CA80 Atlas Asbestos Mine

Background

Prior to even reviewing the facts and background information relative to the Bureau of Land Management's (BLM) involvement at the Atlas Mine Site, it is critical to understand the lack of statutory authority BLM had to regulate activities involving mining claims located under the General Mining Laws of 1872. The following is a synopsis of the history of land acquisition in California and the effects of the 1872 Mining Laws.

History of United States land acquisition in California and overview of federal Mining Laws.[1] The Treaty of Guadalupe Hidalgo was signed in 1848 at the end of the Mexican War. This resulted in the cession of California from Mexico and incorporation of California into the public domain of the United States. Unappropriated and unreserved lands in the public domain were administered by the General Land Office within the Department of the Interior. The General Land Office presided over the homesteading of much of this land but a portion still remains in public ownership today.

These public lands are now managed by the Bureau of Land Management which was created by the joining of the General Land Office and the Grazing Service in 1946. Under the General Mining Laws of May 10, 1872 (30 U.S.C. §§ 22-54), all unappropriated public lands are open to claim and location by citizens of the United States and those expressing interest in becoming citizens. There is a nominal charge for filing a claim and the only action required of a miner to hold a claim is to file an annual statement indicating one hundred dollars worth of labor and, or improvements were expended toward improving or developing the claim.

The 1872 mining laws gave miners the statutory right to enter, prospect, and mine minerals without requiring any approval from the United States. All actions considered necessary to mine the minerals were within the miners rights under the law. The federal regulations implementing the General Mining Laws of 1872 (See, i.e., 43 CFR Subpart 3400 (1965), attachment 1) generally, regulated only the manner in which lode or placer claims were located or patented, prescribed annual assessment requirements or settled claim disputes.

Federal regulation did not even require mining claimants to file location notices or other documents with the federal government. Instead, all location notices and other claim related documents were filed with the state, usually in the county in which the claim was geographically situated. State laws (as well as local custom)

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[1]Historical information on U.S. land ownership and mining law excerpted in part from letter dated May 1, 1987, from Robert D. Rheinor, District Manager, BLM to Keith A. Takata, Superfund Program Branch Chief, EPA Region IX.

to the extent they were not inconsistent with federal law, regulated mining activities located on federal lands (30 U.S.C. § 26).

Federally appointed "mineral surveyors" were required to perform surveys of mine sites incident to patent applications (43 CFR Subpart 3441, 30 U.S.C. § 39). However, this seems to have been the extent of permissible federal oversight of mining activities aside from the resolution of claim disputes. Neither the statute nor its corresponding federal regulations provided the federal government with any ability to interfere with the mining process, as long as compliance with federal and state laws occurred. Since there were no laws governing mining operations, BLM had no authority to regulate the manner in which validly located claims actually operated.

In fact, 30 U.S.C. § 26, a provision of the 1872 Mining Laws states:

> The locators of all mining locations . . . situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States and with the State, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes and ledges . . . . (emphasis added)

The nature of the interest secured by locators of valid "perfected"[2] mining claims is held to be tantamount to a fee

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[2]Consistent with an opinion issued by the Associate Solicitor, Energy and Resources, dated September 25, 1978, entitled "Effect of Wild and Scenic Rivers Act (16 U.S.C. §§ 1271-1287) on Mineral Development Under the Mining Laws", the "perfection" of a mining claim requires the discovery of a valuable mineral deposit, and once perfected, a claim for all practical purposes is good "as though secured by patent". In reliance on this principle, the opinion quoted Wilbur v. Krushnic, 280 U.S. 306, 316-317 (1930), which held:

> The rule is established by enumerable decisions of this court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession . . . The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory

interest regardless of whether the claim is patented, Dahl v. Raunheim Mont., 132 U.S. 260, 262 (1989). (A valid location, though unpatented, is a grant, and the estate enjoyed is in the nature of an estate in fee, which consists of an appropriation of land by the locator, to the exclusion of all others).

valid possessory title has been held to be good even as against the United States. Possession by a mining claimant under a valid discovery can be maintained against the United States for mining purposes only, U.S. v. Osterlund, (D.C.Colo. 1981), 505 F.Supp. 165, aff'd. 671 F.2d 1267. See also, U.S. v. Barrows, (C.A.Cal 1968), 404 F.2d 749, cert. den. 89 S.Ct.1468, Right of operators of sand and gravel business on Government property to their claim, unless and until the claim was finally declared void, was a property right, so that until a final determination was made as to the claim's validity, the Government, short of a condemnation proceeding, would probably not be entitled to enter upon the claim or to require defendants to move their plant.

