have or may result in endangerment to human health and the environment, or fail to fulfill the stated objectives of the remedial actions in compliance with the National Contingency Plan, or fail to fulfill the purpose or objectives of the Resource Conservation and Recovery Act, or fail to provide a remedy consistent with the purpose of CERCLA, and it can be shown that such decisions and actions were negligently arbitrary and capricious, and by a preponderance of the evidence are shown to yield a negligently absurd and illogical result.

16. Petitioner submits that by any objective analysis, the decisions and actions of the EPA at the Iron Mountain Mine superfund site were negligently arbitrary and capricious.

17. Petitioner submits that prejudice and segregation of the defendants has contributed to the negligent discrimination suffered by acts of agents and agencies under color of law.

18. Petitioner submits that by every measure of reason or logic in the scientific consideration of the problem of pollution at the Iron Mountain Mine superfund site, and the only remedy consistent with EPA guidance for the safe and proper operation of mines, of the alternatives considered, and the remedial actions selected, the only action available when the remedial actions began or action that is available now that is shown to be fully protective of human health and the environment is to remedy the pollution and to finish the mining, and further that the outcome of any other alternative including the presently implemented plan yields an absurd result when a remedy is known and other actions as such are then negligently arbitrary and capricious.

JURISDICTION

19. This Court has Jurisdiction pursuant to U.S.C. §§ 6902 and 9613. This Court also has jurisdiction of the subject matter of this action under 42 U.S.C.§§ 6972(a)(1)(B), 9658, and 11046(d)(1), and 28 U.S.C. § 1331.3. Venue is proper in this District pursuant to section 7002(a) of RCRA, 42 U.S.C.§ 6972(a), because it is the "district in which . . . the alleged endangerment may occur." Venue is also proper in this District pursuant to section 310(b)(1) of CERCLA, 42 U.S.C. § 9658, and section 326(b)(1) of EPCRA, 42 U.S.C. § 11046(b)(1), because the source of the violations is located within, and the violations occurred within this District. This Court may also exercise supplemental jurisdiction, pursuant to 28 U.S.C. Section 1367 (a) and (c), over such claims. This Court also has jurisdiction of pendant State claims.

STATEMENT IN SUPPORT OF JOINDER

20. Petitioner attests that he is a real party in interest to this matter and further attests that the interests are not merely economic interests. Petitioner claims joinder as by right.

STATEMENT OF INTERVENTION

21. Petitioner submits that nowhere in the Plaintiffs 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.

22. 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)(2)." CERCLA also provides for citizen suits for failures to perform, such 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 INTEREST

23. Petitioner and Defendants 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,.

24. 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".

25. Defendants have delegated to Petitioner a substantial business and fiduciary responsibility including rights under contract of both Agency and Factor, 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.

BACKGROUND

26. 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 defendants, including the two remaining defendants, 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 con-

tinues as a result of plaintiffs claims against defendants for recovery of "unrecovered past costs" from the Iron Mountain Mine Superfund Site located outside of Redding California. On December 8, 2000, this Court approved a settlement between the Plaintiffs 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 Settling Parties. Defendants Arman and IMMI did not object to the settlement but were not parties to it.

Subsequently, defendants discovered that they had been deceived and misled by being encouraged not to object to entry of the Consent Decree by counsel for plaintiffs, who informed defendants that said Consent Decree was to their benefit, and was the best possible outcome that the government could negotiate with the responsible parties.

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

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

On Dec. 17, 2008, Petitioner and Defendants petitioned to reopen this case which has been listed as "closed" since 1993, to vindicate the Petitioner and the Defendants from the guilt and liability and establish a valid claim for just compensation along with bringing counterclaims and a citizen suit, all of which was stricken on Dec. 17, 2008 by Order of the Court.

QUESTIONS OF LAW AND MATERIAL FACTS AT ISSUE

Claim 1

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

27. 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.

28. 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”.

29. 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)

30. (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.

31. Table 1.1

Siting (1) Not on Holocene faults;

(2) Outsite of areas of rapid geologic change;

32. 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."

