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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35934

D.C. No. 6:12-cv-00053-DLC

[Filed: September 14, 2020]

ASARCO LLC, a Delaware corporation, *Plaintiff-Appellee*,	)
v.	)
ATLANTIC RICHFIELD COMPANY, LLC, a Delaware corporation, *Defendant-Appellant*,	)
and	)
BRITISH PETROLEUM, PLC, a United Kingdom Corporation; AMERICAN CHEMET CORPORATION, a Montana Corporation, *Defendants*.	)

OPINION

App. 2

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted April 27, 2020
Seattle, Washington

Filed September 14, 2020

Before: M. Margaret McKeown, N. Randy Smith, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Environmental Law

The panel affirmed in part and vacated in part the district court's judgment, after a bench trial, in favor of the plaintiff in a contribution action under the Comprehensive Environmental Response, Compensation, and Liability Act.

Plaintiff ASARCO LLC entered into a consent decree with the Environmental Protection Agency to clean up environmental contamination at several sites, including a Superfund Site in East Helena, Montana. Asarco, former operator of a lead smelting facility, then brought a CERCLA contribution action against Atlantic Richfield Co., successor in interest to the operator of a zinc fuming plant The district court found that Asarco

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

had incurred $111.4 million in necessary response costs for the cleanup of the Site and that Atlantic Richfield was responsible for 25% of that sum.

Vacating and remanding in part, the panel held that the district court erred in its determination of the necessary response costs incurred by Asarco. Specifically, the district court erred when it counted the full settlement amount, including about $50 million of funds that had not been, and might never be, spent on the Site cleanup, as response costs subject to contribution at this stage of the Site cleanup. The panel remanded for further consideration of what response costs were sufficiently concrete and non-speculative such that they would be eligible for contribution under CERCLA.

Affirming in part, the panel held that the district court did not err in allocating responsibility for 25% of the response costs to Atlantic Richfield. The panel held that the district court properly exercised its discretion in its consideration of appropriate equitable factors and did not clearly err in its factual findings supporting its allocation decision.

COUNSEL

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OPINION

NGUYEN, Circuit Judge:

In June 2009, ASARCO LLC ("Asarco") agreed to settle with the government and enter into a consent decree to clean up environmental contamination at several sites, including a Superfund Site in East Helena, Montana (the "Site"). Asarco then brought a contribution action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601–9675, against Atlantic Richfield Company, LLC ("Atlantic Richfield"). Following a bench trial, the district court entered judgment in favor of Asarco, finding that Asarco had incurred $111.4 million in necessary response costs for the cleanup of the Site and that Atlantic Richfield was responsible for twenty-five percent of that sum. Atlantic Richfield appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the district court erred in its determination of the necessary response costs incurred by Asarco, but the court did not err in allocating twenty-five percent liability to Atlantic Richfield. We therefore vacate and remand in part, and affirm in part.

I. BACKGROUND

A. Operations at the Site

Asarco and its predecessors owned and operated a lead smelting facility at the Site from 1888 to 2001. Asarco's lead smelting facility was the largest operation at the Site. This operation recovered lead and other metals by smelting a variety of foreign and domestic concentrates, ores, fluxes, and other non-ferrous, metalbearing materials and byproducts. Those materials contained arsenic concentrations as high as 190,000 parts per million ("ppm"). The smelting operation produced slag as a waste product, which contained small residual quantities of metals and arsenic. It is undisputed that Asarco "released significant amounts of arsenic into the environment" from its smelting facility.

Atlantic Richfield is the successor in interest to Anaconda, which leased a portion of the Site from Asarco to construct and operate a zinc fuming plant. Using a blast furnace fueled with coal, Anaconda reprocessed slag that it purchased from Asarco to recover zinc. Anaconda used and produced several arsenic-bearing materials in its fuming operation, albeit with a lower arsenic concentration than Asarco's primary materials. Anaconda operated the zinc fuming plant from 1927 to 1972, at which point it sold the plant to Asarco. Asarco then operated the zinc fuming plant for another decade.

B. EPA Involvement and Remediation

In 1984, the Environmental Protection Agency ("EPA") added the Site to the CERCLA National

Priorities List, targeting it for environmental remediation. The primary environmental concern at the Site was arsenic contamination of the groundwater. In the years that followed, Asarco entered into a series of agreements with the EPA to begin the process of remediation.

In 1990, Asarco and the EPA finalized a settlement agreement and consent decree in CERCLA litigation concerning the contamination of the process ponds at the Site. Pursuant to the consent decree, Asarco agreed to undertake a cleanup of the process ponds, which it substantially completed by 1997.

In 1998, Asarco and the EPA entered into another settlement agreement and consent decree, this time resolving claims brought by the EPA under the Resource Conservation and Recovery Act and the Clean Water Act. The settlement did not raise any claims under CERCLA.

On August 9, 2005, Asarco filed a Chapter 11 bankruptcy petition. In connection with the bankruptcy proceedings, the United States, the State of Montana, and the State of Montana Department of Environmental Quality all filed proofs of claim for Asarco's projected liability under CERCLA. Asarco, the United States, and the State of Montana reached two complementary settlement agreements and consent decrees in February and June 2009, resolving Asarco's outstanding environmental liabilities at several Montana sites, including the Site at issue in this case.

