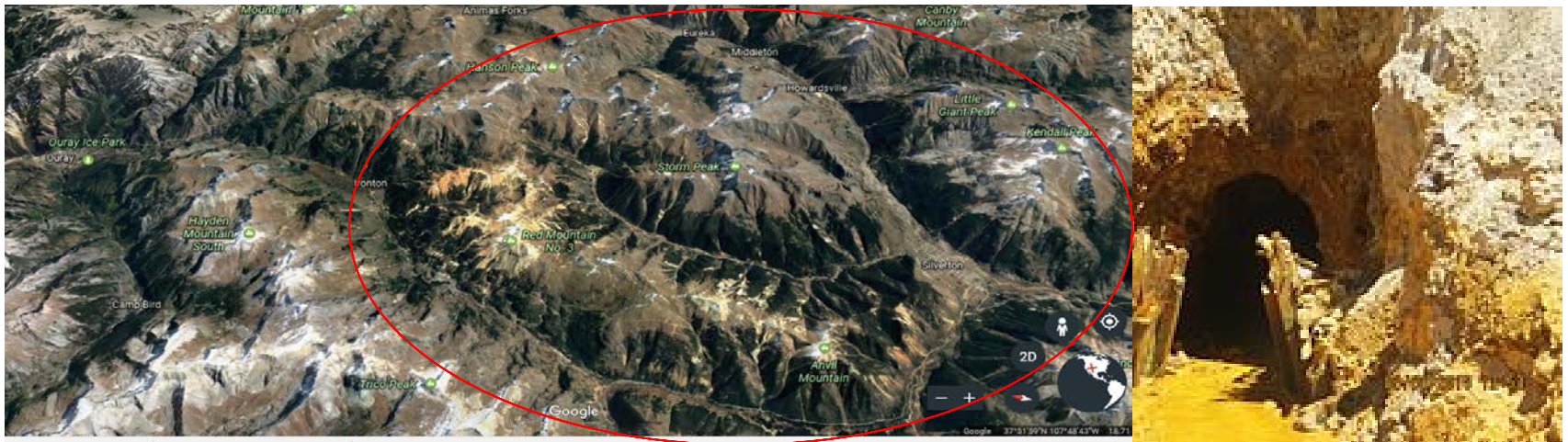


# The San Juans and the Reshaping of CERCLA and Hard Rock Mining: A Legal Update on the Gold King and Bonita Peak (May 24, 2017)



2017 San Juan Mining and Reclamation Conference | Ouray, CO  
"Coming Full Circle: Making a Difference and Forging Ahead"

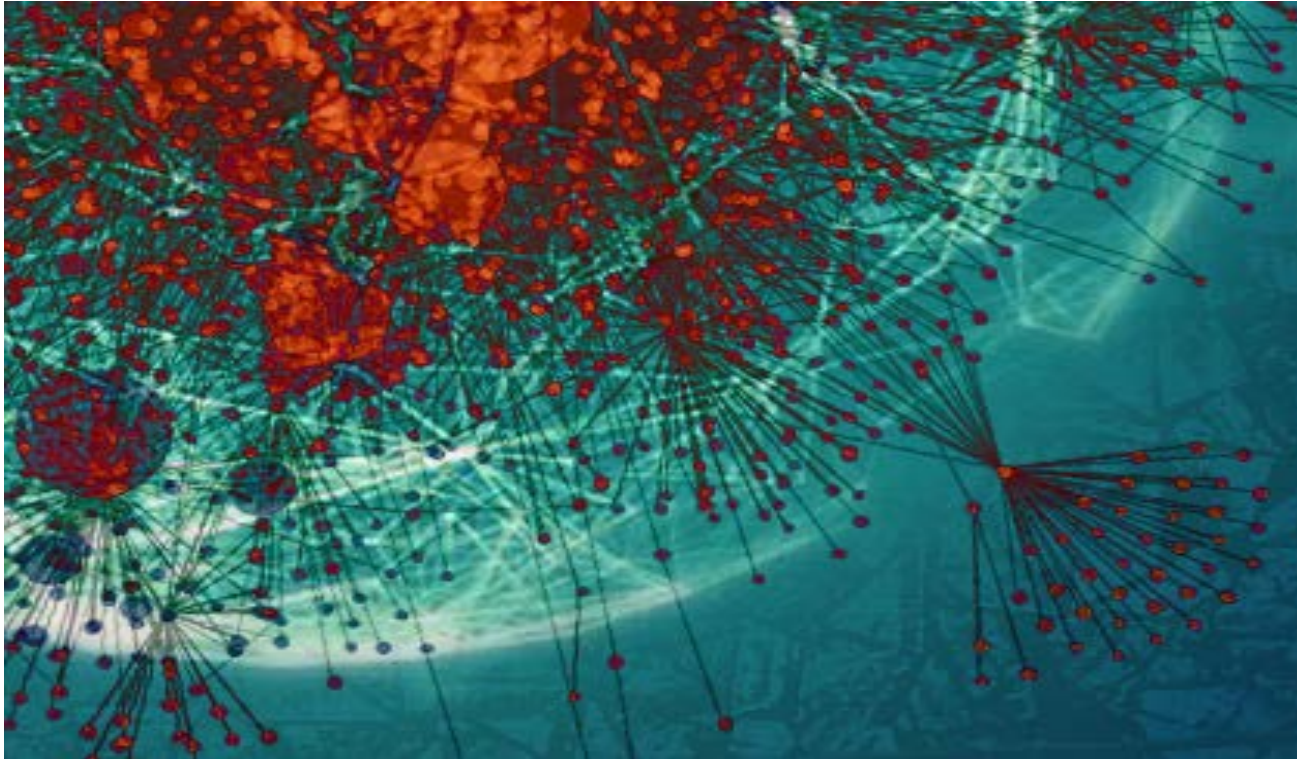
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“Simple can be harder than complex: You have to work hard to get your thinking clean to make it simple. But it’s worth it in the end because once you get there, you can move mountains.”

