APPENDIX I

ATLANTIC RICHFIELD'S PREHEARING MOTIONS

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

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CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY
ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 1 REQUESTING A REGIONAL BOARD RULING THAT CERCLA PROHIBITS THE REGIONAL BOARD FROM ISSUING THE CAOs

INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") prohibits the Regional Board (the "Board") from issuing the Draft Cleanup and Abatement Orders (the "Draft CAOs") for these Sites and asserting jurisdiction over the cleanup. Because the United States Forest Service ("USFS") is already carrying out a CERCLA remedy at the Sites, CERCLA bars any other party from attempting to implement a different or additional remedy. The Board participated with the USFS in considering and selecting the CERCLA remedy and apparently has elected not to coordinate, among other things, its response activities at the Mine Site with the USFS. The regulations set forth in CERCLA's National Contingency Plan ("NCP") also provide an opportunity for the Board's participation in USFS review of the protectiveness of the USFS remedy. With the CERCLA process long since set in motion, only a federal court can authorize activities that seek to improve upon or could alter the CERCLA remedy, and even a federal court may do so only after the remedy is complete.

Atlantic Richfield Company ("Atlantic Richfield") therefore moves the Board for a ruling that CERCLA prohibits the Board from exercising jurisdiction over the Draft CAOs.

BACKGROUND

After completing a site investigation that began in 1990, USFS entered its Record of Decision ("ROD") for the Tailings Site in June 1994. (*See* Exhibit No. 145, ROD at p. 4-5.) The ROD reports that USFS and the Board "worked closely to analyze the site and develop treatment alternatives," and that the Board received copies of all relevant documents. (*Id.* at p. 4). USFS amended the ROD in August 2001. (*See* Exhibit No. 153, Amended ROD.) Under the ROD and Amended ROD, USFS has (or will) implement the following cleanup measures at the Tailings Site: reconstruct 1,300 feet of the upper Dolly Creek Channel; construct a passive wetland treatment system (*i.e.*, aerobic wetland) in the lower portion of Dolly Creek; install wind fences on 50 acres of the tailings; re-vegetate on and around the tailings; and, divert Dolly Creek around the tailings to ensure effectiveness of the passive wetland treatment system.

Of course, Little Dolly Creek also flows past the Mine Site, less than a mile upstream from the Tailings Site. Board staff considers the Mine Site to be separate from the Tailings Site solely due to the Mine Site having been privately owned. (*See* Prosecution Team Opening Brief ("Pros. Op. Br.") at p. 1 ("The site requires two CAOs because the Mine is privately-owned while the Tailings are on [USFS] land.").) Historically, the Walker Mining Company (and potentially other operators that followed) utilized both Sites as part of a single mining operation. In addition to being less than a mile apart along the same creek, the Sites also are part of the same hydrogeological system. Accordingly, "[a]ttainment of water-quality objectives for Dolly Creek and other surface waters requires coordination of upstream and downstream response actions." (Lombardi, at p. 22.)

ARGUMENT

I. CERCLA § 113 Bars the Prosecution Team's Effort to Impose the CAOs for the Sites.

CERCLA § 113(b) vests "exclusive original jurisdiction over all controversies arising under [CERCLA]" with the federal district courts. 42 U.S.C. § 9613(b). State courts and other state tribunals (*e.g.*, the Board) do not have jurisdiction over such claims. *See ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000). Section 113(b)'s "arising under" clause is "coextensive" with CERCLA Section 113(h)'s timing of review bar and thus both provisions bar "any 'challenge' to a CERCLA cleanup," until the cleanup is complete, and then an action is permitted only in federal court. *Fort Ord Toxics Project, Inc. v. Cal. Envtl. Prot. Agency*, 189 F.3d 828, 832 (9th Cir. 1999). The Prosecution Team conceded that this is the correct reading of CERCLA Sections 113(b) and (h), leaving the only question as whether the Draft CAOs "challenge" the ongoing CERCLA cleanup at the Tailings Site. (*See* Prosecution Team Opening Brief at p. 10-11 ("Pros. Op. Br.").)