In view of the statutory mandate and judicial interpretations which decidedly view the perfected validly located mine claim as commensurate with a fee interest, it becomes clearer as to why more intrusive mining regulations were not effected. However, it is also true that mining operations until nearly the middle part of the twentieth century, were probably not as great in number or as capable of irreparably damaging the land.

In part because of a need by the United States to determine the extent of the public lands dedicated to mining and to gain some control over mining operations which in certain instances, caused significant degradation of the land and its resources, Congress passed the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 et seq. Sections 302, 303, 601 and 603 of FLPMA required the Secretary of the Interior to take action to prevent unnecessary or undue degradation of the public lands.

To implement this part of FLPMA, the Secretary issued proposed "3809 regulations" on December 6, 1976 (41 FR 53428) which were reproposed on March 30, 1980 (45 FR 13959). The final 3809 regulations which were made effective January 1, 1981 (45 FR 78902) (43 CFR 3809), apply to surface disturbances made in connection with mining operations conducted under the Mining Law, as amended.

The 3809 regulations provide BLM with the ability to monitor mining operations and ensure that the operations are conducted in compliance with federal and state law, a manner which will not The 3809 regulations require a Plan of Operations to be submitted to BLM if surface disturbance exceeds five acres for a single

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right, for all practical purposes, is good as though secured by patent.

calendar year. The plan identifies the operators, describes the location, access routes, types of equipment used, and nature of the operation. The plan must also describe measures to be taken to prevent unnecessary or undue degradation and measures to reclaim disturbed areas. A bond may be required to ensure compliance with the Plan of Operations and the regulations. A Plan of Operation can be denied if unnecessary or undue degradation would occur which cannot be mitigated.

Site History. The Atlas Mine Operable Unit (OU) of the Atlas Mine Superfund Site[1] occupies approximately 450 acres of land in the southern Diablo Mountains in western Fresno County, California. The United States owns all but a 10 acre patented parcel of the OU Site. The Atlas Mine OU lies within a 48 square mile serpentenite rock formation (the New Idria Formation) containing large amounts of naturally occurring chrysotile asbestos. The Atlas Mine OU is located within the Clear Creek Management Area, a 55 square mile recreational area owned by the United States and administered by the Bureau of Land Management. Approximately 36 square miles of the New Idria Formation lies within the Clear Creek Management Area (See, area map at attachment 2).

In the mid-1950's, investigation by the California Division of Mines and Geology determined that the serpentine matrix in the southeastern third of the New Idria Formation contained asbestos ore which could be mined and milled to produce a marketable short-fiber asbestos product. From 1959 to 1962, the Coalinga and Los Gatos Creek areas experienced an intensive land rush for asbestos mining claims.

In 1961, the Atlas Minerals Division of the Atlas Corporation acquired title to a large block of claims, including claims for the Atlas Mine OU Site.[2] Construction of an asbestos mill capable of producing 15,000 tons of fiber per year was completed by Atlas Corp. at the mine site in 1963. A five acre parcel underlying the mill site was patented to the Atlas Corp. in approximately 1967.[3] It is believed that Atlas Corp. conducted mining and milling operations at the site until 1967.

2 Parcels ?

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[1] The Atlas Mine Superfund Site consists of four geographically distinct areas: (1) the Atlas Mine Site; (2) the Clear Creek Management Area; (3) the Arroyo Pasajero Ponding Basin; and a 107 acre site within the City of Coalinga, California.

[2] Approximately 317 mine claims were located within the Atlas Mine OU between 1956 and 1962.

[3] An additional five acre parcel of land adjacent to the mill site was patented to ___ in 19__.

The Vinnell Mining and Minerals Corporation, in a joint venture with California Minerals Corporation, owned and operated the mining and milling operation from 1967 to 1974, when it was sold to Wheeler Properties.[4] The joint venture operated under the name of the Atlas Asbestos Company. Wheeler Properties, also doing business as the Atlas Asbestos Company, operated the facility until approximately 1980, and filed for bankruptcy shortly thereafter.

The mining activity included digging the asbestos ore out of surface pits and then milling the ore. The mill tailings were bull-dozed into piles near the mill building. According to EPA figures, approximately 3 million cubic yards of asbestos ore and asbestos tailings remain at the Atlas Mine OU. The mine site currently consists of three open pit asbestos mine surfaces, stockpiles of asbestos waste material, an abandoned mill building, and a settling pond.

During the years the Atlas mining and milling operations were active, BLM's activities are believed to have been restricted to inspection of the site incident to the applications for patenting of the two five acre sites. There is no indication that BLM entered the site during this period for other purposes; and, consistent with the constraints of the 1872 Mining Laws, such entry or involvement would have been limited to settling a claim dispute or securing a patent.