33. 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."

34. From 54423 of the Administrative Record; "In Brick Flat, two major fault zones are present:"

35. "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

36. "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

37. 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.

38. 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.

39. 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.

40. 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. 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.

41. 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 defendants and this petitioner of the opportunity to resume mining on the basis of interference with the EPA's actions.

42. 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.

43. 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.

44. 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 Defendants 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.

45. 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 Defendants interference with the operations of the facilities.

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

46. 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 Contin-

gency 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 Mine 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 Due Process and Equal Protection from 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.

47. 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.

48. 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 re-

medial actions for the last 25 years, and so therefore the only remedy to the pollution is to finish the job of mining, and there are no other alternatives that are not arbitrary and capricious.

49. T.W. Arman and IMMI proposed insitu solution mining (bio-mining) 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.

50. 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.

51. 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 enumerated in of the United States Constitution.

52. 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.

53. 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.

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

55. 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 defendants.

Claim 2

Fraud upon the Court, fraudulent denial of the "Innocent Landowner" defense

56. 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."

57. The actual language of the statute is:

"9607(a)(1) the owner and operator of a vessel or a facility,"

58. 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".

59. 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.

60. 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

61. The plain meaning of the terms used to define "disposal" compels the conclusion that there was no "disposal" during the Defendants' 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)

62.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 scenarios 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 definition 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 acknowledge 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.

63. Therefore, whether by the interpretation of the majority or the dissent as expressed in the Opinion, by a preponderance of the evidence, there was no “disposal” giving rise to CERCLA liability during the ownership of Iron Mountain Mines, Inc.

64.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.

65. 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 Defendants are entitled to a presumption of innocence in the innocent landowner defense.

66. Furthermore, Defendants 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 Copper 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.

67. Having found that Defendants 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.

68. (It is also interesting to note that AstraZeneca, (heir to the liabilities of Stauffer Chemical Co. through its 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 at-

tached 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.)

69. 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.

70. 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).

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.

71. 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 then levied a lien against the lands owned by Iron Mountain Mines Title by Patent Deeds to recover the $51 million in unnecessary costs.

72. Now the government owns AIG, how convenient.

73. T.W. Arman has owned Iron Mountain Mines, Inc. since 1976; so far the company has not reported a profit.

ULTERIOR GOVERNMENT MOTIVE

74. 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. 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.

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.

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.

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

75. 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).

76. 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

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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. ….

77. 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.

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

79. 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. Defendants 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.

80.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);

81. "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.

82. 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)."

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

84. 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".

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

86. **"OVERVIEW OF THE PROBLEM**

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

87. And a few pages later (page 7),

88. "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."

89. Defendants 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 defendants, and since the EPA acknowledged in ROD

1 that “mining activities are the primary source of contamination”, and that “there is no evi-
2 dence that mining has occurred under the current ownership”.
3 90. It is therefore apparent that for the purposes of CERCLA and this litigation in a determina-
4 tion of liability that the defendants are not the “operators” as they did not “manage, direct, or
5 conduct operations specifically related to pollution.”
6 **Claim 3**
7 91. The Plaintiffs falsely alleged and therefore the Court wrongly concluded that “as a “current
8 owner” of the facility in question, it is not necessary to establish IMMI’s liability as an “opera-
9 tor” of the same facility.”
10 92. Petitioner submits that it is this very question which is the most central issue in this matter.
11 Petitioner reiterate that it is apparent that for the purposes of CERCLA liability that the defen-
12 dants are not the “operators” as they did not “manage, direct, or conduct operations specifically
13 related to pollution.”
14 **Claim 4**
15 93.The EPA falsely alleged and therefore the Court wrongly concluded that “to establish liabil-
16 ity for CERCLA clean-up costs, a plaintiff must show that the defendant is a potentially re-
17 sponsible party (“PRP”).”
18 94. Petitioner submits that this statement is an example of an unconstitutional interpretation of
19 CERCLA and that it is contrary to the language of the statutes, the intent of the Congress, and
20 the interpretations and precedents of the Courts, as such a showing would only establish “po-
21 tential” liability, it does not establish liability.
22 **Claim 5**
23 95. The plaintiffs falsely alleged and therefore the Court wrongly concluded that “Arman is an
24 operator under CERCLA because he is someone who currently “manage[s], directs[s], or con-
25 duct[s]…operations having to do with the leakage or disposal of hazardous waste, or decisions
26 about compliance with environmental regulations.” The very decision the plaintiffs cite as the
27 definitive ruling relevant to this case, (U.S. v. Best Foods, see claim 2) elaborates in great detail
28 on the important distinctions and clarifications that must be taken into account in such a deter-