The June 2009 consent decree established a custodial trust for the affected sites, and the Montana

Environmental Trust Group ("METG") was appointed as the custodial trustee for the East Helena Site. The June 2009 consent decree also designated the EPA as the lead agency for the Site, placing it in charge of selecting, approving, and authorizing all work performed and funds expended by METG. Pursuant to the June 2009 consent decree, Asarco paid approximately $111.4 million[1] for cleanup of the East Helena Site—accounting for comprehensive damage done to the Site by all responsible parties. That sum included: (a) $99.294 million into the East Helena Custodial Trust Cleanup Account for a groundwater remedy;[2] (b) $6,403,743 toward the establishment of the Custodial Trust and the funding of the Custodial Administrative Account to be used for trust administration expenses; (c) $706,000 to the U.S. Department of the Interior for natural resource restoration and future oversight costs for the Site; and (d) $5 million to the State of Montana for compensatory natural resource damages at the Site.

METG has begun its remediation work at the Site. So far, it has fully implemented three interim measures to curb the spread of contaminants and further environmental degradation at the Site. METG also has implemented institutional controls for the Site and the surrounding areas, designed to prevent

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[1] In total, Asarco paid $1.8 billion to settle environmental claims related to hazardous waste in the bankruptcy proceedings.

[2] This figure was based on estimates for a pump-and-treat system recommended by the State of Montana's experts, William Bucher and Ann Maest.

property owners from using their domestic water wells to avoid contact with contaminated groundwater. METG proposes one additional future project: capping the portion of the slag pile at the Site that consists of unfumed slag. METG has not instated and does not plan to install a pump-and-treat system.

As of the most recent accounting available, METG had spent a little less than half of the trust funds at its disposal, leaving it with approximately $50 million for further remediation efforts. Atlantic Richfield's expert estimated the ongoing costs for operations and maintenance at $9.2 million, and METG estimated the cost of covering the unfumed slag at $3.7 million. Adding those sums to the dollar amount already expended by METG, the total cleanup cost for the Site would approximate $61.4 million. Asarco contends that Atlantic Richfield's expert vastly understates how costly the cleanup would be. Asarco's expert opined that METG's proposed remedies would be insufficient to address the groundwater contamination and that more substantial remediation work would be necessary.

C. Procedural History

In 2012, Asarco brought this contribution action against Atlantic Richfield under CERCLA §§ 107 and 113. The district court granted summary judgment in favor of Atlantic Richfield, finding the action barred by the statute of limitations. Asarco appealed, and we concluded that Asarco's contribution claim was, in fact, timely. *See Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017). We vacated the district court's summary judgment order and remanded for further proceedings before the trial judge. *Id.*

On remand, the district court conducted an eight-day bench trial, weighted heavily toward expert testimony. Following trial, the district court issued detailed findings of fact and conclusions of law and entered judgment in favor of Asarco. The court found that Asarco had expended $111,403,743 in necessary response costs for cleanup of the Site[3] and that Atlantic Richfield was liable for twenty-five percent of those costs, i.e., $27,850,936. The court also granted an additional $1 million award to Asarco, based on its findings as to Atlantic Richfield's failure to cooperate with the authorities and its misrepresentations to the EPA and to Asarco.[4] Atlantic Richfield moved to alter or amend the judgment, but the district court denied the motion. This appeal timely followed.

II. ANALYSIS

A. The District Court Erred by Including Speculative Future Costs in its Tabulation of Necessary Response Costs Eligible for Contribution Under CERCLA.

Atlantic Richfield argues that the district court erred in finding that Asarco incurred $111.4 million in necessary response costs for the environmental cleanup of the Site, because that sum improperly included (i) costs that had not yet been, and might never be, incurred; and (ii) costs that were not necessary to

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[3] This figure is the amount paid by Asarco in connection with the June 2009 consent decree.

[4] Atlantic Richfield does not challenge on appeal the imposition of this additional $1 million award.

protect human health and the environment. Atlantic Richfield contends those costs are unrecoverable under CERCLA, and that the response costs eligible for contribution should be limited to the $61.4 million that it represents have been incurred so far to remediate the Site.

We review for clear error the district court's findings of fact following a bench trial, and we review de novo its conclusions of law and mixed questions of law and fact. *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011). We hold that the district court erred when it counted the full settlement amount—including about $50 million of funds that had not been, and might never be, spent on the Site cleanup—as response costs subject to contribution at this stage of the Site cleanup. We therefore vacate and remand for further consideration of what response costs are sufficiently concrete and non-speculative such that they would be eligible for contribution under CERCLA.

The parties agree on the initial premise that, pursuant to the CERCLA contribution regime, Asarco is entitled to recover an allocated proportion of the "necessary costs of response incurred . . . consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). From that point, their positions diverge.

Atlantic Richfield contends that those funds not yet spent or earmarked for specific, imminent work cannot qualify as costs "incurred." It relies on cases that prohibit recovery under CERCLA for future response costs or the award of speculative damages unmoored to

concrete expenses. *See Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021–22 (9th Cir. 1993); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249–50 (9th Cir. 1991). Atlantic Richfield asserts that METG no longer expects to implement the costly pump-and-treat remedy, instead planning to carry out cheaper remedial actions that would leave a large portion of the settlement funds untouched. It also cites to a reversion provision in the settlement agreement, whereby unused settlement funds would be redirected to remediate other sites for which Atlantic Richfield has no liability.

