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

9 **TWO MINERS & 8000 ACRES OF LAND**
10 IRON MOUNTAIN MINES, INC. et al,
11 (T.W. ARMAN and JOHN F. HUTCHENS,
12 real parties in interest), “Two Miners”
13 Plaintiffs

Court of Federal Claims No. 09-207 L

Honorable Judge Christine O. C. Miller

Second Amended Complaint

Taking of private property for the public benefit
requiring the payment of just compensation under
the 5th amendment of the constitution.

TAKINGS CLAIM!

v.

14 **UNITED STATES**

Defendants

15
16 **Extent of the Taking**

17 **1.** It is well established that a physical taking is defined by the government’s corporeal viola-
18 tion of private property. As the Supreme Court has noted, “where real estate is actually invaded
19 . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the
20 Constitution.” *Loretto v. Teleprompter Manhattan CATB Corp.*, 458 U.S. 419, 427 (1982)
21 (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871)). The Court has similarly
22 emphasized that, “[t]he hallmark of a physical taking is government occupation of real prop-
23 erty.” *Alameda Gateway, Ltd. v. United States*, 45 Fed. Cl. 757, 762 (1999), quoting *Loretto*,
24 458 U.S. at 426 (1982).

25 **2.** However, it has also recognized the possibility of compensable stigmatic injuries that ex-
26 tend beyond the tangible aspects of a physical taking. In *Hendler v. United States*, it held that
27 “if fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a
28 similarly well-informed seller, diminution in value caused by that fear may be recoverable as

1 part of just compensation.” *Hendler v. United States*, 38 Fed. Cl. 611, 625 (1995) (quoting
2 *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir. 1984)), *aff’d* 175 F.3d
3 1374 (Fed. Cir. 1999); see also *Shelden v. United States*, 34 Fed. Cl. 355, 373 (1995) (reducing
4 post-taking fair market value of property due to stigma associated with earthquake damage).

5 **3.** Iron Mountain Mines contend that the physical taking of the Brick Flat Pit produced a com-
6 pensable impact on the entire Property’s value. Petitioners claim that the remedial action pro-
7 duced two linked effects flowing from the EPA’s physical occupation of the Brick Flat Pit. The
8 first effect was the physical taking of the Brick Flat Pit itself, which continues to prevent Iron
9 Mountain Mines, Inc. et al from commercially exploiting the Brick Flat Pit. The second effect
10 was the diminution of the Property’s overall market value due to the stigma associated with
11 possible liability to any buyer for the CERCLA action. It should be noted that this “stigma”
12 amounts to considerably more than a mental attitude on the part of buyers. It is based upon a
13 very real possibility that any commercial activity on the property might lead to regulatory pro-
14 hibition or real physical danger. While T.W. Arman and John Hutchens are not convinced that
15 in fact the Property is unusable, it seems clear that a reasonably prudent buyer would consider
16 that quite probable, and be unwilling to purchase the property at any positive price, or share in
17 the stigma of exterminating the salmon and trout.

18 Iron Mountain Mines, Inc. has expert testimony stating that, “the mere existence of this huge
19 quantity of waste on the property, even in a constructed repository, creates too great a potential
20 [CERCLA] liability for anyone to consider purchasing the land.”

21 **4.** In summary, Iron Mountain Mines experts in the valuation of contaminated property argue
22 that anyone buying the Property before the EPA completes the removal action and removes the
23 sludge from the Open Pit would potentially bear liability under CERCLA for costs incurred in
24 the removal action.

25 **5.** Consequently, a reasonable purchaser would discount the purchase price of the Property by
26 at least the amount of the liability assumed in the post-removal action condition of the Property.
27 Similarly, Iron Mountain Mines will present evidence that once the presence of hazardous
28 waste has stigmatized property, a reasonable purchaser of said property would discount the

1 sales price for the costs of removal of all of the offending material currently disposed in the
2 Brick Flat Pit. Iron Mountain Mines noted that the stigma flows from the possibility of leakage
3 of contaminants from the waste in the Open Pit and the potential “consequent liability placed
4 upon Iron Mountain Mines, Inc. and T.W. Arman under CERCLA.”

5 **6.** According to Iron Mountain Mines, it follows that just compensation should be the differ-
6 ence between the Property’s pre-taking fair market value and the sum resulting from the cost of
7 the removal of the hazardous waste in the Open Pit added to the CERCLA liability incurred.

