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

UNITED STATES OF AMERICA, Plaintiff, v. IRON MOUNTAIN MINES, INC. and T.W. ARMAN, Defendants.	Civil No. S-91-0768 DFL/JFM (Consolidated for all purposes with Civil No. S-91-1167 DFL/JFM)
STATE OF CALIFORNIA, On behalf of the California Department of Toxic Substances Control and the California Regional Water Quality Control Board for the Central Valley Region, Plaintiff, v. IRON MOUNTAIN MINES, INC. and T.W. ARMAN, Defendants. AND RELATED COUNTER- AND THIRD-PARTY CLAIMS	OPPOSITION TO JOHN F. HUTCHENS', *PRO PER*, "NOTICE OF JOINDER" [Motion to Intervene] Date: Time: Courtroom No. 7 Hon. David F. Levi

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Exhibit L (March 14, 2008 Email, Hutchens to Corcoran, with attached draft "cross-complaint"

and "petition")

Exhibit M (March 16, 2008 Email, Hutchens to Corcoran, with attached signed "cross-complaint").

Exhibit N (Docket No. 48, July 26, 2007 Order entered in *John F. Hutchens v. Alameda County Social Services Agency*, N.D. Cal. Case No. C-06-6870 SBA)

OPPOSITION OF UNITED STATES TO "NOTICE OF JOINDER" AND MOTION TO INTERVENE

The United States files this opposition to John F. Hutchens' March 10, 2008 *pro per* filing of a two paragraph "Notice of Joinder."[1/] One may not unilaterally join a case, as Mr. Hutchens purports to do. The United States treats his "Notice" as a motion to intervene.[2/]

As a motion to intervene, Mr. Hutchens' "Notice" fails to meet any of the criteria for intervention under Federal Rule of Civil Procedure 24(a)(2) and Section 113(i) of CERCLA, 42 U.S.C. § 9613(i), fails to meet the procedural requirements of Fed.R.Civ.P 24(c), and fails to comply with this Court's Local Rules. Furthermore, Mr. Hutchens' participation in this case would contribute nothing other than confusion and delay. For all these reasons, this Court should deny his request to participate, be it by intervention or joinder, of right or permissively.

I. BACKGROUND

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, Ted 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 those same parties and the matters were consolidated. This is an action to recover the

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[1/] The plaintiff State Agencies, the California Department of Toxic Substances Control and the Central Valley Regional Water Quality Control Board, join in this Opposition.

Mr. Hutchens also filed a request for leave to utilize Electron Case Filing. The plaintiffs takes no position on the ECF request.

[2/] The criteria for intervention and joinder are similar. *Compare* Fed.R.Civ.P. 19 and 20 *with* Fed.R.Civ.P. 24. Mr. Hutchens does not state whether he seeks to intervene or join as of right or permissively.

costs of cleaning up one of the largest and most complex federal superfund sites in the country, 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-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, the United States and the State Agencies moved for partial summary judgment on the liability of Arman and IMMI and, on October 1, 2002, this Court entered partial summary judgment against them. The remaining issue in this case is the amount of past response costs for which Arman and IMMI are liable.

Following entry of partial summary judgment, the remaining parties participated in unsuccessful settlement negotiations overseen by Magistate-Judge Moulds. No accord being reached, the plaintiffs requested a status conference with the Court and the parties submitted a joint status conference statement. That request is pending.

In late January of 2008, Mr. John Hutchens began communicating with the plaintiffs regarding this case and his alleged joint venture with the defendants. Defendant Arman has evidently executed a "power of attorney" to Mr. Hutchens. The scope of the power of attorney is unclear. Mr. Hutchens is not an attorney at law.

II. REQUIREMENTS FOR INTERVENTION

Federal Rule of Civil Procedure 24 governs intervention of right.

> On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed.R.Civ.P. 24(a)(2). Rule 24 also specifies that:

> A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Fed.R.Civ.P. 24(c).

CERCLA also allows intervention under certain circumstances. The Ninth Circuit and other courts have held that the same standards apply to intervention under Rule 24(a)(2) and under Section 113(i) of CERCLA, 42 U.S.C. § 9613(i). *See, e.g., California Department of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1118-1119 (9th Cir. 2002).