Asarco responds that the costs for which it seeks contribution were actually "incurred." It argues that the entire sum paid in settlement, $111.4 million, was intended to fund the environmental cleanup of the Site, as evidenced by the fact that the reversion provision does not allow the return of any funds to Asarco's hands. Based on its irrevocable payment, Asarco says it "incurred" those response costs within the meaning of the statute. Asarco attempts to distinguish the cases cited by Atlantic Richfield, noting that they occurred in different contexts and lacked the same type of firm monetary commitment that Asarco undertook here. And Asarco points to cases from other circuits allowing recovery of future costs, arguing that precluding recovery for such costs could undermine CERCLA's policy objective of incentivizing settlements and early, accountable cleanup. *See RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 558–60 (6th Cir. 2007); *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 26–27 (1st Cir. 2004); *Action Mfg., Co. v. Simon Wrecking Co.*, 287 Fed. App'x 171, 174–76 (3d Cir. 2008); *PCS Nitrogen, Inc. v.*

Ross Dev. Corp., 104 F. Supp. 3d 729, 744 (D.S.C. 2015).

On this factual record, Atlantic Richfield has the better argument. We have held that the full dollar value of a settlement agreement to discharge CERCLA liability is not automatically subject to contribution. *AmeriPride Servs. Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474, 490 (9th Cir. 2015) ("[I]f a party who was liable under § 9607(a) entered into a settlement agreement to discharge its CERCLA liability to a third party, it can seek contribution under § 9613(f)(1) only for the settlement costs that were for necessary response costs incurred consistent with the NCP."). In many cases, the full settlement amount may equate with the necessary response costs incurred—but that is not *inherently* so. Thus, funding a settlement obligation, on its own, does not automatically render the entire sum compensable in a contribution action, even if that payment is irrevocable. A party seeking contribution must still show that the settlement amount represents "necessary response costs incurred consistent with the NCP." *Id.* Although the meaning of "incur" is sufficiently broad that it does not require that an expense already be paid, it is also not so broad that it encompasses future expenses that are mere potentialities. *See Trimble v. Asarco, Inc.*, 232 F.3d 946, 958 (8th Cir. 2000) ("We do not dispute plaintiffs' point that a party may be found to have 'incurred' a cost without having actually paid for it[;] . . . a finding that a cost has been 'incurred' may be based upon an existing legal obligation. However, the mere possibility, even the certainty, that an obligation to pay will arise in the future does not establish that a cost has been

incurred, but rather establishes that a cost may be incurred, or will be incurred."), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 961 (9th Cir. 2013) (explaining that courts apply the ordinary meaning of the term "incur" in the CERCLA context, "which is '[t]o acquire or come into,' '[t]o become liable or subject to as a result of one's action,' to 'bring upon oneself'" (quoting *Am. Heritage Dictionary* (4th ed. 2000)) (alterations in original)).

Reinforcing our focus on non-speculative costs actually incurred, our circuit historically has refused to award future response costs. *Stanton Rd.*, 984 F.2d at 1021–22 (holding that "CERCLA prohibits awards of future response costs" and finding error in the district court's order requiring defendants to place $1.1 million in escrow for future cleanup costs); *Dant & Russell*, 951 F.2d at 249–50 (explaining that response costs not yet incurred cannot be recovered under CERCLA, and highlighting that "[s]ection 9607(a)(4)(B) permits an action for response costs 'incurred'—not 'to be incurred'"). Likewise, we have found "no suggestion in the statute that Congress intended CERCLA to create a general federal right of contribution for damages and response costs that are not otherwise cognizable under the statute." *AmeriPride*, 782 F.3d at 490 (quoting *Cty. Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1517 (10th Cir. 1991)). Therefore, we conclude that speculative, potential future response costs are not recoverable in a CERCLA contribution action, even if the party seeking contribution has already made an outlay for such costs pursuant to a settlement. Instead, a declaratory

judgment, whereby liability for future response costs would be allocated at a set percentage across responsible parties, is the proper mechanism for recouping future response costs in the CERCLA regime.[5] *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000) (holding that declaratory judgments are appropriate not only in the context of cost recovery actions brought under 42 U.S.C. § 9607, but also in CERCLA contribution actions brought under 42 U.S.C. § 9613).

Here, based on the most recent accounting as of trial, METG had spent only about $48.5 million of its allocated funds, leaving it with another $50 million for further cleanup efforts. Although the settlement figure was based on the estimated cost of a pump-and-treat remedy,[6] METG does not plan to implement a pump-and-treat remedy at this time. It considers a pump-and-treat remedy too costly, potentially ineffective, and risky in that it could affect the stability of the arsenic-contaminated groundwater plume. Instead, METG's proposed final remedies are meaningfully less costly—quoted to bring the full cleanup costs for the Site to about $61.4 million.

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[5] We also do not intend to foreclose a settling party from seeking contribution for costs not yet incurred in a future action, once those costs have been incurred within the meaning of CERCLA, to the extent otherwise permitted by law.

[6] The settlement does not require that any particular remedial measure be taken to clean up the Site. Therefore, the settlement does not specifically mandate a pump-and-treat remedy, even though it was priced with such a remedy in mind.