mination, 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.

96. 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..

97. 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

98. The plaintiffs 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 plaintiffs are copper, cadmium, and zinc. Defendants 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.

99. Defendants 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 defendants to have "purchased the prop-

erty with knowledge of or because of the presence of hazardous materials“ if they were not hazardous materials at the time of purchase.

100.Defendants 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.

101. Defendants 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.

102. 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.

103. Therefore, and by a preponderance of the evidence, defendants are entitled to the benefits of the “innocent landowner defense”.

Claim 7

104. The plaintiffs falsely alleged and therefore the Court wrongly concluded that “IMMI has not established the necessary elements of the defense.”

105. Petitioner submits that by a preponderance of the evidence they are not “a person otherwise liable”, in accordance with claims 1 thru 6.

106. Petitioner submits that, for the sake of argument, (even though they are not otherwise liable):

107.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.”

108. 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.

109. AMD should be recognized as an "Act of God" because no person is responsible for it having been "deposited, stored, disposed of, or placed".

110. Third party defense: No contractual relationship ever existed between defendants and Mountain Copper Co. (the responsible party for the "disposal" according to plaintiffs.)

111. 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.

112. Petitioner submits that therefore, (even though they are not otherwise liable for the costs of the clean-up), the Defendants 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).

113. Therefore, and by a preponderance of the evidence, defendants are entitled to the benefits of the "innocent landowner defense" the "Third Party defense" and the "Act of GOD defense".

Claim 8

114. The plaintiffs 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."

115. 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 plaintiffs 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.

116. Therefore, and by a preponderance of the evidence, defendants are entitled to the benefits of the "Act of GOD defense" the "innocent landowner defense" and the "Third Party defense".

Claim 9

117. The plaintiffs 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."

118. 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."

119. 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 defendants 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 plaintiffs implicating the polluters in the extermination and possible extinction of the beloved salmon and trout, entitles defendants 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 defendants civil rights.

120. 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 defendants 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 plaintiffs wrongfully continues to prosecute the defendants under CERCLA, to levy a statutory lien against defendants property of $51 million, and to hold defendants 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 defendants.

121. Therefore, and by a preponderance of the evidence, defendants 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

122. The plaintiffs falsely alleged in the joint status report that the terms of the settlement did not provide for reimbursement for past costs.

123. 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."

124. 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 plaintiffs, and with full knowledge and understanding including the express terms of paragraph 86.

125. Defendants further submit that the action of the plaintiffs 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.

126. Defendants 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.

127. Defendants further submit that as the government now effectively possesses the trust funds, it must remove the lien on defendant's property.

128. Petition to remove the statutory lien[s] by plaintiffs against defendant's properties.

Claim 11

129. The plaintiffs falsely alleged in the joint status report that defendants were given ample opportunity to oppose the consent decree.

130. Petitioner submits that defendants 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 defendants with prejudice, so these defendants were informed and understood that the settling co-defendants could not sue these defendants for contribution, and were informed by counsel for the plaintiffs that the Consent Decree provided benefits to these defendants, and that the settlement was the best that the government negotiators could achieve, and so therefore the Court encouraged the defendants to cooperate with the Court in concluding the matter with a just and equitable decision in the proceedings.

131. Petitioner submits that the plaintiffs 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 defendants.

132. Motion to dismiss under *res judicata* plaintiff's claims for liability for pollution or natural resource damage against defendants.