A claim challenges a CERCLA cleanup if the claim "seeks to improve on the CERCLA cleanup" or "interfere[s] with the remedial actions selected." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011). Examples include claims or lawsuits "where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to terminate the RI/FS and alter the method and order of cleanup." *ARCO Envtl.*, 213 F.3d at 1115 (internal citations omitted). If the relief requested could impact the response action that the federal government has selected or will select, then it "challenges" the CERCLA cleanup. *McClellan*, 47 F.3d at 329-30; *see also Razore v. Tualip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). A claim seeking to improve upon or alter the CERCLA remedy is a challenge regardless of whether the claim is brought under federal or state law. *See ARCO Envtl.*, 213 F.3d at 1115; *Fort Ord*, 189 F.3d at 832. "Congress concluded that the need for [remedial] action was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in process. *See McClellan*, 47 F.3d at 329.

A. The Tailings CAO is a "Challenge" to the CERCLA Cleanup at the Sites.

The CERCLA process for the Tailings Site began many years ago and, as the Board acknowledges, continues today. (Pros. Op. Br. at p. 7 (stating that "the remedial action remains open").) The Board "worked closely" with USFS in investigating the Tailings Site and selecting the remedy there, even securing USFS's agreement to include a 1968 State Board resolution and 1991 WDRs as part of the Applicable or Relevant and Appropriate Requirements identified in USFS's ROD. (Exhibit No. 145 at p. 8, ROD.) Yet, the Prosecution Team's Draft CAO for the Tailings Site would require

Atlantic Richfield to first conduct investigatory activities on the Tailings Site and, later, to "remediate the site in such a way to prevent future releases of mining waste." (*See* Draft CAO No. R5-2014-XXXX at p. 8-10.) The Draft CAO contains thirteen separate paragraphs impermissibly "dictat[ing] specific remedial actions" Atlantic Richfield would be compelled to perform if the CAO is issued. *ARCO Envtl.*, 213 F.3d at 1115. The Draft CAO further states that, pursuant to Board policy, the Prosecution Team seeks to obtain cleanup to "background" quality, clearly an attempt "to improve on the CERCLA cleanup." *McClellan*, 47 F.3d at 330. It is hard to imagine a more direct challenge to the USFS's CERCLA remedy.

B. The Mine CAO is a "Challenge" to the CERCLA Cleanup at the Sites.

The Prosecution Team's Draft CAO for the Mine Site is no less a challenge to the USFS remedy. If enacted, the Draft CAO for the Mine Site would require Atlantic Richfield to "clean up and abate the discharge of all mining waste and restore the affected water to background conditions." (Draft CAO No. R5-2014-YYYY at p. 11.) Because the Mine Site and Tailings Site—which operated as one site and are located less than a mile apart—are essentially a single site and are hydrogeologically intertwined, any remedial activities aimed at restoring water quality upstream at the Mine Site will impact the CERCLA cleanup being carried out at the Tailings Site. Water quality issues at the Mine Site and Tailings Site are interrelated and an integrated remedial approach that addresses source contribution from all areas (mine workings, mill site and tailings impoundment area) makes sense to avoid unintended consequences that could arise from failing to coordinate such actions. "Changes in surface water or groundwater systems in the mine and mill area will affect conditions in the lower tailings impoundment area, regardless of administrative boundaries." (Lombardi, at p. 22.) Thus, the Draft CAO for the Mine Site also "challenges" the USFS's cleanup because it would "interfere with the remedial actions selected." *McClellan*, 47 F.3d at 330.

C. The Prosecution Team is Incorrect in Asserting the Board Has Jurisdiction to Enter the CAOs.

In arguing that the CAOs do not constitute a "challenge" to the CERCLA cleanup at the Sites, the Prosecution Team relies primarily on CERCLA's so-called savings clauses, 42 U.S.C. §§ 9614, 9652, & 9620, and the case *United States v. Colorado*, 990 F.2d 1565 (10th Cir.1993). (*See* Pros. Op. Br. at p. 6-9.) The Prosecution Team is incorrect that these authorities give the Board jurisdiction to enact the Draft CAOs.

CERCLA itself states that none of its savings clauses affects the operation of section 113(h): "[CERCLA] does not affect or otherwise impair the rights of any person[1] under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title . . .*" 42 U.S.C. § 9659(h) (emphasis added). Thus, Congress contemplated and rejected the Prosecution Team's argument that CERCLA's general savings clauses restrict the operation of Section 113(h). *See*

[1] The term "person" includes a "State." 42 U.S.C. § 9601(21).