Asarco challenges METG's assessment and proffered the expert testimony of Margaret Staub, who emphasized that the original settlement contemplated implementation of a pump-and-treat system at the Site. Staub opined that the measures proposed by METG likely would not restore the groundwater to acceptable levels, and that, while she could not say definitively what the final remedy would be, "something at some point is going to have to be done." But Staub's opinion, upon which the district court relied, does not provide sufficiently concrete evidence that the entire sum would likely be expended to remediate the Site. Not only is Staub's opinion steeped in speculation to begin with, but there is a vast logical leap from the broad conclusion that "something" further will need to be done to remediate the Site, to the specific quantification of the necessary response costs for the Site at $111.4 million or greater.

In short, Asarco relies on conjecture rather than firmly-grounded facts and figures. As noted, METG has not paid for or assumed an obligation to pay for a pump-and-treat remedy, nor has it earmarked any funds for that purpose. At this stage, any such response costs remain speculative. Further adding to the uncertainty surrounding total response costs, the settlement contains a reversion provision that redirects any unused Site cleanup funds to other causes, including the other contaminated properties subject to the broader settlement. Although Asarco is liable for the cleanup of all the covered properties, Atlantic Richfield is not.

Asarco's argument, which the district court adopted, strays from CERCLA's legal framework. The district court explained:

> The Court . . . concludes that unless and until the groundwater is restored to achieve [maximum contaminant levels] and drinking water standards, something more substantial will need to be done. Whether there remain[] sufficient funds in the trust to accomplish this task, and whether a pump and treat system is the ultimate solution, are not the controlling questions. Regardless of the answer to those two questions, and notwithstanding Atlantic Richfield's arguments to the contrary, the Court is convinced that the balance of the approximate $50 million in the trust will most likely be expended to achieve the mandated remediation results.

Working from that premise, the court found the full $111.4 million settlement amount to be necessary response costs eligible for contribution. While we do not question the district court's finding that further remedial action may be necessary in the future, its forecast was not adequately tethered to any concrete evidence in the record.

If, as the district court concludes, "something more substantial will need to be done," a party in Asarco's position ultimately *can* recover the corresponding response costs from its fellow responsible parties. But until further information is known about the nature and costs of that "something more," those future costs are not eligible for contribution. In the meantime, the

contribution-seeker can pursue (i) contribution for those necessary response costs that have been incurred to date, and (ii) a declaratory judgment to establish liability and a contribution allocation for those costs that have not been incurred yet, but may be incurred in the future.

We emphasize, however, that our holding is a narrow one. We are presented with a cash-out bankruptcy settlement, reached as part of a global settlement of liability for several contaminated sites, with a reversion provision that diverts unused funds to other sites for which only one of the parties is responsible. We likewise face the unusual scenario in which the projected costs of the remediation process, as well as the proposed means of remediation, have fluctuated dramatically since the time the settlement was reached; significantly, one of the core facets of the initial remediation plan, a pump-and-treat remedy, now appears extremely unlikely to come to fruition. On this record, Asarco has failed to adequately support its asserted response costs.

Finally, to the extent the parties disagree about whether the costs of a pump-and-treat system (or other yet-to-be-incurred costs) would be "necessary," we need not resolve the parties' dispute. Because such costs have not been incurred, they cannot be awarded even if they satisfy the remaining requirements for contribution eligibility. For these reasons, we vacate the district court's finding that the full $111.4 million settlement amount was eligible for contribution and remand for further consideration of what necessary

response costs were actually incurred within the meaning of CERCLA.

B. The District Court Did Not Err in Allocating Responsibility for Twenty-Five Percent of the Response Costs to Atlantic Richfield.

Atlantic Richfield argues that the district court inflated its liability far beyond its actual environmental impact and ascribed to it a share of the response costs that bore little relation to the evidence presented at trial. Specifically, Atlantic Richfield contends that the district court failed to take account of the volume and toxicity of the waste each party handled; failed to explain adequately what factors it considered in reaching its allocation; and arrived at an allocation that meaningfully outpaced the level of contamination it could have caused. We disagree, and we hold that the district court did not err in devising an equitable allocation of liability for the Site cleanup.

In a contribution action, CERCLA empowers a district court to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). On appeal, we then "review for an abuse of discretion the equitable factors that a district court considers in allocating CERCLA costs and review for clear error the allocation according to the selected factors." *TDY Holdings, LLC v. United States*, 885 F.3d 1142, 1146–47 (9th Cir. 2018).

As an initial matter, we conclude that the district court properly exercised its discretion by anchoring its

analysis around the so-called "Gore factors."[7] *See id*. at 1147 (approving of the use of the Gore factors in CERCLA costs allocation); *United States v. Burlington N. & Santa Fe Ry. Co*., 520 F.3d 918, 940 n.26 (9th Cir. 2008) (same), *rev'd on other grounds*, 556 U.S. 599 (2009). The district court also acted well within its discretion in its broader efforts to tabulate the parties' historical responsibility for the contamination, its choice to ground that assessment in the expert testimony offered by the parties, and its concern with the duration of each party's operations at the Site.[8] Nor was it improper for the court to determine that it could not and need not allocate response costs to a mathematical certainty, and that it could apply general principles of fairness and equity in deciding whether to

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[7] The Gore factors are: (i) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with federal, state, or local officials to prevent any harm to public health or the environment. *See TDY Holdings*, 885 F.3d at 1146 n.1.