Claim 12

133. 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.

134. 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.

135. 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.

136. The defendants allege that plaintiffs violated defendant’s civil rights in failing to perform in accordance with 9604 (3)(A) and (4).

137. For the reasons heretofore established in claims 1 through 12, defendants 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

138. 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)

139. 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.

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 Studies, 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.

140. Abuse of Discretion for Dismissal of Cross-Claims and Counterclaims of Potentially Responsible Parties and void in accordance with Claim 2. 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.

141. Motion for Order to Vacate Consent Decree of December 8th, 2000

142. Order for Dismissal of 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.

143. Defendant 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 defendants that is just and equitable and consistent with the law.

144.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).,"

145. 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).

146. 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..

147. 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.

148. Defendants 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 Plaintiffs in October of 2000, that such a claim for denying liability was not proposed until 2002, almost 11 years after this litigation commenced, the plaintiffs instead having intended to deprive the Defendant of the innocent landowner defense all along on a theory of interference simply because the Defendants had sought to defend their property rights and for having protested the very actions which are now the focus of this proposed Judicial Review.

137. Defendants declare that at no time did they engage in any action to interfere with the actions of the EPA or the site operators.

138. ("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.")

Claim 14

139. 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 National 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

140. 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

141. 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

142. 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

149. Judicial Review as Removal Actions by lead agency failed to comply with the Statement of Work.

(Plaintiffs 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 defendants 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

150. 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.

151. 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.

152. 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

153. 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

154. 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

155. 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

156. 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

157. 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:

158. "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.

159. Motion for the Court to Intervene under Judicial Review to implement the defendants proposed remedies for the cause of the pollution at the Iron Mountain Mine Superfund Site.

Claim 25

160. 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

161. Judicial Review for Remedial Actions that were Negligently Arbitrary or Capricious.

Claim 27

162. Judicial Review as Removal Actions were not consistent with the National Contingency Plan

Claim 28

163. 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

164. 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

165.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

166. 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.

167. 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

168. 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 unrecov-

ered 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

169.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.

170. 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".

171. 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."

172.From 54423 of the Administrative Record; "In Brick Flat, two major fault zones are present:"

173. "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

174. 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.

175. 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.

176. The recent case of Frey v. EPA offers some useful insight into the parameters of Judicial Review under CERCLA:

177. "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.

178. 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.

179. 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.

180. 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.

181. 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."

182. "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, intend to extinguish judicial review altogether. North Shore Gas Co. v. EPA, 930 F.2d 1239, 1245 (7th Cir.1991)."

183.After a very long wait, defendants 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 DEFENDANTS 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.

1.The maxim, much cited by Macchiavelli, appears in the original Latin as "divide et impera." It may be translated as "divide and rule."

2. Excerpt from the conclusion of the appeal of *United States v. Cannons.*

3.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.

4.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.

5.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 sovereign 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.

6.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."

7. 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.

8. 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 strategy 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.

9. 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*

10. 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.”

11. The constitutional arguments sponsored by Two Miners & 8000 acres measures up to the *Cannons* test of scrutiny. Counterclaimants submit that there is a constitutional right under fed-

eral 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 Counter-claimants were deprived of a constitutionally protected interest

12. The claims include violation of equal protections and due processes

13.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).

14.Counterclaimants invoke the "too big to fail" doctrine of the Executive Branch in the environmental defense of Superfund sites.

15.Defendants motion for a declaration of *Res Judicata* with the State

16.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 defendants 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)

17.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.

18. 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.

19. 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 plaintiffs' own conduct (including their negotiating strategy).

20. Counterclaimants allege that a case of systemic unfairness exists.

21. Remove the EPA's double swaddling, and what do you find?

22. Evidence of bad faith and collusion on the part of the settling parties, and violation of trust

23. 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.

24. 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.