Anacostia Riverkeeper v. Wash. Gas Light Co., 892 F. Supp. 2d 161, 171 (D.D.C. 2012) (rejecting argument that CERCLA's savings clause affects the operation of Section 113(h) because Section 159(h) "makes the primacy of CERCLA § 113(h) explicit"); *see also Razore*, 66 F.3d at 240. CERCLA does not "save" the Prosecution Team's challenge to the USFS remedy.

The Prosecution Team's reliance on *United States v. Colorado* also is misplaced. The Tenth Circuit left no doubt that, "the language of § 9613(h) does not differentiate between challenges by private responsible parties and challenges by a state." There, as here, the question was limited to whether the State's attempt to enforce state environmental laws did, in fact, "challenge" the CERCLA remedy. *Id.* at 1575-80. In *Colorado*, however, the State sought merely to ensure that the federal government conducted its cleanup at the hazardous waste site in accordance with the State's hazardous waste laws. *Id.* at 1568-69. There was no evidence that application of the hazardous waste laws could interfere with or delay the ongoing cleanup. *Id.* at 1576. Here, by contrast, the Prosecution Team seeks an order that would require a third party, Atlantic Richfield, to enter onto federal property where a federally-approved remedy is in process, all because the State is not satisfied with the USFS cleanup and believes it can be improved. The Draft CAOs are squarely within the actions CERCLA Section 113(h) prohibits and *United States v. Colorado* makes no provision to the contrary.

CONCLUSION

Because CERCLA affirmatively bars the type of "challenge" to remedial action that is embodied in the Draft CAOs, Atlantic Richfield respectfully requests a ruling from the Board that, as a matter of law, CERCLA prohibits the Board from exercising jurisdiction. Accordingly, the Draft CAOs must be withdrawn and this matter dismissed.

Dated this 20th day of February, 2014.

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ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 2 REQUESTING A REGIONAL BOARD RULING THAT THE REGIONAL BOARD IS A DISCHARGER AT THE SITES

INTRODUCTION

The Regional Board (the "Board") is liable for conditions at the Sites and any Cleanup and Abatement Order ("CAO") must include the Board as a Discharger. The Board's liability stems from two sources: (1) The Board's settlements with former Mine Site owners wherein the Board held the former owners harmless and assumed the former owners' liability; and (2) The Board's remedial efforts at the Mine Site which are incomplete and may not be beneficial in the long-term. Indeed, the Board's staff has admitted the Board's liability in internal Board documents. In addition – and contrary to the Prosecution Team's representations in its Opening Brief – there are multiple other parties who continue to bear liability for conditions at the Sites.

Atlantic Richfield Company ("Atlantic Richfield") therefore moves the Board for a ruling that the Board itself is a Discharger at the Sites[1]. Accordingly, the Mine Site Draft CAO and the Tailings Site Draft CAO must each be withdrawn, or revised to include the Board as a Discharger.

BACKGROUND

Since the Walker Mining Company's bankruptcy in 1945, numerous individuals and entities have owned or operated the Mine Site. In 1991, the Board settled with then-owners Robert Barry ("Barry"), Calicopia Corporation ("Calicopia"), and several other affiliated individuals. The Prosecution Team describes the 1991 settlement as an agreement by the Board to hold Barry, Calicopia, and all the other settling parties harmless. (*See* Revised Draft CAO No. R5-2014-YYYY at ¶ 28.) Pursuant to their settlement agreement, these parties paid the Board $1.5 million and obtained a complete release of all liability associated with the Mine Site, including a release of the lien the Board had placed on the property.

In 1999, the Board reached a similar agreement with Cedar Point Properties ("CPP") and its principal, Daniel Kennedy ("Kennedy").[2] Here again, the Prosecution Team's Draft CAO provides that the Board agreed to hold Kennedy harmless and completely released Kennedy for any liability related to the Mine Site. (*See* Revised Draft CAO No. R5-2014-YYYY at ¶ 29.) In exchange, CPP and Kennedy paid to the Board the proceeds of a timber harvest on the Mine Site. Before settling with CPP and Kennedy, the Board placed a lien on the Mine Site property for $238,334, which appears to be the costs associated with Board work completed up to that time that had not been paid for by the $1.5 million settlement with Barry and Calicopia. (*See* Exhibit No. 147 at p. 4.) CPP's timber harvest ultimately netted sufficient funds to pay off the lien plus an additional $102,307.60. (*See* Exhibit No. 154, at p. 2.) In 1997, however, the Board had requested and received $1.2 million in state Abatement Account funds

[1] Other parties too, who currently are not included in these proceedings, potentially are Dischargers. *See infra* at Argument Section III for a discussion of documents identifying these additional potential liable parties.