8 **7.** The stigma associated with general contamination and burden of infamy associated with
9 natural resource damage and fish extinction dramatically affects the entire Property’s value.

10 Hendler and Shelden permit recovery for diminution in value due to the general fear of a hazard
11 caused by a taking, assuming that the hazard’s affect on marketability is measurable. See
12 Hendler, 38 Fed. Cl. at 625 (quoting United States v. 760.807 Acres of Land, 731 F.2d 1443,
13 1447 (9th Cir. 1984)

14 **8.** (“[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay
15 to a similarly well-informed seller, diminution in value caused by that fear may be recoverable
16 as part of just compensation.”)); see Shelden, 34 Fed. Cl. at 373. It is generally recognized that
17 general market perception of contamination on a future development site results in the depre-
18 ciation of property value.

19 **9.** Iron Mountain Mines argument is that the Open Pit’s taking negatively impacts the entire
20 Property’s value on the basis of the evidence.

21 **10.** In analyzing this impact, the’ computations regarding the Property’s diminution in value
22 as a result of the stigma associated with hazardous waste and fish extinction.

23 **The Removal Action As A Special Benefit**

24 **11.** When only a portion of private property is physically taken, the amount of compensation
25 owed for the property of Iron Mountain Mines must be reduced by any special benefits from
26 the government action accruing to the remainder of the property. Hendler, 38 Fed. Cl. at 1380.
27 Special benefits are benefits which inure to the particular property suffering the taking, rather
28 than to the general public. The United States placed a statutory lien for “unrecovered past re-

1 sponse costs” and stated that the removal action conferred a special benefit upon the Property
2 which we should deduct from any ultimate damages valuation, and inferred that it was justified
3 as a “windfall” lien.

4 **12.** Such arguments, however, lead nowhere. Even if the Court accepts the government’s
5 argument that the removal action benefits the Property’s value, the United States will be unable
6 to include any evidence regarding the amount by which such benefit increases the Property’s
7 value. Thus, no offset of compensable damages for the benefits allegedly conferred by the re-
8 moval action are possible.

9 **13.** Having resolved these issues, let us now turn to the determination of the Property’s fair
10 market value as a function of calculating the just compensation owed to Iron Mountain Mines.

11 **14.** Just compensation for a taking under the Fifth Amendment requires that a deprived owner
12 be put “in the same position monetarily as he would have occupied if his property had not been
13 taken.” *Almota Farmers*, 409 U.S. at 474 (internal citations omitted). The necessary corollary to
14 this basic damages principle is that the Court may not place a deprived owner in a better posi-
15 tion by a Fifth Amendment taking recovery than if the taking at issue had not occurred.

16 The fair market value of the highest and best use of the Property before and after the action.

17 **15.** A reasonable valuation of the Property’s value as a mine before the EPA’s removal action
18 estimates the Property’s value based upon the 20 million plus tons of proven ore reserves plus 5
19 million tons of probable reserves and the assay of minerals and the prices of Gold, Silver, Cop-
20 per, Zinc, Iron, Aluminum, Magnesium, Manganese, Vanadium, Titanium, Cobalt, Nickel, and
21 other minerals and by-products at close to \$18,400,000,000 (billion). Assuming the EPA esti-
22 mate of mining and remediation at \$1.400,000,000 (billion) is correct, The fair market value
23 would be \$17,000,000,000 (billion). Add to that a fair market value of the land surface (4,400
24 acres) for the future complete development (1 billion), yields a gross takings value of
25 \$18,000,000,000 (billion) of Just Compensation Valuation

26 **16.** Iron Mountain Mines calculates the fair market value of mining on the Property prior to
27 the taking by determining the present value of the future income stream of minerals that could
28 have mined on the Property absent the taking over a twenty year period. This methodology re-

1 quired an estimate of the annual production of minerals on the Property to determine the pre-
2 sent value of the future royalty income stream.

3 **17.** Iron Mountain Mines, Inc., T.W. Arman and John Hutchens assume that solution mining
4 would have averaged annual production of 500,000 tons of mineral products and a royalty of
5 \$100,000,000 (million) per year. Multiplying projected annual production by this royalty rate,
6 Iron Mountain Mines, Inc. and T.W. Arman projected annual royalties from January 1989 until
7 January 2009 of \$2,000,000,000.