It should be noted that BLM would not necessarily have afforded an asbestos mine any greater scrutiny than any other type of mining operation. BLM would have been focusing on the operations and reclamtion activities of all mine sites. Other federal and state agencies (i.e. OSHA, EPA, etc.) were tasked with enforcing worker safety or environmental laws at mine sites (to the extent these laws were in existence while the Mine was operational). BLM did not gain the ability to require compliance with environmental laws until implementation of FLPMA. This compliance was achieved through review and approval of Plans of Operations. However, BLM did not obtain this authority until after the Atlas Mine ceased operation.

BLM location records for the Atlas Mine Site do not indicate when the claims for the site were abandoned or relinquished. As

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[4]Historical information concerning the names and dates of ownership of mining claims at the Atlas Site is derived primarily from EPA document sources. BLM location records maintained in the California State Office do not document location of the claims by Atlas Corp. or subsequent transfer of ownership to Vinnell and Wheeler. As discussed, infra, this is because prior to 1979, location records were filed with a state and not with BLM.

discussed infra, BLM took actions as part of its land management responsibilities for the Clear Creek Recreational Area to post the mine site as closed to vehicular traffic as early as 1981, and to post asbestos hazard warning signs within the recreation area in 1976.

EPA's involvement at the Atlas Mine Site appear to derive from concern surrounding detection of asbestos in the California Aqueduct, a source of drinking water for southern California.[7] In 1980, the Metropolitan Water District of Southern California detected elevated levels of asbestos in water samples from the California Aqueduct near Los Angeles. Extensive sampling by the State "suggested" that the Atlas Mine was one probable source of asbestos in the California Aqueduct.

According to EPA data, in October of 1980, the Central Valley Regional Water Quality Control Board (CVRWQCB) and the California Department of Health Services (DHS) inspected the Atlas Mine to determine if waste discharges from the site were in compliance with state regulations. The CVRWQCB apparently concluded that additional corrective measures should be taken to prevent mine and mill-generated asbestos from entering the drainage basin. BLM was never made aware of any such inspection nor provided with documentation of the findings.

A CVRWQCB Inspection Report for the White Creek Watershed dated 13 May 1983 (attachment 3), noted that " . . . a large percent of sediment load is generated by the erosion of the stream channels under high flows". The report also noted that:

> "The mine [Atlas] and mill facilities are located at the top of two drainage areas . . . [covering] . . . approximately 1,940 acres. The analysis indicates that the asbestos runoff from this area is no more significant than from the other two areas covering 2,560 acres. The analysis of the samples indicates the runoff water and sediment from all four drainage areas carries significant amounts of asbestos. Although there were significant

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[7] EPA historical data (Record of Decision, p. 3), indicates that in 1976 and 1980, Wheeler Properties/Atlas Asbestos Company received two notices of violation (NOV) from the California Air Resources Board (CARB) for violation of the National Emissions Standards for Hazardous Air Pollutants (NESHAPS) resulting from asbestos emissions emanating from the milling operation located on privately owned patented land. BLM never received notice (either actual or constructive) of violations of federal or state environmental laws occurring on unpatented portions of the Atlas OU.

amounts of asbestos from the watersheds containing the abandoned mines, control of the point sources will not eliminate the problem. (emphasis added)

Nevertheless, on June 14, 1983, EPA performed an assessment of the Atlas Site using the Hazard Ranking System. The Atlas Site was approved for listing on the National Priority List in September of 1984. It appears that EPA's initial attention was drawn to the Atlas Site primarily because of the controversy surrounding detection of asbestos in the California aqueduct rather than because of concern over air emissions emanating from the Site.

BLM became aware of EPA's proposed listing of the Atlas Site through a newspaper article. As early as September 30, 1983, before the Atlas Site was even listed on the NPL, BLM began to take steps internally for assessment of the conditions at the Atlas Mine Site, including remedial action if warranted (attachment 4). A letter dated October 17, 1983, from the California State Director to BLM's Director apprising him of a scheduled meeting with EPA concering the Atlas Site states: " . . . The intent of our meeting will be to assure BLM's involvement in site specific actions now underway, or that are proposed." (attachment 5)

After BLM's initial meeting with EPA, Region IX, BLM sent a letter to EPA Headquarters on October 31, 1983, protesting inclusion of the Atlas Mine Site on the NPL (attachment 6). The letter cited the naturally occurring geologic conditions as the major contributing factor causing asbestos releases in the areas. The letter also noted the " . . . intensive hazard awareness program . . . " in place in the Clear Creek Recreation Area, including posted notices and warnings from BLM patrol personnel. Finally, the letter stated BLM's planned meeting with EPA's contractor preparing the Remedial Action Management Plan (RAMP) for the Site to provide " . . . any information . . . including appropriate sedimentation studies".