— [Steve Jobs](#)

# The San Juans and the Reshaping of CERCLA and Hard Rock Mining: A Legal Update on the Gold King and Bonita Peak

## The Presentation

- I. Disclosure
  - I. Corporate Counsel and Trial Attorney: Currently serve as Counsel for Gold King Mines Corporation and Winter Park Helicopter, LLC
- II. Limitations of Presentation
  - I. Issues and Information Presented have been tailored to the conference and therefore are not all inclusive.
- III. Gold King Mine Spill: *New Mexico v. Colorado* (U.S. Supreme Court)
- IV. Gold King Mine Spill: *New Mexico v. EPA et al.* (U.S. D.N.M.)
- V. Gold King Mine Spill: *Navajo Nation v. EPA et al.* (U.S. D.N.M.)
- VI. Superfund Designation: *Sunnside Gold v. EPA* (U.S. Court of Appeals D.C.)
- VII. Federal Tort Claims
- VIII. On the Horizon



GENERAL ISSUES: 1 of 3

**Whether Colorado is liable under CERCLA and common law for the expenses incurred and will be incurred by New Mexico in responding to releases or threatened releases of hazardous substances from the Gold King Mine, the Sunnyside Mine, or the American Tunnel to the date of judgment;**



GENERAL ISSUES: 2 of 3

**Whether Colorado is in violation of the Resource Conservation and Recovery Act's imminent and substantial endangerment provision, 42 U.S.C. § 6972(a)(1)(B), until it ceases the disposal of hazardous substances from the Gold King Mine and the Sunnyside Mine, including, but not limited to, acid wastewater, mine sludge, mine-dump runoff, and metals into the Animas River watershed;**



**Gold King Mine Spill**  
*New Mexico v. Colorado* (US Supreme Court)

GENERAL ISSUES: 3 of 3

**Whether Colorado has negligently, recklessly and willfully authorized and allowed the discharge of toxic mine waste directly into the Animas River in a manner that has injured and continues to threaten the health, safety, and comfort of downstream New Mexico residents;**



**Gold King Mine Spill**  
***New Mexico v. Colorado* (US Supreme Court)**

CURRENT STATUS

- **The Acting Solicitor General was invited to file a brief in this case expressing the views of the United States. (November 2016)**
- **STATE OF COLORADO HAS RESPONDED**



## STATE OF COLORADO'S RESPONSE

- **The exclusive jurisdictional provisions of CERCLA and RCRA preclude State versus-State claims.**
- **New Mexico's CERCLA claims do not establish that Colorado is a "covered person" for purposes of CERCLA liability.**
- **New Mexico's RCRA claims are expressly barred by CERCLA and RCRA**






## POTENTIAL OUTCOMES/TAKEAWAY

**If New Mexico and the Navajo Nation are successful, upstream states sovereign immunity could be relinquished if their environmental management, or lack thereof, is found to contribute to the impairment of downstream states resources.**