[8] We are not persuaded by Atlantic Richfield's argument that the comparative duration of the parties' operations is "irrelevant" to an appropriate allocation. The number of years a polluter operates can be tied to the amount of pollution it generates and its overall responsibility for contamination. Atlantic Richfield contends that other factors would be superior, but that does not render the district court's approach to be an abuse of discretion.

err on the side of over- or under-compensation. The district court was not required to adopt the particular set of factors, or the weighting among them, for which Atlantic Richfield advocated. Because we find no abuse of discretion at this step of the analysis, the propriety of the district court's allocation decision turns on whether it committed clear error in its allocation of Atlantic Richfield's responsibility. *See TDY Holdings*, 885 F.3d at 1146–47.

We conclude that the district court did not clearly err in its factual findings supporting its allocation decision. The district court, in a ninety-five page order, made extensive findings about the historical use and contamination of the Site by Asarco and Atlantic Richfield. It described in detail each party's operations at the Site; their respective uses and releases of arsenic, to the extent knowable from the historical records; their efforts, and failures, to prevent environmental contamination; and their interactions with the government concerning accountability and remediation. Although the district court's discussion of the nexus between its factual findings and the Gore factors could have been clearer at times, the court's findings and overarching analysis were sufficiently robust that we do not find reversible error on that basis here.

The first Gore factor inquires into the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished. *Id.* at 1146 n.1. The district court explained that the "sparse historical record" complicated the task of distinguishing the parties'

contributions, noting a lack of clarity as to "the precise nature and amount of pollutants" historically emitted by each operator. It noted that the deficiencies in the record were partially attributable to Atlantic Richfield's longstanding denial of responsibility for contamination at the Site. Nonetheless, the court found that the record generally "revealed enough information to understand the history of operations . . . at the Site," coupled with the aid of expert testimony, such that it could make a rough assessment of the parties' respective contributions.

The second and third Gore factors ask how much hazardous waste was involved, as well as the degree of toxicity of that waste. *Id*. The fourth Gore factor considers the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste. *Id.* To this end, the district court made detailed findings about the historical operations of Asarco and Atlantic Richfield, including the manners in which each used and released arsenic at the Site. It recognized, as do both parties, that "the majority of the groundwater contamination METG is remediating at the Site was caused by Asarco's operations." But the court noted that both parties used vast quantities of arsenic-laden materials in their everyday operations and generated substantial amounts of arsenic-laden byproducts. Although the court could not quantify all of Atlantic Richfield's past releases, given the large gaps in the historical record, it noted that Atlantic Richfield released so much toxic fly ash and coal dust that it received complaints from the City of Helena. The court likewise made findings as to the relative toxicity of arsenic in the various

materials used by Asarco and Atlantic Richfield, to the extent those toxicities could be ascertained.

The fifth Gore factor assesses the degree of care exercised by the parties with respect to the hazardous waste concerned. *Id.* The district court reviewed the precautions taken by both Asarco and Atlantic Richfield to protect against environmental contamination, as well as the failures of certain preventive measures taken by each party—such as leakages in the protective infrastructure and the careless handling of contaminated wash-down water. The court further noted Asarco's adoption of relatively intensive preventive measures toward the later years of its operation, including replacing Thornock Lake with a massive steel holding tank, as well as broader remediation efforts beginning in the 1990s.

The sixth Gore factor evaluates the degree of cooperation by the parties with federal, state, or local officials to prevent any harm to public health or the environment. *Id.* As to this factor, the court explained that Atlantic Richfield had repeatedly evaded responsibility for any environmental contamination at the Site, flagrantly misled the EPA regarding its releases at the Site, and made ongoing misrepresentations throughout the course of the litigation. Atlantic Richfield contends the district court's misrepresentation findings are "irrelevant" to its appeal of the twenty-five percent allocation because the court separately awarded a $1 million uncertainty premium pursuant to the sixth Gore factor. However, it is not inconsistent for the district court to award an uncertainty premium based on the egregiousness of its

findings as to the sixth Gore factor, and also separately to consider Atlantic Richfield's non-cooperation when weighing the equities in the context of reaching its baseline allocation.

In addition to its core factual findings, the district court considered the expert testimony proffered by the parties in arriving at its allocation. Asarco's expert proposed three alternative liability allocation strategies, which apportioned Atlantic Richfield's responsibility at twenty-five percent to forty-one percent depending on the method. Atlantic Richfield's expert focused on challenging Atlantic Richfield's liability altogether and opined that Atlantic Richfield should have zero responsibility for the Site cleanup. The court reviewed the testimony of the parties' dueling experts, discussing the merits and shortcomings of each. The court found the opinions of Asarco's expert, Andy Davis, "to be compelling and persuasive," adding that he "was the only witness at trial who was qualified by education, training, experience, and the work he performed in this case, to quantify the contribution of arsenic made by Anaconda's 45 years of operation at the Site." By contrast, the court found that Atlantic Richfield's expert, Brian Hansen, focused too much on Asarco's operations and tried so hard to minimize Anaconda's role that he failed to provide a useful quantification of its contamination. The court further found that Hansen failed to account for several material historical documents, and "le[ft] the majority of expert Davis's opinions largely unchallenged."