BLM continued involvement internally (memo noting briefing by BLM of DOI personnel on Atlas issue, (attachment 7)), as well as assisting EPA in its Site characterization efforts (BLM comments on EPA RAMP for Atlas Site, dated May 25, 1984, attachment 8)). BLM and EPA met on November 29, 1984 to discuss expanding the scope of the Atlas Site to address the regional asbestos problem, based on EPA's preliminary determination that "the Atlas site was not significantly contributing to the 'bigger' problem of sedimentation in the area" (attachment 9).

Cooperation between EPA and BLM continued despite the fact that in early 1985, BLM declined participation in a federal/state task force which would have studied the regional asbestos problem. EPA's Director of Toxics and Waste Management accepted BLM's comments on its Remedial Investigation/Feasibility Study (RI/FS) workplan, and stated "I hope that EPA, the Bureau of Reclamation

(USBR) and the Department of Water Resources (DWR) can rely on your agency for technical assistance and cooperation" (attachment 10).

BLM continued providing technical assistance to EPA through review of EPA documents. BLM has incurred approximately $160,000 in costs as a result of contracting for review of Atlas Superfund Site documents. In addition, BLM estimated its total costs through mid-1990 in support of the Atlas Superfund Site at $140,000 (attachment 11). Additional costs have been incurred in the interim.

EPA commenced the RI/FS for the Site. BLM continued to provide assistance as requested by EPA. The RI/FS process can take 2-3 years to complete. A letter from Ed Hastey, BLM California State Director to Deputy Regional Administrator, EPA Region IX, John Wise, dated September 9, 1987, documented a meeting which had been held between the two agencies in which an interagency agreement had been discussed (attachment 12).

On October 13, 1987 EPA sent a "notice letter" to BLM informing the agency that BLM was a potentially responsible party (PRP) at the Site on the basis of its ownership of the Site. EPA "invited" BLM to assist EPA in conducting the RI/FS and in performing interim corrective measures at the site, such as fencing, signing and patrolling the site. EPA also included a draft interagency agreement for BLM's consideration (attachment 13).

Finally, EPA's letter contained the statement that "The entire process [RI/FS] may take several years, so if an immediate health threat is discovered, emergency response actions can also be taken to eliminate or minimize the threat". At this point in time, BLM was committed to assisting EPA in its investigation and potentially, its remediation of the Atlas Site. BLM however, had serious questions concerning what its legal responsibilities were under CERCLA. BLM approached remediation of the Atlas Site from a mine reclamation perspective, believing that the site should be reclaimed to a level consistent with sound mining practices.

BLM also believed that consistent with the statement made in EPA's letter if any immediate health threat were to be identified it would be done by EPA. It was beyond BLM's expertise to have bridled it with the responsibility for making such a complex judgment. Arguably, BLM was not tasked with the regulatory responsibility for making this call, even if it had been designated as the lead agency at the Site, which it had not.

In 1988, BLM in accordance with the interim corrective measures mentioned in its October 13, 1987 letter, fenced, signed and erected barriers around access points to the Atlas Mine site. BLM's contract cost for this project was approximately $200,00.

In late 1987, BLM expressed its concern to EPA about the liability issues it perceived in entering into an interagency agreement as

outlined by EPA (attachment 14). EPA apparently refused to allow BLM to assume responsibility for the RI/FS preparation without an IAG in place. BLM instead, proposed a "Pre-120 IAG" between BLM and EPA which would allow BLM to conduct the RI/FS (attachments 15 and 16). EPA declined, stating that until BLM's position as a PRP was resolved it would not be appropriate for EPA to enter into an interim agreement (attachment 17).

While no CERCLA § 120 agreement was entered into by BLM and EPA, BLM has continued to support EPA's efforts at the Atlas Site (attachment 18). The Environmental Protection Agency (EPA), Region IX, signed a Record of Decision (ROD) for the Atlas Mine Operable Unit (OU) of the Atlas Mine Superfund Site on February 14, 1991. By letter dated March 29, 1991 (attachment 19), EPA informed BLM that as a potentially responsible party (PRP) at the OU Site, BLM was expected to enter into a CERCLA § 120 federal facility agreement for remediation of a portion of or potentially all of the OU Site.

BLM responded to EPA by letter dated June 11, 1991 (attachment 20), which stated the Department of the Interior's position that BLM occupies the position of an innocent landowner at the Atlas Mine OU, and as such its liability is limited in accordance with § 107 (b) of CERCLA.

The letter further stated that Interior believes that a CERCLA § 120 federal facility agreement is inappropriate in this instance. However, BLM did agree to perform certain tasks outlined in the OU ROD not on the basis of any CERCLA liability, but because of its stewardship role for the public lands and its corresponding desire to see this abandoned mine site reclaimed.