> Under both provisions, the party seeking intervention must satisfy a four part test:
> (1) the party's motion must be timely; (2) the party must assert an interest relating to the property or transaction which is the subject of the action; (3) the party must be so situated that without intervention the disposition of the action, may, as a practical matter, impair or impede its ability to protect its interest; and (4) the party's interest must not be adequately represented by other parties.

United States v. Acorn Engineering Co., 221 F.R.D. 530, 533 (C.D. Cal. 2004) (citations omitted). *See also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (same four criteria); *Cal. DTSC*, 309 F.3d at 1119 (same four criteria). Under Rule 24(a)(2), the party seeking to intervene bears the burden of showing all the requirements for intervention have been met. Under CERCLA section 113(i), the burden of showing the party's interest is not adequately represented by other parties shifts to the government. *See Alisal Water Corp.*, 370 F.3d at 919; *Cal. DTSC*, 309 F.3d at 1119; *Acorn Eng.*, 221 F.R.D. at 533. Mr. Hutchens' motion meets none of these four requirements, nor does it meet the additional requirements of Fed. R.Civ.P. 24(c) or of this Court's Local Rules.

III. MR. HUTCHENS' MOTION IS UNTIMELY

In *Cal. DTSC*, the Ninth Circuit upheld denial of a motion to intervene on the grounds that the motion was untimely. The Ninth Circuit identified three factors to be evaluated to determine whether a motion to intervene is timely, two of which are relevant to Mr. Hutchens' motion: (1) the stage of the proceedings; and (2) the prejudice to the other parties. *Cal. DTSC*, 309 F.3d at 1119 (the third factor is the reason for and length of the delay).

In *Cal. DTSC*, the motion to intervene was filed six years after litigation commenced and after the parties had settled, albeit before entry of a consent decree. The Ninth Circuit affirmed the District Court's ruling that the motion to intervene was untimely. *See Cal. DTSC*, 309 F.3d at 1119-20. In this case, Mr. Hutchens has filed his motion seventeen years after the litigation commenced, 12 years after the close of discovery in the first phase of this case, over seven years *after* entry of a consent decree settling the case between the primary parties, and over six years after this Court entered summary judgment on liability against the remaining defendants Arman and IMMI.

Mr. Hutchens' participation presents a number of sources of potential prejudice to the plaintiffs. If he seeks to reopen any issues or discovery, the plaintiffs will be subjected to additional litigation costs and the costs associated with further delay in reimbursing EPA's and the State Agencies' recovery costs. Because the defendants' assets appear to be substantially less than EPA's costs, EPA has no way of recovering the interest which accrues as this case drags on.

The prejudicial costs and delay associated with Mr. Hutchens' participation are exacerbated by Mr. Hutchens' manner of doing business. In the short time since Mr. Hutchens' joint venture was launched six weeks ago, he has peppered EPA and the Department of Justice with numerous demanding and argumentative communications which are difficult to understand. A few examples are submitted with this Opposition as Exhibits A through F. *See* Exhibit A (March 10 and 11, 2008 Email exchange between Sugarek and Hutchens regarding site access

and information request); Exhibit B (February 22, 2008 Email, Hutchens to Lyons, with attached "cross-complaint"); Exhibit C (February 20, 2008 Email, Hutchens to Takata, requesting referral to Office of Investigations); Exhibit D (February 16, 2008 Email, Hutchens to Lyons with attached February 7, 2008 letter from Arman to President Bush); and Exhibit E (February 12, 2008 Email, Hutchens to Lyons with attached Durable Power of Attorney from Arman); Exhibit F (February 7, 2008 Email, Hutchens to Sugarek presenting six single-space pages of legal argument and attaching a January 29, 2008 letter from Arman to President Bush).