25. Harmful errors of law: see claims, 2 miners & 8000 acres of land v. United States; **1.** 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." **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 plaintiffs 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 plaintiffs falsely alleged and therefore the Court wrongly concluded that "IMMI has not established the necessary elements of the defense." **5.** The plaintiffs 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 plaintiffs 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 plaintiffs falsely alleged in the joint status report that this action is to" recover response costs incurred and to be incurred". **8.** The plaintiffs falsely alleged in the joint status report that the terms of the settlement did not provide for reimbursement for past costs. **9.** The plaintiffs falsely alleged in the joint status report that defendants 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 defendants of property and livelihood by conspiracy under color of law.

26. A. Procedural Fairness?

27. 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 proce-

dural 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).

28. 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, and particularly to the effect of the lack of informed counsel damaging the defendants.

29. 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 defendants the innocent landowner defense by fraud upon the court, with malice and oppression, and without due process or equal protection, is a violation of defendants civil rights. The government acted beyond the scope of its discretion in depriving the defendants of these rights, and for the taking of private property for public benefit without just compensation.

30. 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.

31. 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 defendants 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 defendants 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 defendants 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 defendants were deceived and misled, that the Court must inspect the swaddling of EPA under CERCLA.

32. Iron Mountain Mines, Inc. and T.W. Arman are not the polluters

33. 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 defendants participation, and the defendants counsel was soon to be disbarred and who had no experience in Federal Court or with pollution cases and the Department of Justice, and defendants 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..

34. B. Substantive Fairness?

35. Counterclaimants aver that if there is no substantive fairness, there can be no comparative fairness.

36. 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.

37. 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 defendants of the constitutional right to equal protection and due process of the innocent landowner defense, the EPA in tort and equity violated the defendants’ civil rights. Whatever formula or scheme the EPA later advances for measuring comparative fault and allocating li-

ability 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.

38. 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.

39. 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).

40. 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.

41. 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 return for the premium paid, RP can cash out, thus obtaining four important benefits: re-

duced 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 defendants 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.

42. 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.

43. 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 defendants 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 unconscion-

able 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 defendants the benefit of the innocent landowner defense, and unreasonable by failing to make a settlement proposal in this CERCLA case that was substantively fair.

44. C. Reasonableness?

45. 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

46. 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 offsite 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.

47. 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 measures. 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.

48. 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 plaintiffs 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.

49.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.

50. D. Fidelity to the Statute?

51. 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.

52. We describe the two major policy concerns underlying CERCLA:

53. 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.

54.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.

55. 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.

56. 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.

57. 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.

58.Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir.1988).

59. 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.

60. 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 plaintiffs acknowledge that the innocent landowner defense is the only defense available, and suggest that allegation of a lack of "due care" would deny defendants the benefit of the innocent landowner defense. The Courts have found this premise lacking in previous CERCLA cases.

61. 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 defendants of their civil and constitutional rights.

62. 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.

63. Counterclaimants allege that by a preponderance of the evidence, the plaintiffs have deceived and misled and discriminated against the remaining Defendants in this case.

64. 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 settle-

ments 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 defendants were discriminated against, misled, and deceived.

65. 5. 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.

184. **§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

RELIEF REQUESTED

WHEREFORE, Claimant respectfully requests that the Court:

1. Declare that there exists or may exist an imminent and substantial endangerment to health and the environment caused by EPA's and the site operator's past and/or present handling, treatment, and/or disposal of solid waste with respect to hazardous waste sludge manufactured at Iron Mountain Mines; declare that the construction of an acutely toxic hazardous waste pit disposal cell upon the Brick Flat mine, bounded as it is by known Holocene faults, and without provisions for offsite disposal facilities by arrangement and contract with the State of California for 20 years of disposal as required by 9604 of CERCLA; and in the absence of any functional equivalent to an environmental impact statement, is in violation of the National Environmental Policy Act (NEPA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and California State Environmental laws, and issue a preliminary and a permanent injunction to stop the unlawful disposal of "ACUTELY TOXIC HAZARDOUS WASTE" upon the Brick Flat mine at the Iron Mountain Mine Superfund site.