**Gold King Mine Spill**  
***New Mexico v. EPA et al. (D.N.M) &***  
***Navajo Nation v. EPA et al.***

***New Mexico v. EPA et al. [Environmental Restoration,  
Kinross Gold Corporation, Sunnyside Gold  
Corporation], No. 16-cv-465 (D.N.M. May 23, 2016)***  
**CONSOLIDATED WITH *Navajo Nation v. EPA et al.***  
***[Environmental Restoration, Kinross Gold Corporation,  
Sunnyside Gold Corporation, Gold King Mine  
Corporation], No. 16-cv-465 (D.N.M. May 23, 2016)***



# Gold King Mine Spill

*New Mexico v. EPA et al. (D.N.M) &  
Navajo Nation v. EPA et al.*

## GENERAL ISSUES:

- **Whether EPA can be held accountable for the Gold King Mine spill?**
- **Whether EPA Contractors can be held responsible for response actions?**
- **Whether former owners can be held accountable for events transpiring subsequent to ownership?**
- **Whether private entities owning properties adjacent to a property, the Gold King Mine, can be held liable for the damages incurred from the Gold King Mine Spill?**



**Gold King Mine Spill**  
*New Mexico v. EPA et al. (D.N.M) &*  
*Navajo Nation v. EPA et al.*

CURRENT STATUS:

**DEFENDANTS HAVE SEPARATELY FILED MOTIONS TO DISMISS**

**EPA:**

- **Sovereign Immunity Prevents Plaintiffs' claims against the EPA**
- **EPA is not an “Operator”, “Transporter”, or “Arranger” under CERCLA**
- **The Court Lacks Jurisdiction over the Navajo Nation's Tort Claims Because the FTCA's Discretionary Function Exception Preserves Sovereign Immunity for Such Claims.**



**Gold King Mine Spill**  
*New Mexico v. EPA et al. (D.N.M) &*  
*Navajo Nation v. EPA et al.*

CURRENT STATUS:

**EPA is investigating the “*commingled release* of metals from numerous mines and mine-related activities in the Animas River watershed.” *Id.* In other words, the scope of the listing (and the future potential remedy) is as broad as the watershed. New Mexico’s argument that it can maintain its CWA claim as to (unnamed) mines not subject to the NPL listing thus fails—simply put, there are no such mines within the relevant watershed. [EPA Response Dkt 148, P.8]**



*"Boundary Descriptions and Names of Regions, Subregions, Accounting Units and Cataloging Units". U.S. Geological Survey. Retrieved 2017-4-27.*



# Gold King Mine Spill

## *New Mexico v. EPA et al. (D.N.M)*

CURRENT STATUS:

### **DEFENDANTS' MOTIONS TO DISMISS KINROSS/SUNNYSIDE/GOLD KING MINE CORPORATION**

- **Plaintiffs lack PERSONAL JURISDICTION over the Defendants**
- **Colorado is an INDISPENSABLE PARTY that cannot be joined in the matter**
- **CERCLA PREEMPTS state law claims other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource.” *General Electric*, 467 F.3d at 1247**



*Bonita Peak Superfund Site*  
*Sunnyside vs. EPA*  
**(U.S. Court of Appeals, D.C.)**

ISSUE (ARBITRARY AND CAPRICIOUS):

THE HAZARD RANKING SYSTEM (HRS) PROTOCOL WAS NOT APPLIED TO 27 SITES INCLUDED IN THE SUPERFUND LISTING

**In an effort to ensure that potential NPL sites were reviewed in an objective manner, the EPA created the HRS. 40 C.F.R. § 300.425(a) (“The purpose of this section is to identify the criteria as well as the methods and procedures EPA uses to establish its priorities for remedial actions.”).**





*Bonita Peak Superfund Site*  
*Sunnyside vs. EPA*  
(U.S. Court of Appeals, D.C.)

Plaintiff Supporting Arguments:

To address the concern associated with EPA not properly using the HRS, Congress amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), Pub. L. No. 99-499, 100 Stat. 1613 (1986).