One particular problem which Mr. Hutchens' involvement has created for the Department of Justice is confusion as to his status with respect to the defendants and their counsel. The Department has written both to Mr. Arman (in response to an email he sent to the Department), and to the defendants' last known attorneys, asking who currently represents the defendants. *See* Exhibits G (February 28, 2008 Letter, Corcoran to Arman) and H (March 5, 2008 Letter, Corcoran to Hall and Logan). In the letter to defendants' last known attorneys, the Department asked that they explain Mr. Hutchens' authority under a Durable Power of Attorney from defendant Arman. The Power of Attorney appears to give Mr. Hutchens authority over this litigation but the extent of that authority is not clear. *See* Exhibit F (Durable Power of Attorney). The Department has received no answer to its queries. However, on March 14, 2006, Mr. Hutchens sent the Department of Justice a cross-motion and petition by defendant Arman proceeding *pro per*. *See* Exhibit L (March 14, 2008 Email, Hutchens to Corcoran, with attached documents). On Sunday, March 16, 2008, Mr. Hutchens sent a copy of the cross-complaint, again signed by defendant Arman, *pro per*, President, Iron Mountain Mines, Inc. *See* Exhibit M (March 16, 2008 Email, Hutchens to Corcoran, with attached "cross-complaint"). Mr. Hutchens' role and authority in communicating with the Department of Justice is increasingly unclear and confusing, as is the status of the defendants' representation in this case. *See, infra*, p. 10, n. 4 (questioning who Hutchens truly represents).

Mr. Hutchens' participation in this case is unnecessary, for reasons discussed

below, and will introduce confusion which will impede this Court and prejudice the plaintiffs.

IV. MR. HUTCHENS HAS FAILED TO SHOW ANY LEGAL INTEREST

Mr. Hutchens' Notice states that he and his business entered into a "joint venture," with the defendants T.W. Arman and IMMI, for the purpose of mineral recovery from sludge, sludge which is a byproduct of the EPA remedial and removal actions at the Iron Mountain Mine Superfund Site which is the subject of this case. Mr. Hutchens' Notice also stated that the joint venture will be submitting a reclamation plan. Mr. Hutchens submitted no evidence to support either of his two assertions – no copy of his alleged joint venture and no reclamation plan, which state law requires be approved by the County of Shasta before it is final.

> Intervention as of right requires a "direct, substantial, legally protectable interest in the proceedings." To constitute a legally protectable interest, "the interest must be one which the *substantive* law recognizes as belonging to or being owned by the applicant. Moreover, that interest cannot be contingent or speculative, or merely economic.

Acorn Eng., 221 F.R.D. at 538 (emphasis in original; citations omitted). *See also Alisal Water Corp.*, 370 F.3d at 919.

The nature of Mr. Hutchens' alleged interest is not self-evident. Although some circuits have suggested that an interest in the property that is impacted by the litigation may trigger a right to intervene, the Ninth Circuit has declined to follow that approach. *See Alisal Water Corp.*, 370 F.3d at 920 n. 3 ("A mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself.").

A concrete, non-speculative, economic interest may be sufficient to support a right to intervene but it must be related to the underlying subject matter of the litigation. *See Alisal Water Corp.*, 370 F.3d at 919. In this case, the issue is EPA's and the States Agencies' recovery of *past* recovery costs. Hutchens does not explain how his *future* work on the site is

related to the recovery of *past* recovery costs, and it is difficult to conceive of any connection.[3/]

While it is possible to conceive of how future actions by Hutchens on the site may trigger recovery costs and obligations on his part, any such possibilities are entirely speculative at this time and, consequently, are not basis for intervention. *See United States v. Alisal Water Corp.*, 370 F.3d at 919.

V. MR. HUTCHENS FAILS TO SHOW IMPAIRMENT OF HIS INTEREST

Mr. Hutchens offers no explanation of how disposition of this case may impair or impede his alleged interest. The only issue remaining in the case is the amount of unrecovered past response costs for which the defendants are liable. As noted in the preceding section, the United States cannot conceive, and Mr. Hutchens does not identify, any way in which this Court's decision on the amount of *past* response costs may impair Mr. Hutchens' *future* use of the property.

VI. DEFENDANTS ADEQUATELY REPRESENT MR. HUTCHENS' INTERESTS

Mr. Hutchens bears the burden of demonstrating that the existing parties may not adequately represent this interests. *See Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). Mr. Hutchens has not even alleged that his interests will not be adequately represented, much less offered any evidence. Indeed, in a February 22, 2008 email to EPA, Mr. Hutchens referred to legal counsel which he shares with defendant Arman. Exhibit B (February 22, 2008 Email, Hutchens to Lyons) ("Attached please find a partial preliminary draft of a cross-complaint that Mr. Arman assumes he will have to turn over to *our* attorneys . . .")