2. Order EPA to immediately begin the orderly transfer of authority as lead agency to the California Department of Conservation Mining and Geology Board, with continuing support agency assistance from the California Department of Toxic Substances, and order the transfer of project manager and site operator to the management of the defendants and their designated affiliates or representatives in accordance with the National Contingency Plan, to take all such actions as may be necessary to eliminate any such endangerment, including: fund an independent, comprehensive, scientific study and Environmental Impact Statement to determine the precise nature and extent of the endangerment; fund an independent, comprehensive, scientific study and Environmental Impact Statement of appropriate, effective, environmentally-sound means to eliminate the endangerment; and to develop and implement an appropriate and effective remedial plan, based on the studies described above; Declare EPA to have violated and to be in violation of the reporting and notification requirements of the NEPA, RCRA, CERCLA and State of California environmental laws; and require the EPA to comply with the provisions

of the National Environmental Policy Act and prepare Environmental Impact Statements (EIS) for all disposal sites.

5. Assess appropriate civil penalties against the site operator of up to $27,500 per day for each day that violations of RCRA, CERCLA, EPCRA, NEPA, and State environmental laws have continued;

6. Orders for Declaratory Relief to remove the liens upon Defendant's properties.

7. Orders to Award defendants actual, general, and special damages and costs (including reasonable attorney and expert witness fees) as authorized by section 7002(e) of RCRA, 42 U.S.C. § 6972(e), section 310(f) of CERCLA, 42 U.S.C. § 9659(f), and section 326(f) of EPCRA, 42 U.S.C. § 11046, and 42 U.S.C. §1983; and 42 U.S.C. §1988;

8. Orders providing for Constitutionally Protected Procedural and Substantive Fairness.

9. Assess appropriate civil penalties against the site operator of up to $27,500 per day for each day that violations of RCRA, CERCLA, EPCRA, NEPA, and State environmental laws have continued;

10. An Order for Declaratory Relief to remove the liens upon Defendant's properties.

11. Award defendants actual, general, and special damages and costs (including reasonable attorney and expert witness fees) as authorized by section 7002(e) of RCRA, 42 U.S.C. § 6972(e), section 310(f) of CERCLA, 42 U.S.C. § 9659(f), and section 326(f) of EPCRA, 42 U.S.C. § 11046, and 42 U.S.C. §1983; and;

12. Grant such other relief as the Court deems just and proper.

Petition to Re-open case for Judicial Review and Injunctive Relief

I, John F. Hutchens, hereby declare upon information and belief and under penalty of perjury under the laws of the State of California and the United States of America that the foregoing statements are true and correct, so help me GOD!

Signed_____

December 22, 2008 John F. Hutchens

Private Warden of the Forest

CERTIFICATE OF SERVICE

I hereby certify that, on December 24, 2008, I caused copies of the following document:

PETITION FOR EMERGENCY REVIEW

Seymour, 554 F.Supp. at 1340 (urgency of abating danger to public must be considered).

PETITION FOR REDRESS OF GREIVENCES, INTERVENTION AND RCRA CITIZEN SUIT, BREACH OF TITLE BY PATENT DEEDS, BREACH OF GENERAL MINING LAW, TRESPASS, DETINUE SUR BAILMENT, INVERSE CONDEMNATION, DECLARATION OF ERRORS of IMPUNITY & MISCARRIAGE of JUSTICE, PETITION TO REOPEN CASE, PETITION FOR JOINDER, PETITION FOR INJUNCTIVE AND MISCELLANEOUS RELIEF
CAL. PUBLIC RESOURCE CODE 3940-3950

to be served by first class mail, postage prepaid, upon the following Plaintiff's parties.

For the State of California

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For the United States of America

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to be served by first class mail, postage prepaid, upon the following Defendant parties.

T.W. Arman, President,
Iron Mountain Mines, Inc.
P.O. Box 992867, Redding, Ca. 96099

Dec. 24, 2008

John F. Hutchens, Private Warden of the Forest
P.O. Box 182,
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