The district court favored Davis's most conservative allocation, which ascribed twenty-five percent of the total liability to Atlantic Richfield. It rejected Asarco's higher proposed allocations, as well as Atlantic Richfield's proposed zero percent allocation.[9] Davis's conservative allocation, i.e., "Strategy III," assigned equal responsibility to Asarco and Atlantic Richfield for discharges into the north plume and the Thornock Pond and Lake area plume, adjusted for the respective time periods the parties operated in each region, and then adjusted for the square footage of the contaminated groundwater in each area. The court found this strategy appealing, because it accounted for the parties' differential time periods of ownership—notably, a factor that favored *Atlantic Richfield* due to its comparatively short-lived operations at the Site. Particularly given the failure of Atlantic Richfield's expert to proffer a well-supported, sensible alternative

[9] The district court also rejected three alternative allocations suggested by Atlantic Richfield in its proposed amended post-trial findings of fact and conclusions of law. Atlantic Richfield contests the court's cursory rejection of those alternatives. However, Atlantic Richfield devoted nearly all of its energy at trial—and all of its expert testimony—to challenging *any* attribution of responsibility to Atlantic Richfield, so it provided minimal support for these alternative allocations. Although the court's rejection was terse, it was sufficient under the circumstances—especially when coupled with the district court's explanation of the allocation it did choose.

allocation, the district court reasonably resorted to the most conservative of Asarco's proposed allocations.[10]

The district court acknowledged that all the allocation strategies presented were imperfect and explained that it would compensate for the mathematical uncertainties by considering "such equitable factors as the court determines are appropriate," per the framework of CERCLA. 42 U.S.C. § 9613(f)(1). Ultimately, the court used the Gore factors—as well as the general equitable principle that the cooperating, settling party should receive the benefit of the doubt—to support its decision to adopt an allocation that erred on the side of over-compensation rather than under-compensation for the contamination emitted by Atlantic Richfield. Because these equitable factors weighed in Asarco's favor, and the court found Davis's "Strategy III" to be the most compelling of the proffered allocation strategies, it decided to stand by a twenty-five percent allocation of responsibility to Atlantic Richfield. Because the district court assessed the record evidence and underlying equities with sufficient rigor and care, we affirm.[11]

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[10] Moreover, that allocation aligned with the overarching theme of the court's factual findings, i.e., that Asarco bore responsibility for the vast majority of the Site's contamination, but Atlantic Richfield was more than a de minimis polluter.

[11] Atlantic Richfield further argues that a twenty-five percent allocation exceeds its realistic share of the Site contamination. But the district court was not required to allocate response costs precisely along the lines of the parties' emissions. Because consideration of "equitable factors" is permissible, it is immaterial if the court did not apportion response costs perfectly in line with

Finally, Atlantic Richfield argues that the district court's decision provided an insufficient articulation of the reasoning behind its allocation. We conclude that the court below made a sufficient record to inform our review. The court's ninety-five page decision is expansive and detailed, and it thoughtfully grapples with a challenging case. A decision need not be articulated with perfection to meet the standards we have set forth in our case law. *See Traxler v. Multnomah County*, 596 F.3d 1007, 1016 (9th Cir. 2016) (explaining that the district court must articulate its reasoning in a manner sufficient to permit meaningful appellate review, and remanding where the record "d[id] not permit [the court] to infer a rationale"). For these reasons, we affirm the district court's allocation decision.

Each party shall bear its own costs.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

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emissions—especially where no party has been able to quantify those emissions with precision.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 12-53-H-DLC

[Filed: October 5, 2018]

ASARCO LLC, a Delaware corporation,	)
	)
Plaintiff,	)
	)
v.	)
	)
ATLANTIC RICHFIELD COMPANY, a Delaware Corporation,	)
	)
Defendant.	)

ORDER

On June 26, 2018, following a bench trial, the Court entered judgment in favor of Plaintiff ASARCO, LLC ("Asarco"), and against Defendant Atlantic Richfield Company ("Atlantic Richfield"). (Docs. 269, 270.) At issue here are three matters: (1) Atlantic Richfield's motion to alter or amend the judgment (Doc. 277); (2) the prejudgment interest rate to be applied to the judgment in this case; and (3) the appropriateness of

awarding Asarco's costs and attorneys' fees. The Court considers each in turn.

I. Motion to Alter or Amend

Atlantic Richfield asks the Court to reduce the total amount of money allocated in the judgment from $111,403,743 to $61,400,000. (Doc. 277.) If the Court were to accept this position, Atlantic Richfield's total liability would decrease by approximately $13 million.

The Court has "considerable discretion in granting or denying [a Rule 59(e)] motion." *McDowell v. Calderon,* 197 F.3d 1253, 1255 n.1 (9th Cir. 1999). "A motion for reconsideration under Rule 59(e) 'should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or . . . there is an intervening change in the controlling law.'" *Id.* (quoting *389 Orange St. Partners v. Arnold,* 179 F.3d 656, 665 (9th Cir. 1999)). Atlantic Richfield argues that the 59(e) standard is met here because the Court committed manifest errors of law and fact in determining the amount of the allocable judgment.