8 **18.** Iron Mountain Mines therefore believe the present value of lost mining opportunity on the
9 Property as of January 1, 1989, to the present at \$2,000,000,000.

10 **19.** It is well established that “comparable sales are considered by the courts to be the best evi-
11 dence of fair market value, and thus preferable to other forms of valuation.” *Stearns Co., Ltd. v.*
12 *United States*, 53 Fed. Cl. 446, 458 (2002) (citing *United States v. 50 Acres of Land*, 469 U.S.
13 24 (1984)); *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1 (1984). Other valuation meth-
14 ods may prove useful, but a comparable sales methodology is a generally superior indicator of
15 value if an active real estate market existed in the vicinity of the subject property prior to the
16 taking. See *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 35 (1999) (citing *Whit-*
17 *ney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, affirmed 926 F.2d 1169 (Fed. Cir.), cert. de-
18 nied, 502 U.S. 952 (1991)).

19 **20.** Here, Iron Mountain Mines valued the Property’s worth for mining since no comparable
20 comparison was or is available, by analyzing the Property’s pre-taking future income stream.

21 **21.** Iron Mountain Mines claims that future income stream analysis is appropriate here be-
22 cause the valuation of mineral interests is preferably done by determining the present value of a
23 future income stream. Iron Mountain Mines support this view by arguing that the federal gov-
24 ernment, in its Uniform Appraisal Standards for Federal Land Acquisitions, states that,
25 “[p]roperty having a highest and best use for mineral production may be appraised utilizing an
26 income approach when comparable sales are lacking.” Uniform Appraisal Standards at 23-24
27 (internal citations omitted). Iron Mountain Mines further points to *Whitney Benefits, Inc. v.*
28 *United States*, in which the Federal Circuit approved of the use of future income stream analy-

1 sis, as support for the relevance of future income stream analysis in the present case. See 962
2 F.2d 1169 (Fed. Cir. 1991).

3 **22.** Deprived owner Iron Mountain Mines, Inc. is entitled to interest on just compensation
4 awarded pursuant to Fifth Amendment takings. *Stearns Co., Ltd, v. United States*, 53 Fed. Cl.
5 446, 466 (2002) (citing *Kirby Forest Indus. v. United States*, 467 U.S. 1 (1984)). Thus, an
6 award to Iron Mountain Mines, with compounded prejudgment interest from the date of the
7 taking until the date of the judgment is proper. See *Id.* (citing *United States v. Thayer-West*
8 *Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Miller v. United States*, 223 Ct. Cl. 352, 360 (1980)).
9 We date the taking as having actually commenced on January 1st, 1989, as the first day of the
10 production for the solution mining plan, for the calculation of pre-judgment interest. Iron
11 Mountain Mines also uses this date because it marks the Courts approval of the physical intru-
12 sion from which all damages in this matter arise. Interest computation will be based upon the
13 Contracts Disputes Act, 41 U.S.C. §§ 601-13 (1982). See *Jones v. United States*, 3 Cl. Ct. 4, 7
14 (1983). Iron Mountain Mines further seeks awards of attorney fees and costs incurred as a re-
15 sult of litigation to Iron Mountain Mines, Inc. T.W. Arman and John F. Hutchens under the
16 Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U.S.C.
17 § 4601 et seq. (1995 & 2002 Supp.).

18 **23.** Iron Mountain Mines, Inc., T.W. Arman and John F. Hutchens also seek compensation for
19 stigmatic injuries. Iron Mountain Mines, Inc. et al have been unfairly blamed for the endan-
20 germent and possible extinction of salmon and trout in the Sacramento River, a crime of infamy
21 if ever there was one, notwithstanding that there is no evidence that any fish have been killed
22 in the affected reaches of the Sacramento River since at least 1969, seven years before T.W.
23 Arman. purchased the property, or that T.W. Arman and Iron Mountain Mines, Inc. did not ac-
24 tively mine the massive sulfide ores found to be the source of the minerals passively migrating
25 from the property and alleged to pose an “imminent and substantial endangerment” to the envi-
26 ronment, and in disregard of contributory factors, particularly the United States construction of
27 dams that destroyed the habitat of the salmon and trout necessary for their reproduction, and
28

1 without consideration of other factors affecting the fishes demise, such as urban run-off, un-
2 treated sewage, ranching, farming, global warming, and other forms of habitat destruction.