[2] In addition to being CPP's principal, Kennedy appears to have owned the Mine Site in his personal capacity for some period of time before transferring it to CPP.

for work at the Mine Site, (*see* Exhibit No. 146, p. 1), yet the Board apparently made no effort to recover those funds from CPP or Kennedy before releasing and holding Kennedy harmless.

Of course, the remedial work funded by these settlements is work the Board itself has conducted at the Mine Site. Beginning in at least 1984, the Board has worked with various contractors to study the Mine Site, install the adit plug, perform maintenance on the tunnel, install surface water diversion features, and install a monitoring well. (*See* AMEC Rpt. at pp. 19-21.)

Nor is the Board the only party to own or operate the Mine Site since the Walker Mining Company's bankruptcy. Besides CPP, Kennedy, Barry, and Calicopia, the historical and administrative records indicate that multiple other parties owned the Mine Site or operated there. Some of these parties appear to remain viable. For instance, a 1986 memo indicates that several large mining companies conducted operations at Walker Mine, among them Noranda Exploration, AMAX, Conoco, and Standard Bullion Company. (Exhibit No. 142.)[3] Yet, no other documents from the Board's productions of documents indicate that the Board ever investigated what operations any of those companies conducted or whether those entities appear to still be viable.

ARGUMENT

I. The Board Assumed Liability Through Settlements With Former Site Owners.

By settling with former owners and operators of the Mine Site, the Board assumed liability for the Mine Site. Under California law, a hold harmless agreement is "[a] contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility." *Cal. Sch. Boards Assn. v. State Bd. of Educ.*, 191 Cal. App. 4th 530, 568 (Cal. Ct. App. 2010). As the Prosecution Team states in the Draft CAOs, its settlements with Barry, Calicopia, Kennedy, and CPP include agreements by the Board to hold the settling parties harmless from further liability related to the Mine Site. Thus, the Board effectively stepped into the settling parties' shoes for purposes of addressing any additional liability related to the Mine Site.

Water Code Section 13305 confirms the Board's assumption of liability under the settlement agreements. Section 13305 imposes a mandatory obligation on the Board to abate conditions at any "nonoperating industrial or business location." Cal. Water Code § 13305(a). Section 13305 then gives the Board authority to impose a lien against the property for the reasonable costs of its abatement efforts. *Id.* § 13305(f). In pursuing its settlement with Barry, Calicopia, and others, the Board exercised its authority under Section 13305 with the approval of the State Board. (*See* Exhibit No. 143, Release of Lien; Prosecution Team Opening Brief ("Pros. Op. Br.") at p. 2 (explaining that the Board "decided to seal the 700 level mine portal under authority of Water Code section 13305."). The Board later released its lien for recovery of its costs for abatement from

[3] This letter was located among documents the Board produced to Atlantic Richfield.

Barry, Calicopia and the other settling parties. To the extent the remedy the Board selected is, in hind sight, insufficient, incomplete, or temporary at best, the Board elected to bear that risk too when it relinquished its lien. And to the extent the Board misjudged the true amount of costs necessary to abate the Mine Site and maintain the remedy it selected and installed pursuant to Section 13305, the Board bears that liability itself.

The Board's settlement with CPP and Kennedy after exercising authority pursuant to Water Code Section 13304 has the same effect. Section 13304 gives the Board the option to conduct abatement efforts itself where the property owner is unwilling to do so and, like Section 13305, also gives the Board the authority to impose a lien for the reasonable costs of its cleanup. Cal. Water Code § 13304(b)(1)-(2), (c)(2). The Board elected to impose a lien against CPP's property for only $238,334 – and to enter a settlement agreement releasing Kennedy upon satisfaction of *half* that lien amount – despite having just requested and received $1.2 million from the State Abatement Account for remedial activities at Walker Mine. The Board's election to release the property owner without obtaining full satisfaction of the amounts owed to it cannot create liability for Atlantic Richfield. To the contrary, the Board alone is liable for amounts it expended during CPP's ownership of the property but elected not to recover from CPP or Kennedy.