[3/] On occasion, in correspondence, Mr. Arman appears to assert claims against the plaintiffs arising out of EPA's response activities on the site. In the event either of the defendants purported to transfer an interest in their claims against the United States, those transfers are barred by the Assignment of Claims Act, 31 U.S.C. § 3727(b), which only allows assignment of claims against the United States which have been allowed, decided, and for which a warrant for payment issued. *See, e.g., Atlas Hotels, Inc. v. United States*, 140 F.3d 1245, 1247 (9th Cir. 1998); *Cadwalder v. United States*, 45 F.3d 297, 299 (9th Cir. 1995).

(emphasis added).

The record in this case demonstrates the defendants' tenacious litigation of their interests. Mr. Hutchens' legal interest, if any, is entirely derivative from the interests of defendants Arman and IMMI. Hutchens presents no evidence nor arguments for why the representation of either of his grantors may be any less vigorous in the future. Since the defendants' interests are the source of and subsume Mr. Hutchens' interest, if any, his interest is adequately represented by the present defendants.

VII. MR. HUTCHENS FAILED TO SET OUT ANY CLAIM OR DEFENSE

As noted above, any motion to intervene "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed.R.Civ.P. 24(c). Hutchens did not state any claim nor any defense. He filed no pleading. Consequently, it is unclear what role Mr. Hutchens might take in this case were the Court to allow his participation.

The United States is concerned that Mr. Hutchens' objective may be to challenge EPA's selected remedy to clean up the site. The copy of his Application for Permit, which Hutchens sent to EPA, contains a Scope of Work which appears to be intended to modify the existing, long-term project which EPA has in place on the site and which was the basis for the partial summary judgment on liability which this Court entered on October 1, 2002. *See* Exhibit J at 16-17 (Application for Permit, addressed to Shasta County). Similarly, defendant Arman, in a February 7, 2008 letter to President Bush, expressly states that his joint venture is to correct what defendant Arman sees as deficiencies in EPA's plan. *See* attachment to Exhibit D (February 7, 2008 letter, Arman to President Bush).

As this Court has ruled previously, the "pre-enforcement review bar" of Section 113(h) of CERCLA generally provides that federal courts do not have jurisdiction to review preliminary challenges to EPA's remedy selection. *See United States, et al., v. Iron Mountain Mines, Inc. et al.*, 987 F.Supp. 1244, 1247 (E.D. Cal. 1997).

> Section 113(h) is clear and unequivocal. It amounts to a "blunt withdrawal of federal jurisdiction." . . . . . The statute divests federal courts of jurisdiction over "any challenges" to removal or remedial actions under CERCLA. . . . . "Section 113(h) protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort. . . .
>
> We recognize that the application of Section 113(h) may in some cases delay judicial review for years, if not permanently, and may result irreparable harm to other important interests. Whatever its likelihood, such a possibility is for legislators, and not for judges to address. . . .

McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328-29 (9th Cir. 1995) (citations omitted; emphasis in original).

An exception to the application of Section 113(h) is an action brought by the United States to recover costs. However,

> Although the pre-enforcement bar does not operate when the United States brings CERCLA sections 106 and 107 actions against a PRP [potentially responsible party], the United States has brought no such action against [the party seeking intervention]. . . . Furthermore, [the party seeking to intervene] cannot precipitate an enforcement action against itself by its attempted intervention in this matter as a defendant.

Acorn Eng., 221 F.R.D. at 539-40. In short, if Mr. Hutchens had complied with Fed.R.Civ.P. 24(c) and stated his claim or defense, it is entirely possible that this Court would have no jurisdiction to review either. This illustrates the importance of Mr. Hutchens' failure to comply with the Rules and to state his claim or defense.

VIII. MR. HUTCHENS HAS NOT COMPLIED WITH COURT RULES

In addition to failing to file a pleading setting out the claim or defense for which he seeks to intervene, Mr. Hutchens has ignored a number of other rules of this Court.

> Any individual representing himself or herself without an attorney is bound by the Federal Rules of Civil or Criminal Procedure and by these Local Rules. All obligations placed on "counsel" by these Local Rules apply to individuals appearing <u>in propria persona.</u> Failure to comply therewith may be ground for dismissal, judgment of default, or any other sanction appropriate under these

> Rules. A corporation or other entity may appear only by an attorney.