On May 30, 1991, Atlas and Vinnell filed suit against Interior under CERCLA for contribution, cost recovery, declaratory judgment as well as other relief stemming from the Atlas Mine OU.

The minimum 120-day moratorium period under CERCLA § 122 for negotiation of voluntary agreements to remediate the site ended on August 12, 1991. EPA is in the process of finalizing negotiations with all PRPs. If agreemnt cannot be reached EPA will issue CERCLA § 106 orders to two potentially responsible parties at the Site, Atlas Corporation and Vinnell Mining and Minerals Corporation.

An additional issue concerns potential natural resource damages which may have occurred to the Site. While BLM may have lacked the ability to require Site reclamation under the 1872 Mining Laws, the unreclaimed Atlas Site when viewed as possible natural resource damage under CERCLA. mining lawsBLM as the administrators of the federal land underlying the Atlas Mine Site are natural resource trustees pursuant to Section 122

<u>BLM management actions within the Clear Creek Recreational Area.</u>

Within the Clear Creek Recreational Area in which the Atlas Mine OU is located, BLM took action in 1976 - 1977 to post signs at the entrance to the recreational area warning that soils in the area may contain naturally occurring asbestos. In 1979, the signs were replaced with a stronger warning that soils, dust and water in the area contained asbestos which could be hazardous to health. The initial signing coincided with BLM's initiation of a permit system for organized recreational (off-road vehicle) use. An opinion from the Regional Solicitor's Office dated January 18, 1980, stated that if BLM were to impose fees for the use of the recreational area that it may also have an obligation to warn users of potential asbestos hazards associated with such use.

In an effort to determine the effects of exposure to naturally occurring asbestos by off-road vehicle users in the Clear Creek Recreational Area, BLM, in 1978, contracted with the University of California at Berkeley to assess the potential exposure. Two studies conducted by Berkeley concluded that the type and length of fibers occurring in the Clear Creek Recreational were of the type believed to cause asbestos related diseases. The studies used the then existing OSHA occupational work place standard as a basis for determining permissible exposure levels.

The studies show that the permissible exposure limits based on a 40-hour work week could be exceeded depending upon the level and type of activity performed. However, the average working lifetime permissible exposure limit would not be exceeded. It should be noted that outdoor recreational permissible exposure standards did/do not exist, and this may have some bearing on the ability to accurately calculate exposure risk. It is equally true that the OSHA work place exposure standards have been ratcheted down significantly since the Berkeley studies were performed.

BLM's decision concerning off-road vehicle use in the Clear Creek Management Area as reflected in its Final Environmental Assessment for Off-Road Vehicle Designation for the Clear Creek Recreation Area (1981), was generally, to allow off-road vehicle use in designated areas. A large factor in this decision was that the off-road vehicle use occurs primarily during the wet months when asbestos exposure is lessened.

BLM prohibited vehicle access to the Atlas Mine Site; however, a road leading through the mine site was left open. This road was left open primarily to allow right-of-way holders access at communications sites located beyond the Atlas Mine Site. All-weather access was not available through alternate means. In 1982, BLM also posted signs at the mine site stating that the area was closed to vehicles. While the mine site itself was not actually fenced to totally restrict access until 1988, BLM believes that the mine site was not used to any significant degree by off-road vehicle users. One of the reasons the site was fenced was to keep rock hounds and individuals curious about the abandoned mine and

mill site from exploring the site.

Discussion

To establish a prima facie case of liability under CERCLA Section 107 (a) it must be established that: (1) the party to be assessed response costs is a "person" within the covered class of CERCLA Section 101 (21); (2) the location of an alleged release or threatened release is a "facility" within the meaning of CERCLA Section 101 (9); (3) there is or has been a "release" or a threatened release" as defined by CERCLA Section 101(22), (4) of a "hazardous substance" within the meaning of CERCLA Section 101 (14) which has occurred from the facility; (5) causing the party maintaining the "response costs" including "removal and remedial action . . . . not inconsistent with the National Contingency Plan", in accordance with CERCLA Sections 101 (23), 101 (24), and 101 (25).

A further determination must be made under Section 107 (a) (1) the "person" "owns or operates" the facility, or has some other relationship to the hazardous substance and the site as set forth in CERCLA Sections 107 (a) (2) - (4). If undisputed facts establish each of these elements, then absent a finding that one of three narrow defenses contained in Section 107 (b) is applicable, liability attaches to such a "responsible party". New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985), and United States v. Conservation Chemical Company, 619 F. Supp. 162 (D.C. Mo. 1985).