II. The Board Is Liable For Its Failed Remedial Efforts.

The Board has conducted remedial activities on the Mine Site since at least 1984 and must bear any liability for maintaining or fixing the remedies the Board installed. The Board previously has been found liable at another mining site under very similar circumstances. In *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, the U.S. Court of Appeals for the Ninth Circuit affirmed a trial court decision holding the Board liable under the Clean Water Act for remedial actions it took at the Penn Mine, 13 F.3d 305, 310 (9th Cir. 1993); *see also* Regional Board Resolution R5-2013-0053 ("The Central Valley Water Board and EBMUD were subsequently found jointly responsible under the Clean Water Act for the acid mine drainage due to their operation of the remediation project."). At Penn Mine, as here, the Board had constructed remedial facilities designed to capture acidic runoff from a historical mining operation, but the Board's facility sometimes allowed the runoff to flow into local waterways. 13 F.3d at 306-07. The Ninth Circuit rejected the Board's arguments that the releases from its remedial facilities did not count as discharges under the Clean Water Act, *id.* at 308-09, as well as the Board's claim that it was immune from suit, *id.* at 309-10. So too here, the Board will be unable to avoid liability for its failed or insufficient remediation of Walker Mine.

In addition to being liable under the Clean Water Act, the Board also is liable under CERCLA and California's analogous provisions in the Health & Safety Code. The U.S. District Court for the Eastern District of California considered similar circumstances in *United States v. Iron Mountain Mines*. 881 F. Supp. 1432 (E.D. Cal. 1995). The court in *Iron Mountain* agreed with the defendant that the State of California (through the Board and the State Board) could be liable as an operator for participating in the

operation of dams that allegedly contributed to environmental harm connected to a historical mining area. *Id.* at 1452. In so holding, the court rejected the State's argument that it was entitled to some kind of immunity because it had acted only in a remedial capacity and pursuant to regulatory authority. *Id.* at 1445-49. The case for operator liability here would be even stronger because the Board, by itself, has conducted several remedial operations on the Mine Site and continues to operate those facilities today. California's Health & Safety Code imposes liability in the same circumstances as does CERCLA, Cal. Health & Safety Code § 25323.5 (defining "responsible party" and "liable person" by reference to CERCLA), so the Board is liable under both federal and state law for these same remedial activities.

Multiple Board staff members have identified the Board's increasing liability for its remedial actions as a reason for now pursuing Atlantic Richfield. In July 2011, Jeff Huggins wrote that "the [Board] has incurred considerable obligations for long term operations and maintenance of the mine seal. This is expensive and the liabilities are not insignificant. If the [Board] is to reduce its liabilities for Walker Mine, it must determine if a responsible party exists." (Exhibit No. 158 (emphasis in original).) To similar effect, in April 2013, Victor Izzo ended a memo by saying "Please bear in mind that the [Board] potentially is a responsible party for the mine seal and remedial actions that currently exist at the site and the sooner we bring [Atlantic Richfield] in as a RP the sooner we are relieved of that responsibility." (Exhibit No. 159 (emphasis added).[4]) Notwithstanding the Board's apparent belief that Atlantic Richfield can absolve the Board of liability the Board itself assumed, the Board's own analysis admits that the Board has significant liability for its own activities at the Mine Site.

III. Multiple Other Parties Have Contributed To Conditions At The Sites.

The Prosecution Team stated in its Opening Brief that Atlantic Richfield is "the sole remaining viable responsible party." (Pros. Op. Br. at p. 3.) Based on the Board's own records, however, that does not appear to be the case. In addition to the Board itself, multiple Board documents refer to entities that operated at the Mine Site, with the Board's knowledge, during Calicopia's tenure as the Site owner. A 1986 memo in the Board files lists the various entities that conducted these operations, including Noranda Exploration, AMAX, Inc., Conoco (now known as ConocoPhillips Company), and Standard Bullion Corporation, Inc. (Exhibit No. 142, at pp. 2-3.) Another document from the Board's files gives additional details about these entities' involvement at the Mine Site, indicating that several of these entities actively undertook both mining related work and remedial work on the Mine Site. (*See, e.g.*, Exhibit No. 141, at p. 6 (describing AMAX as "the operator" and describing its reconstruction of a tunnel, as well as cleaning out of "a major cave-in").) Through the Board's settlement and assumption