Local Rule 83-183(a). Among the other rules of this Court which Mr. Hutchens has ignored are the requirement to sign all non-evidentiary documents, to file proof of service, and to file with the Clerk a notice of his motion. *See* Local Rules 7-131, 5-135, 4-210, and 78-230.[4/] In and of themselves, these failings by a new litigant *in propria persona* may not be cause to refuse intervention. However, the United States notes that last year, in another case, a federal court admonished Mr. Hutchens, who was proceeding *pro per*, to familiarize himself with court rules and procedures. *See* Exhibit N (Docket No. 48, July 26, 2007 Order entered in *John F. Hutchens v. Alameda County Social Services Agency*, N.D. Cal. Case No. C-06-6870 SBA). In the context of Mr. Hutchens' utter failure to even attempt to establish a right to intervene, and in the context

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[4/] An additional concern of the United States is whether Mr. Hutchens truly represents himself or whether he will be asserting claims or defenses of his joint venture or his codefendants in violation of Local Rule 83-183(a) and *Rowland v. California Men's Colony*, 506 U.S. 194, 201 - 202 (1993) (artificial entities such as corporations, partnerships and associations may appear in federal courts only through licensed counsel). In a copy of a mining application Mr. Hutchens sent to EPA, Mr. Hutchens identifies himself as the CEO of Artesian Mineral Development & Consolidated Sludge, Inc., a corporation. *See* Exhibit J (March 5, 2008 Application for Permit). Although Mr. Hutchens "Notice" only cites his unsubstantiated joint venture, in his dealings with EPA and the Department of Justice over the last six weeks he has purported to act pursuant to a Durable Power of Attorney from defendant Arman. *See, e.g.*, Exhibit E (February 12, 2008 Email, Hutchens to Lyons, with attached February 11, 2008 Durable Power of Attorney). For example, on February 15, 2008, Mr. Hutchens transmitted to EPA defendant Arman's response to EPA's Kathleen Sayler. *See* Exhibit K (February 16, 2008 Email, Hutchens to Lyons with attached copy of February 14, 2008 Letter from Arman to Sayler). In a February 22, 2008 email to EPA, Mr. Hutchens was clearly speaking for defendant Arman, and he referred to shared legal counsel. Exhibit B (February 22, 2008 Email, Hutchens to Lyons) ("Attached please find a partial preliminary draft of a cross-complaint that Mr. Arman assumes he will have to turn over to *our* attorneys . . .") (emphasis added). In the last week, Mr. Hutchens has sent the Department of Justice two versions of a signed pleading in the name of defendant Arman. *See* Exhibit L (March 14, 2008 Email, Hutchens to Corcoran, with attached draft cross-complaint and petition); Exhibit M (March 16, 2008 Email, Hutchens to Corcoran, with attached "cross-complaint" signed by defendant Arman, *pro per*). This Court may wish to compare the signature of defendant Arman on his letters to President Bush, and that on his December 6, 2000 Declaration filed in this Court, with the signatures on the "cross-complaints" which purport to be his. *Compare* Docket No. 1183 (December 6, 2000 Declaration of Defendant Arman) and attachments to Exhibits D and F *with* attachments to Exhibits L and M.

of his recent communications with EPA (for example, his argumentative response to EPA's request for a FOIA request, *see* Exhibit A), his failure to read and comply with the Court's rules is strongly suggestive that Mr. Hutchens' participation in this case would sow confusion and result in unnecessary costs and delay.

IX. PERMISSIVE INTERVENTION SHOULD NOT BE GRANTED

Fed.R.Civ.P. 24(b) allows the Court to grant permissive intervention. For the same reasons given above, in opposition to intervention of right, the United States opposes permissive intervention.

X. CONCLUSIONS

Mr. Hutchens' motion is untimely and his intervention at this late stage of the litigation will potentially prejudice the plaintiffs. He has failed to demonstrate any legal interest or that any alleged interest may be impeded or impaired by a decision in this case. Mr. Hutchens has not even alleged that his interests, if any, are not adequately represented by the present parties. He has failed to set out any claim or defense as he is required to do in order to intervene. He has not even attempted to comply with the Local Rules of this Court. Were Mr. Hutchens to participate in this case, there is a substantial risk of prejudicial confusion and delay. For all these reasons, the United States respectfully requests the Court deny his intervention or joinder.

Dated: March 19, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 19, 2008, I caused a copy of the foregoing to be served by first class mail, postage prepaid, upon the following parties:

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