Section 107 (b), the provision of CERCLA which addresses defenses to its liability, provides

> (b) there shall be no liability under section (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of a release of a hazardous substance and the damages resulting therefrom were caused solely by -
>
> (1) an act of God;
>
> (2) an act of War;
>
> (3) an act or omission of a third party other than an employee of the defendant, or other than one whose act or omission occurs in connection with a contractual relationship[pp, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the

> hazardous substances concerned, taking into consideration the characteristics of such hazardous substances 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.

As set forth, to successfully assert a defense under Section 107 (b) (3):

(1) the release or threat of release of a hazardous substance and the resulting damages must be caused solely by an act or omission of a third party;

(2) the third party's act or omission cannot occur in connection with a contractual relationship (either direct or indirect) with the defendant;

(3) the defendant must have exercised due care with respect to the hazardous substances; and

(4) the defendant must have taken precautions against the third party's foreseeable acts or omissions and the foreseeable consequences resulting therefrom.

In support of its assertion of a defense to liability under CERCLA Section 107 (b) (3), BLM sets forth the following analysis.

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JUN 11 1991

Mr. Dan Meer (H-6-2)
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Subject: Atlas Mine Superfund Site

Dear Mr. Meer:

This letter responds to a letter from Jerry Clifford, Deputy Director for Superfund, Hazardous Waste Management Division, Environmental Protection Agency (EPA), Region IX, to me, dated March 29, 1991. Mr. Clifford's letter states that the U.S. Department of the Interior (DOI), Bureau of Land Management (BLM), is required pursuant to Section 120 (e) (2) of CERCLA, to enter into an interagency agreement or Federal Facility Agreement (FFA) to perform the remedy selected for the Atlas Mine Operable Unit (OU) of the Atlas Mine Superfund Site.

EPA's letter further requests that by June 11, 1991, BLM provide EPA with "A statement of BLM's willingness to conduct the remedial action that is consistent with the Record of Decision and the proposed FFA. . . . . " and also, that BLM provide a detailed response to the proposed FFA and the proposed Scope of Work. In accordance with this request, BLM provides the following response.

We believe that the "standard" FFA proposed by EPA to govern BLM's responsibility and future involvement at the Atlas Mine OU is inappropriate in this instance. It is our contention that BLM occupies the position of an "innocent landowner" at the Atlas Mine OU, and as such, its liability is limited in accordance with Section 107 (b) of CERCLA.

The premise for this position is as follows. Mining activities occurring at the Site (between 1961 and 1979) were conducted prior to the promulgation of the Federal Land Policy and Management Act (FLPMA), (43 U.S.C. § 1701 et seq.), and its implementing regulations (43 C.F.R. Part 3800). Under the 1872 Mining Law (30 U.S.C. § 22 et seq.), which was in effect during mining activities at the Site, BLM lacked a regulatory basis for limiting mining activity on validly located claims.

The 1872 Mining Law gave miners the statutory right to enter, prospect and mine minerals without requiring any approval from or providing any discretionary control to the United States. Nor did the United States derive any monetary payment or benefit in exchange for the extraction of minerals from the federal lands. It was only with the passage of FLPMA and its implementing regulations that BLM gained the authority to prevent undue and unnecessary degradation of the public lands. In sum, BLM neither contributed to the degradation of the Site, nor had the legal authority to control the activities of the mining claimants who did.

The FFA proposed by EPA would shift liability for remediation of the entire Atlas Site to BLM.[1] This proposal represents a drastic departure from the conclusions reached on this issue in meetings between EPA, DOI (Solicitor's Office), BLM, and the Department of Justice in 1988. The meetings, which were held to determine the roles and responsibilities of EPA and DOI-BLM during EPA's "fund-lead" management of the Atlas Site, resulted in an understanding that BLM was not, ipso facto, liable under CERCLA for remediation of abandoned mine sites located on the public lands.

In fact, this determination was consistent with the long-term cooperative effort which has existed between BLM and EPA at this Site since EPA's initial involvement in approximately 1983. To this extent, BLM has openly advocated to EPA its desire to have the mining claimants reclaim the Site in accordance with established mining practices.

It remains BLM's objective to see reclamation of the Atlas Mine Site performed by the mining claimants. BLM is prepared to perform certain tasks at the Site consistent with its continued presence as a federal land manager and a trustee for natural resources. Generally, these tasks focus on inspection of the remedial measures to be implemented at the Site by Atlas and Vinnell as set forth in the Atlas Mine OU ROD. A description of the tasks which BLM is prepared to accomplish is attached.