3 **24.** When the EPA first conducted its remedial investigation of Iron Mountain Mines, it con-
4 sidered “Among the remedial action alternatives that could be implemented by the EPA, the
5 total removal of the source and sediments in the receiving waters (Alternative CA-10) is con-
6 sidered the only remedy for the Iron Mountain Mine site which is capable of meeting project
7 cleanup objectives and the full requirements of the Clean Water Act (CWA). This alternative
8 would effectively eliminate discharges from Iron Mountain and restore all tributaries to pristine
9 condition. This alternative was based on total removal of all the source of contamination and
10 disposing of them in a RCRA-approved facility.”

11 **25.** Without digressing to consider the notion of disposing of millions of tons of valuable ore
12 and mining by-products, it will suffice to observe that having recognized that there was a viable
13 alternative that was fully protective of human health and the environment, the EPA elected to
14 proceed with a remedial action (removal) that was less than fully protective of human health
15 and the environment, and then and thereafter disregarded its duty and responsibilities to imple-
16 ment a remedial action that was fully protective of health and environment.

17 **26.** For these reasons Iron Mountain Mines, Inc. et al dispute the United States lawful authority
18 to conduct these CERCLA remedial actions (removal) and demand the return of the property
19 and restoration of rights, privileges, and immunities of patent title to the possession and enjoy-
20 ment of T.W. Arman and John F. Hutchens.

21 **27.** Because the United States has no actual justification for its actions, and the only remedy
22 found to be fully protective of human health and the environment is to finish the mining begun
23 150 years ago, which is what Iron Mountain Mines, Inc. was doing before the EPA interfered,
24 the EPA should be found liable for the taking of private property for the public benefit requir-
25 ing the payment of just compensation under the 5th amendment of the constitution.

26 **28.** T.W. Arman and Iron Mountain Mines, Inc. used “due care” in the purchase of the prop-
27 erty, because copper, zinc, and cadmium were not listed as “hazardous substances” under the
28 relevant provisions of the Clean Water Act (CWA) in 1976 when the property was purchased

1 **CONCLUSION of the extent of the TAKINGS**

2 Iron Mountain Mines, Inc., T.W. Arman and John Hutchens claim that the EPA’s remedial
3 (removal) action constituted a taking of the Iron Mountain Mines, Inc. property warranting just
4 compensation to Iron Mountain Mines, Inc. under the Fifth Amendment of the constitution of
5 the United States for a partial takings with actual damages of lost mining opportunities to date
6 of \$2,000,000,000 (billion) plus stigmatic injuries of \$5,000,000,000 (billion), and property and
7 other incidental damages of \$74,500,000 (million). We therefore seek an award to Iron Moun-
8 tain Mines, Inc. of \$7,074,500,000 (billion) in just compensation, with detinue sur bailment,
9 reversion, plus interest, attorney’s fees, and costs. In the alternative that the United States ac-
10 tion is a condemnation that will forever prevent the lawful mining of Iron Mountain Mines, ,
11 T.W. Arman and John Hutchens seek an award to Iron Mountain Mines, Inc. for the complete
12 taking of private property for the public benefit requiring the payment of of \$18,000,000,000
13 (billion) just compensation. Plaintiff’s “Two Miners” mutual interests are undivided interests.

14 Wherefore, the United States is liable for the taking of private property requiring the pay-
15 ment of just compensation under the 5th amendment of the constitution of the United States, we
16 demand judgment against the United States of seven billion, seventy four million, and five
17 hundred thousand dollars for the partial takings and stigmatic injury, or eighteen billion dollars
18 for the complete takings of the Iron Mountain Mines, Inc. properties.

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20 May 26, 2009 Signature: _____

21 /s/ John F. Hutchens, *pro se; sui juris*; Tenant in-Chief, Warden of the Forest,
22 Warden of the Stannaries, Iron Mountain Mines, Inc.

23
24 May 26, 2009 Signature: _____

25 /s/ T.W. Arman, *pro se*; sole stockholder of Iron Mountain Mines, Inc.
26 President, Chairman, and Chief Executive Officer, Iron Mountain Mines, Inc.