[4] The referenced record was produced with other materials by the Regional Board in response to a CA Public Records Act Request served by Atlantic Richfield. The Prosecution Team later produced a privilege log through which the Prosecution claims this record is protected from disclosure, citing Deliberative Process (Cal. Gov. Code 6255); Active Litigation (Cal. Gov. Code 6254, subd. (b)); and attorney client and attorney work product privileges. Atlantic Richfield disagrees with the Prosecution's privilege claims, and the parties agreed to seek a ruling from the Advisory Board whether the subject record is privileged under one or all of the grounds asserted by the Prosecution.

of the liabilities of Barry and Calicopia, the Board arguably has also assumed liability for the actions of others who operated on the Mine Site during the same timeframes.

CONCLUSION

Given the Board's own liability for further response actions at the Sites, Atlantic Richfield respectfully requests that the Board rule, as a matter of law, that the Board itself is a liable party for conditions at the Sites. Accordingly, the Mine Site Draft CAO and the Tailings Site Draft CAO must be withdrawn, or revised to include the Board as a Discharger.

Dated this 20th day of February, 2014.

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ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 3 REQUESTING A REGIONAL BOARD RULING THAT THE DOCTRINE OF LACHES PRECLUDES THE BOARD FROM ISSUING THE DRAFT CAOs

INTRODUCTION

The Regional Board (the "Board") has been investigating the Walker Mine and Tailings Sites since 1958. At that time, it was common knowledge that International Smelting &Refining Company ("IS&R") had been an investor in the Walker Mining Company, the company that initially owned and operated the mine. Many individuals with first-hand knowledge of Walker Mining Company's operations were likely available at that time. Thirty years later, in 1987, Atlantic Richfield Company's predecessor donated its geological records to the University of Wyoming and thus made public the details of its relationship with the Walker Mining Company. Almost sixty years after the mine closed in 1941, the Board elected in 1999 to pursue Atlantic Richfield Company ("Atlantic Richfield") as a Discharger at the Walker Mine. But when Atlantic Richfield objected, for many of the same reasons now raised as defenses to the Draft Cleanup and Abatement Orders ("Draft CAOs"), the Board sent Atlantic Richfield a letter acquiescing to Atlantic Richfield's objections and removing Atlantic Richfield from the list of Dischargers. At least some individuals with knowledge of the facts were living in 1999. Now, fifteen years later and following inadequate settlements with the Mine Site's former owners, the Prosecution Team attempts to retread the same ground by looking to an incomplete documentary record as the sole evidence for imposing liability on Atlantic Richfield. In sum, there are no witnesses available to explain the documentary evidence on which the Prosecution Team relies or, more importantly, to provide evidence on mine operations that are not described in the geological records.

In light of the Prosecution Team's failure to timely prosecute this matter, Atlantic Richfield moves the Board for a ruling that the doctrine of laches precludes the Board from issuing the Draft CAOs.

BACKGROUND

The Walker Mining Company closed the mine in 1941. At that time, all of the documentary evidence of Atlantic Richfield's predecessors' relationship with the Walker Mining Company had already been generated and most witnesses with knowledge of the relationship presumably were still living. In 1945, when the Walker Mining Company's records were more readily available to the parties, the federal bankruptcy court held an eight-day hearing to consider the relationship between IS&R and the Walker Mining Company. (*See* Exhibit No. 132.) Based upon the testimony and documentary evidence presented, federal Judge Jackson concluded that Walker Mining Company "is not and has never at any time been an alter ego or instrument or department of Anaconda Copper Mining Company or of [IS&R]." (Exhibit No. 131.)[1]

The Board has waited 55 years from its first investigation of the sites until today to bring an enforcement action against Atlantic Richfield. Because the Board failed to

[1] *See also id.* at ¶ 4 ("[Walker Mining Company's] business and affairs have at all times been carried on and conducted in the manner and according to the methods and practice usually employed by corporations free of any domination or control by others.")