*Bonita Peak Superfund Site*  
*Sunnyside vs. EPA*  
**(U.S. Court of Appeals, D.C.)**

Plaintiff Supporting Arguments:

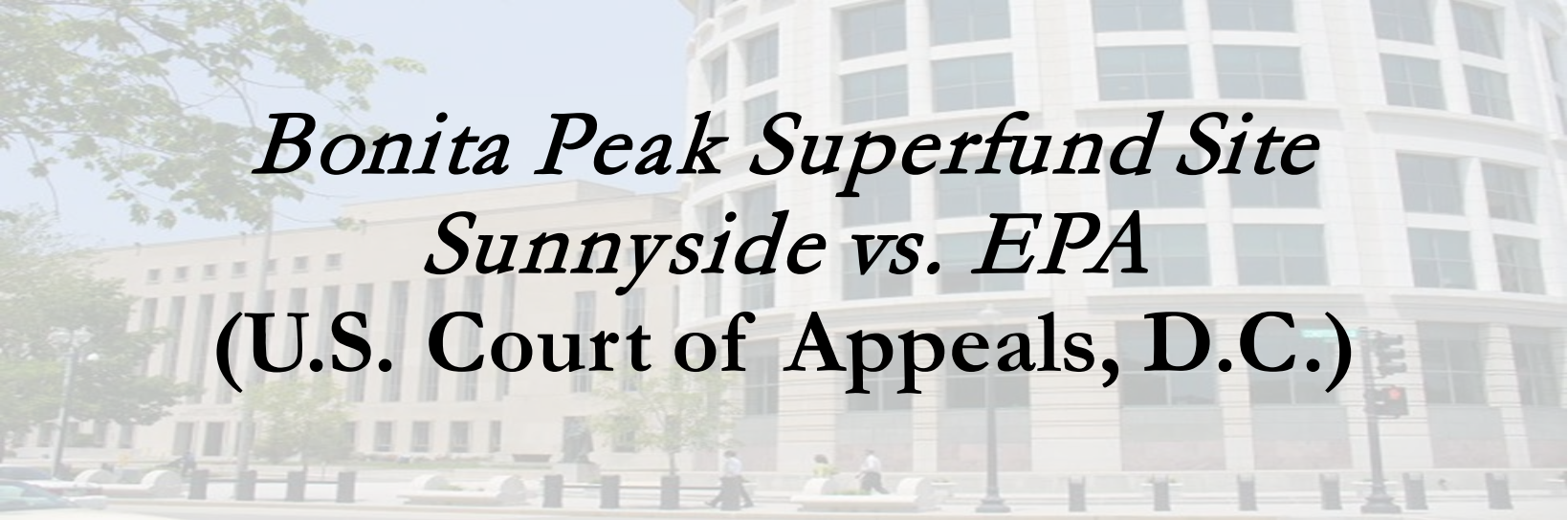
Congress’s motivation to amend CERCLA was its dissatisfaction with the EPA’s “listing of a disproportionate number of high volume, low toxicity hazardous waste sites— notably mining sites.” *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1303 (D.C. Cir. 1991) (quoting 42 U.S.C. § 9605(c)(1)).



*Bonita Peak Superfund Site*  
*Sunnyside vs. EPA*  
(U.S. Court of Appeals, D.C.)

Plaintiff Supporting Arguments:

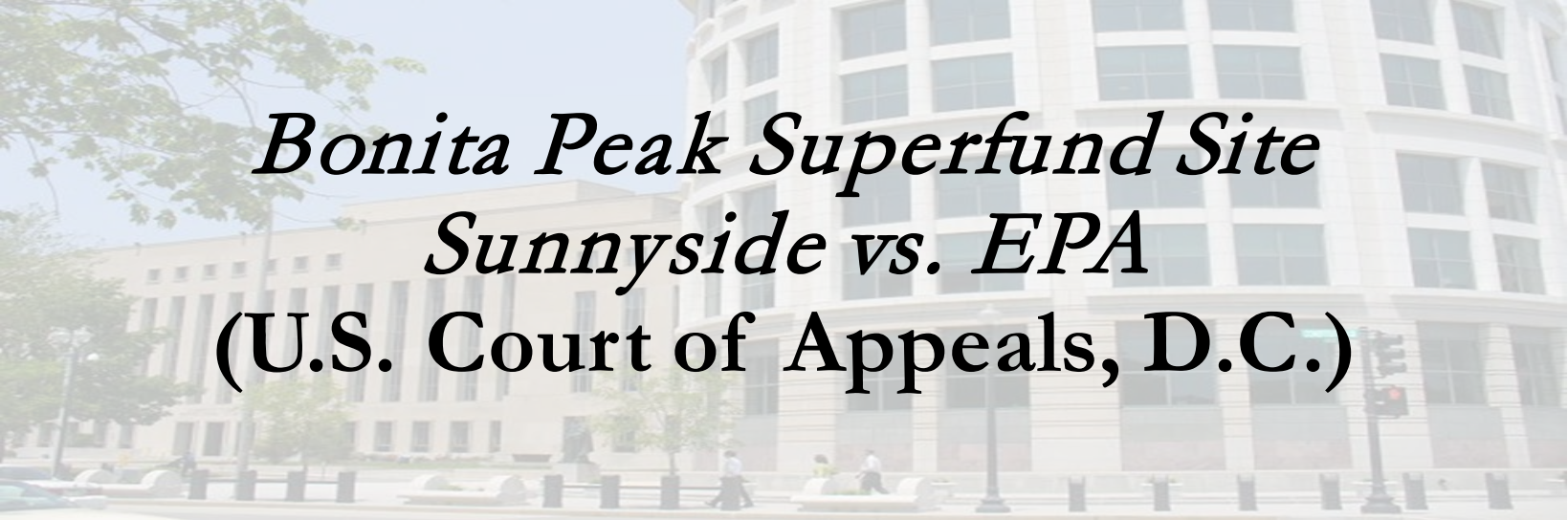
**The HRS “process is relatively objective; the data is collected, then scored.” An owner then has the opportunity to evaluate the findings and present objections. An owner does not have this opportunity when property is not scored before listing it on the NPL—resulting in the harmful effects of the listing without the objective criteria to justify the harm. *SCA Services of Indiana, Inc. v. Thomas*, 634 F. Supp. 1355, 1364–65 (N.D. Ind. 1986).**



*Bonita Peak Superfund Site  
Sunnyside vs. EPA*  
(U.S. Court of Appeals, D.C.)

Supporting Arguments:

**EPA simply attributed the HRS scores for the Scored Sites to each and every Non-Scored Site as well as other, as yet unidentified, “mining and mining-related activities” across the entire BPMD. EPA’s decision to include Non-Scored Sites within the BPMD listing must be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).**

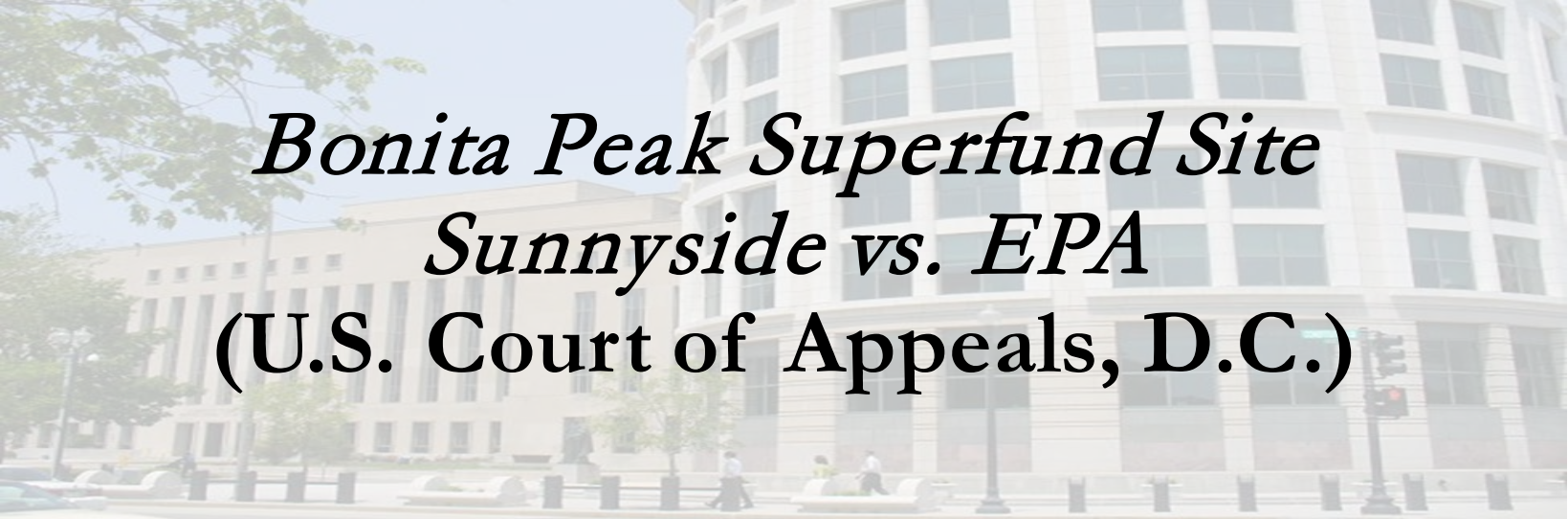


*Bonita Peak Superfund Site*  
*Sunnyside vs. EPA*  
(U.S. Court of Appeals, D.C.)