Further, if an interagency agreement between BLM and EPA is required pursuant to CERCLA § 120 (e) (2) at the Site, we believe that such a document should specifically reference those tasks

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[1]See, (e.g.), Section 3.1 (o) of EPA's proposed FFA which construes the term "Site" to include " . . . the 'federal facility' of the Atlas Mine Area OU . . . and the 'facility' as defined in CERCLA". Section 6.2 of the proposed FFA further provides that "The Department of the Interior, Bureau of Land Management ("BLM") agrees to undertake, seek adequate funding for, fully implement and report on the following tasks . . . . (b) implementation of the remedy selected in the Record of Decision ("ROD") for the Site signed February 14, 1991 . . . . " (emphasis added).

which BLM will perform, as well as expressly preclude BLM's liability for remediation of the entire Site.

Finally, on a related Site issue, BLM continues to take exception with EPA's inclusion of the entire Clear Creek Management Area (CCMA) within the Atlas Mine Superfund Site. The CCMA contains approximately 36 square miles of the New Idria Formation, a serpentine rock configuration containing large amounts of naturally occurring asbestos. The Atlas Mine OU overlays but a small portion of this naturally occurring formation. We believe that EPA's inclusion of the entire CCMA within the Site based on its determination that wind, water and vehicular traffic have transported asbestos from the mine site throughout the entire CCMA is not supported by its technical data for the Site. Accordingly, BLM insists that EPA delete the CCMA (except for the Atlas Mine OU) from the designated "Site" for the Atlas Mine Superfund Site.

BLM would welcome technical support from EPA in revising its management plan for the CCMA to minimize releases of airborne asbestos resulting from recreational uses. However, we do not believe that CERCLA provides EPA with the ability to control BLM's management activities in the CCMA absent data establishing a clear nexus between asbestos releases from the Atlas Mine OU and resulting contamination from this source within the entire CCMA.

Like EPA, we also look forward to continuing our cooperative effort with EPA to reclaim this Site. Our points of contact on this matter are Richard F. Johnson, Deputy State Director, Lands and Renewable Resources, FTS 460-4720, and Clementine Berger, Attorney, Office of the Regional Solicitor, FTS 460-4831.

Sincerely,

Ed Hastey

Edward L. Hastey
State Director

Enclosure

cc: Cy Jamison, Director, Bureau of Land Management

J. Steven Rogers, Attorney, U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section

John Wise, Deputy Regional Administrator, EPA, Region IX

ATLAS MINE NPL SITE
REMEDIAL ACTIONS TO BE IMPLEMENTED BY THE
BUREAU OF LAND MANAGEMENT

The Bureau of Land Management will implement the following remedial actions at the Atlas Mine Operable Unit.

* BLM will apply a dust suppressant to the portion of the access road crossing the mine site.

* BLM will provide routine inspection of all the remedial measures implemented by Atlas and Vinnell as required by the Atlas Mine Site Operable Unit ROD. BLM will report all apparent structural failures to EPA, or appropriate responsible party.

* BLM will patrol the mine site and adjacent area to assess public access problems and to monitor remedial features, including fences, warning signs, gates, and locks. BLM will provide technical assistance in designing any new structures or devices to restrict public access to the mine site.

* BLM will provide aerial photography of the mine site area every five years.

* BLM will administer a five-year revegetation pilot study at the mine site. This effort will be directed at the feasibility of revegetating the disturbed land areas with native flora. Costs associated for the materials (fertilizer, seed, seedlings, irrigation, etc.) and the development of a study design are the responsibility of Atlas and Vinnell.

* BLM will provide air, water, and meteorological monitoring at the mine site consistent with the Atlas Mine Site Operable Unit ROD.

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
CALIFORNIA STATE OFFICE
2800 COTTAGE WAY, ROOM E-2845
SACRAMENTO, CALIFORNIA 95825-1889

IN REPLY REFER TO:

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(CA-930)

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FYI

Mr. Dan Meer (H-6-2)
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

Subject: Atlas Mine Superfund Site

Dear Mr. Meer:

This letter responds to a letter from Jerry Clifford, Deputy Director for Superfund, Hazardous Waste Management Division, Environmental Protection Agency (EPA), Region IX, to me, dated March 29, 1991. Mr. Clifford's letter states that the U.S. Department of the Interior (DOI), Bureau of Land Management (BLM), is required pursuant to Section 120 (e) (2) of CERCLA, to enter into an interagency agreement or Federal Facility Agreement (FFA) to perform the remedy selected for the Atlas Mine Operable Unit (OU) of the Atlas Mine Superfund Site.

EPA's letter further requests that by June 11, 1991, BLM provide EPA with "A statement of BLM's willingness to conduct the remedial action that is consistent with the Record of Decision and the proposed FFA. . . . . " and also, that BLM provide a detailed response to the proposed FFA and the proposed Scope of Work. In accordance with this request, BLM provides the following response.

We believe that the "standard" FFA proposed by EPA to govern BLM's responsibility and future involvement at the Atlas Mine OU is inappropriate in this instance. It is our contention that BLM occupies the position of an "innocent landowner" at the Atlas Mine OU, and as such, its liability is limited in accordance with Section 107 (b) of CERCLA.