Atlantic Richfield contends that reconsideration is appropriate because $50 million allocated in the judgment may not ultimately be spent to clean up the East Helena site. It claims that: (1) "Asarco failed to prove that the Unspent Funds are necessary costs of response"; (2) Asarco's failure to bring a declaratory judgment action is dispositive of Asarco's entitlement to funds that will be spent in the future; and (3) Asarco and the Court have misread the relevant case law. Although, as a preliminary matter, the Court disagrees

that Atlantic Richfield's arguments rise to Rule 59(e)'s standard, it nonetheless addresses the merits of the motion. Ultimately, the Court remains convinced that the $111,403,743 is allocable as necessary to remedy "an actual and real threat to human health or the environment." *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 871 (9th Cir. 2001).

The Court found that Asarco met its burden of showing that the full amount of the allocable judgment comprises necessary response costs. (Doc. 269 FOF[1] at ¶ 78.) When it found for Asarco following trial, the Court thoroughly considered and rejected the same argument that Atlantic Richfield presents now in its motion to alter and amend the judgment.

As part of a 2009 consent decree, Asarco paid the full amount of the allocable judgment, over $111.4 million, to address the environmental impacts caused by all parties at the East Helena Site. (Doc. 269 at FOF ¶ 51.) Atlantic Richfield concedes that $61.4 million has been properly claimed. Following an exhaustive bench trial, the Court found that the remaining $50 million–which, again, Asarco has already paid–will be spent to remedy the lingering significant environmental damage caused by Asarco and other parties, including Atlantic Richfield, at the East Helena Site. (Doc. 269 at FOF ¶¶ 60-79.) Put simply, there is still far too much arsenic in the water in East Helena. Tellingly, even after $61.4 million in cleanup costs, current institutional controls are focused on

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[1] "FOF" refers to the Court's numbered Findings of Fact, and "COL" refers to the Court's Conclusions of Law.

preventing people from using their wells. (Doc. 269 at FOF ¶ 72.)

The Court considered the facts presented at trial and expressly rejected the testimony of Atlantic Richfield's expert that final costs of cleanup should be limited to $61.4 million. (Doc. 269 at FOF ¶¶ 75, 77-78.) The Court determined that "unless and until the groundwater is restored to achieve MCLs and drinking water standards, something more substantial will need to be done." (Doc. 269 at FOF ¶ 78.) Accordingly, the Court found that "the balance of the approximate $50 million . . . will most likely be expended to achieve the mandated remediation results." (*Id*.)

Atlantic Richfield's other arguments in favor of Rule 59(e) reconsideration are also unavailing. Although Asarco likely could have brought a declaratory judgment action, here there is a sum certain that Asarco has already paid and that is earmarked for cleanup at the East Helena site. Again, the Court found that all of the money Asarco paid will most likely be spent to reduce the arsenic in the groundwater to safe levels. (And, in fact, $111 million may not be enough.) As Atlantic Richfield itself posits, the issue is whether the money spent by Asarco consists solely of "necessary costs of response." 42 U.S.C. § 9607(a)(4)(B); *see AmeriPride Servs., Inc. v. Tex. E. Overseas, Inc.,* 782 F.3d 474, 490 (9th Cir. 2015).

The Court is similarly unmoved by Atlantic Richfield's argument that Asarco and the Court misinterpret the relevant caselaw. Neither party has pointed to binding precedent addressing the precise circumstances presented here, and neither party needs

to. Consistent with all the cases cited by both parties, the question, again, is simply whether $111,403,743 comprises only costs necessary to remedy "an actual and real threat to human health or the environment." *Carson Harbor Vill.,* 270 F.3d at 871. That question has been asked and answered, and the Court is unconvinced that it erred as either a matter of law or fact.

II. Pre-judgment interest

In its Findings of Fact and Conclusions of Law, the Court ordered the parties to "meet and confer about the appropriate prejudgment interest calculation in this case using the interest rate calculation provided in 26 U.S.C. § 9507(d)(3)(C)." (Doc. 269 at 95 n.71.) The parties agree that, under the Superfund rate set forth in § 9507(d)(3)(C), Atlantic Richfield would owe Asarco $1,314,681.88 in prejudgment interest. Nonetheless, they dispute whether the Superfund rate appropriately applies. The Court determines that it does.

42 U.S.C. § 9507(d)(3)(C) provides that the prejudgment interest rate "shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund . . . ." 42 U.S.C. § 9507(a)(4). "Because § 9613(f) incorporates the liability provisions of § 9607, the court is not free to exercise its discretion in determining the methodology for calculating prejudgment interest" in a contribution action brought under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). *AmeriPride,* 782 F.3d 474, 490-91 (9th Cir. 2015).

Asarco argues that the time value of its money is higher than that of the government's money. Thus, it contends, the Court should apply a higher interest rate than applies to the Superfund. Asarco presents no reasoned precedent in support of its position, which appears to be wholly foreclosed by *AmeriPride,* if not by statute. Thus, the Court determines that the Superfund rate properly applies and orders Atlantic Richfield to pay $1,314,681.88 in prejudgment interest.

III. Costs and Fees

In its Findings of Fact and Conclusions of Law, the Court concluded that Asarco was entitled to its costs and reasonable attorneys' fees incurred in identifying Atlantic Richfield as a potentially responsible party. (Doc. 269 at COL ¶¶ 71-77.) It accordingly ordered Asarco to submit its claim for attorneys' fees and costs along with supporting documentation. Upon review of the materials presented by the parties, the Court determines that Asarco has not met its burden of showing its entitlement to attorneys' fees and that most of the submitted costs are not reimbursable.