General Supporting Arguments:

**The Fifth Amendment’s Due Process Clause states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”**

**The HRS process, while minimal at best, in conjunction with the opportunity to comment on the findings is the extent of “due process” offered to private property owners during the NPL process.**



*Bonita Peak Superfund Site*  
*Sunnyside vs. EPA*  
(U.S. Court of Appeals, D.C.)

CURRENT STATUS:

**EPA RESPONSE IS DUE IN AUGUST 2017**

POTENTIAL OUTCOME

**Non-Scored Sites could be removed from the NPL**

A Guide to the  
**Federal  
Tort  
Claims  
Act**

PHILLIP



In January, the EPA claiming sovereign immunity declared that is not [mandated under federal law](#) to repay \$1.2 billion to the states affected by the Gold King Mine spill, the Department of Justice (DOJ) supposedly told the agency. The spill caused 3 million gallons of dangerous metals like lead, cadmium and arsenic into the Animas River.



# ON THE HORIZON

## **SUPERFUND LITIGATION**

**ACTION AGAINST POTENTIAL RESPONSIBLE PARTIES**

**NATURAL RESOURCE DAMAGES ACTION**

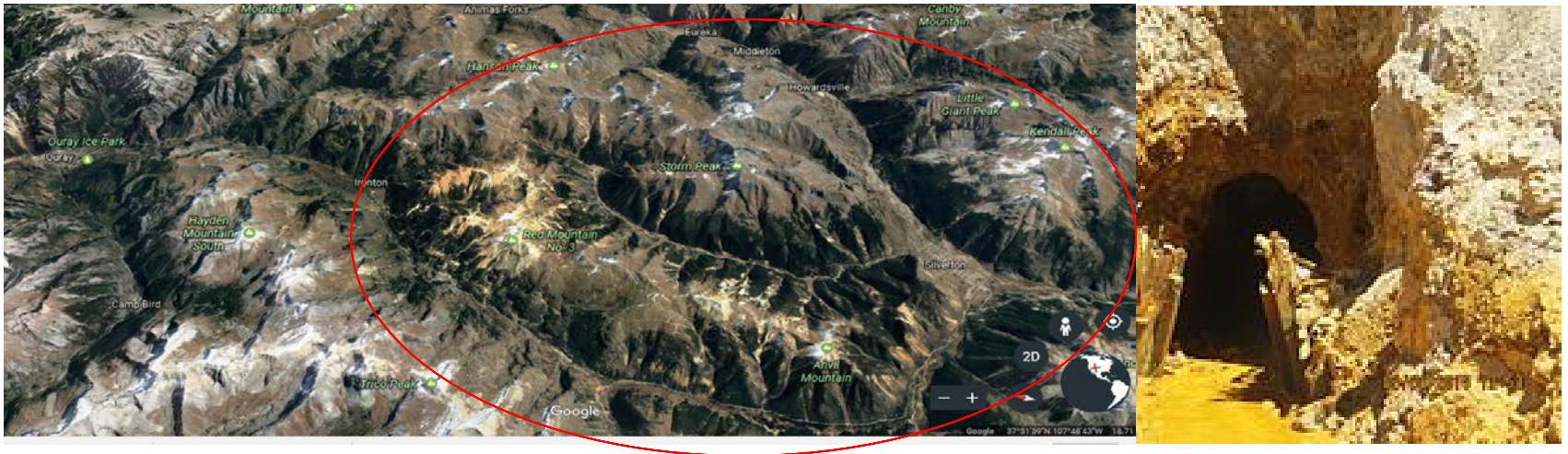
## **BONITA PEAK/SUPERFUND FACTS**

**LITIGATION HOLD INCLUDES APPROXIMATELY 50,000 DOCUMENTS  
EXCEEDING OVER 1.3 MILLION PAGES**

**THE SUNNYSIDE CONSENT DECREE WAS ORDERED BY COLORADO  
SUPREME COURT CHIEF JUSTICE NANCY RICE WHEN ORIGINALLY  
SERVING AS A DENVER DISTRICT COURT JUDGE**



# QUESTIONS?



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