The premise for this position is as follows. Mining activities occurring at the Site (between 1961 and 1979) were conducted prior to the promulgation of the Federal Land Policy and Management Act (FLPMA), (43 U.S.C. § 1701 et seq.), and its implementing regulations (43 C.F.R. Part 3800). Under the 1872 Mining Law (30 U.S.C. § 22 et seq.), which was in effect during mining activities at the Site, BLM lacked a regulatory basis for limiting mining activity on validly located claims.

The 1872 Mining Law gave miners the statutory right to enter, prospect and mine minerals without requiring any approval from or providing any discretionary control to the United States. Nor did the United States derive any monetary payment or benefit in exchange for the extraction of minerals from the federal lands. It was only with the passage of FLPMA and its implementing regulations that BLM gained the authority to prevent undue and unnecessary degradation of the public lands. In sum, BLM neither contributed to the degradation of the Site, nor had the legal authority to control the activities of the mining claimants who did.

The FFA proposed by EPA would shift liability for remediation of the entire Atlas Site to BLM.[1] This proposal represents a drastic departure from the conclusions reached on this issue in meetings between EPA, DOI (Solicitor's Office), BLM, and the Department of Justice in 1988. The meetings, which were held to determine the roles and responsibilities of EPA and DOI-BLM during EPA's "fund-lead" management of the Atlas Site, resulted in an understanding that BLM was not, ipso facto, liable under CERCLA for remediation of abandoned mine sites located on the public lands.

In fact, this determination was consistent with the long-term cooperative effort which has existed between BLM and EPA at this Site since EPA's initial involvement in approximately 1983. To this extent, BLM has openly advocated to EPA its desire to have the mining claimants reclaim the Site in accordance with established mining practices.

It remains BLM's objective to see reclamation of the Atlas Mine Site performed by the mining claimants. BLM is prepared to perform certain tasks at the Site consistent with its continued presence as a federal land manager and a trustee for natural resources. Generally, these tasks focus on inspection of the remedial measures to be implemented at the Site by Atlas and Vinnell as set forth in the Atlas Mine OU ROD. A description of the tasks which BLM is prepared to accomplish is attached.

Further, if an interagency agreement between BLM and EPA is required pursuant to CERCLA § 120 (e) (2) at the Site, we believe that such a document should specifically reference those tasks

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[1]See, (e.g.), Section 3.1 (o) of EPA's proposed FFA which construes the term "Site" to include " . . . the 'federal facility' of the Atlas Mine Area OU . . . and the 'facility' as defined in CERCLA". Section 6.2 of the proposed FFA further provides that "The Department of the Interior, Bureau of Land Management ("BLM") agrees to undertake, seek adequate funding for, fully implement and report on the following tasks . . . . (b) implementation of the remedy selected in the Record of Decision ("ROD") for the Site signed February 14, 1991 . . . . " (emphasis added).

which BLM will perform, as well as expressly preclude BLM's liability for remediation of the entire Site.

Finally, on a related Site issue, BLM continues to take exception with EPA's inclusion of the entire Clear Creek Management Area (CCMA) within the Atlas Mine Superfund Site. The CCMA contains approximately 36 square miles of the New Idria Formation, a serpentine rock configuration containing large amounts of naturally occurring asbestos. The Atlas Mine OU overlays but a small portion of this naturally occurring formation. We believe that EPA's inclusion of the entire CCMA within the Site based on its determination that wind, water and vehicular traffic have transported asbestos from the mine site throughout the entire CCMA is not supported by its technical data for the Site. Accordingly, BLM insists that EPA delete the CCMA (except for the Atlas Mine OU) from the designated "Site" for the Atlas Mine Superfund Site.

BLM would welcome technical support from EPA in revising its management plan for the CCMA to minimize releases of airborne asbestos resulting from recreational uses. However, we do not believe that CERCLA provides EPA with the ability to control BLM's management activities in the CCMA absent data establishing a clear nexus between asbestos releases from the Atlas Mine OU and resulting contamination from this source within the entire CCMA.

Like EPA, we also look forward to continuing our cooperative effort with EPA to reclaim this Site. Our points of contact on this matter are Richard F. Johnson, Deputy State Director, Lands and Renewable Resources, FTS 460-4720, and Clementine Berger, Attorney, Office of the Regional Solicitor, FTS 460-4831.

Sincerely,

Ed Hastey

Edward L. Hastey
State Director

Enclosure

cc: Cy Jamison, Director, Bureau of Land Management

J. Steven Rogers, Attorney, U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section

John Wise, Deputy Regional Administrator, EPA, Region IX

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