A. Attorneys' Fees

As a general rule, attorneys' fees are not recoverable in a CERCLA contribution action. *Key Tronic Corp. v. United States,* 511 U.S. 809, 819 (1994). However, the Supreme Court has carved out a narrow exception for "work that is closely tied to the actual cleanup," including "work performed in identifying other [potentially responsible parties ('PRPs')]." *Id.* at 820. In consideration of the significant misrepresentations made to governmental authorities by Atlantic Richfield

and its predecessor, the Anaconda Cooper Mining Company, the Court reasoned that some of Asarco's attorneys' fees were necessary to overcome those misrepresentations and to identify Atlantic Richfield as a potentially responsible party. However, upon review of Asarco's claim for attorneys' fees and supporting documentation, the Court has no choice but to conclude that Asarco is not entitled to an award of attorneys' fees.

To support its claim for $4,721,023.56 in attorneys' fees, Asarco proffered a 6-paragraph declaration stating that these fees "were reasonable and necessary to identify Atlantic Richfield as a PRP at the Site and to refute Atlantic Richfield and Anaconda's untrue representations to federal and state regulators." (Doc. 274-1 at ¶ 5.) Asarco's request is inadequate for two reasons. First, it is impossible for Atlantic Richfield and the Court to determine whether these fees are "reasonable" because Asarco has not given even the most basic information regarding hourly rates charged by its attorneys and services performed. Second, it is similarly unclear whether these fees meet the *Key Tronic* exception, as there is no indication of when the work was performed and what that work was.

Asarco may be entitled only to those fees that are properly characterized as necessary response costs. *Key Tronic Corp.,* 511 U.S. at 819. While "[l]itigation costs may indeed be a part of recovering funds that are needed to advance the cleanup[,] . . . the ability to recover litigation-related attorney's fees does not necessarily advance the pace of cleanup because it may encourage ambitious litigation." *Fireman's Fund Ins.*

Co. v. City of Lodi, 302 F.3d 928, 953 (9th Cir. 2002). Accordingly, under *Key Tronic,* "the key inquiry for courts to examine carefully is the exact type of legal services covered by the fee." *Sealy Conn., Inc. v. Litton Indus., Inc.,* 93 F. Supp. 2d 177, 190 (D. Conn. 2000). The Court needs more than a declaration from counsel to perform this necessary inquiry.

Asarco cites to three cases for the proposition that the Court's wide discretion authorizes an award of fees solely on the basis of a conclusory declaration from counsel. (Doc. 281 at 4-5 (citing *Gluck v. Am. Protection Indus., Inc.,* 619 F.2d 30, 32-33 (9th Cir. 1980); *Mesa Petroleum Co. v. Coniglio,* 629 F.2d 1022, 1030 (5th Cir. 1980); *National Ass'n for Mental Health, Inc. v. Weinberger,* 68 F.R.D. 387, 393 (D.D.C. 1975), *rev'd on other grounds,* 561 F.2d 1021 (D.C. Cir. 1977).) However, the Court does not have discretion to award fees unless they fall under the *Key Tronic* exception, and it cannot make that determination absent a sufficient showing of proof.

Moreover, even assuming that the Court had the discretion to award $4.6 million in fees without further information, the Court would decline to exercise that discretion in this instance. Atlantic Richfield has not had an opportunity to review and respond to the details of Asarco's request, and the Court cannot verify either the reasonableness of the award or Asarco's threshold entitlement to it. Indeed, Asarco states in its reply brief that it incurred these fees "to identify, understand and pursue Atlantic Richfield as a PRP in this case." Doc. 281 at 3. *Key Tronic* does not allow litigation fees–fees incurred in "understand[ing] and pursu[ing]" a party

opponent. Thus, the Court will not award attorneys' fees to Asarco.

B. Costs

Also at issue is Asarco's entitlement to costs totaling $924,808.49. As with the requested fees, Asarco has not shown that the costs requested meet the *Key Tronic* exception, although it has at least provided itemizations of costs. Because the Court cannot conclude that the narrow exception set forth in *Key Tronic* is met here, the Court may award only those costs outlined in 28 U.S.C. § 1920.

The bulk of Asarco's request is $817,075.63 in what it classifies as "other costs," primarily expert fees paid to Andy Davis. The Court placed great weight on Davis's testimony and reports, determining that "the work of expert Davis in this case represents the only truly comprehensive analysis to date of the contribution that was made by Anaconda's historical operations at the Site to groundwater contamination." (Doc. 269 at FOF ¶ 181.) Although the Court remains certain of both the importance of Davis's work and the reprehensibility of Atlantic Richfield's and Anaconda's conduct, the Court cannot award Davis's fees absent a showing that they constitute a necessary response cost.

Rather, Davis's expert costs were incurred after the Amended Complaint naming Atlantic Richfield was filed. Ostensibly, then, Davis's services were a means of proving Atlantic Richfield's apportionable liability rather than identifying Atlantic Richfield as potentially responsible party. Asarco classifies all of Davis's costs as "expert work to identify [Atlantic Richfield] as a

PRP & refute false representations," (Doc. 275-5 at 2-4), but, as discussed above, something more is needed to verify the accuracy of Asarco's claim. Because the Court simply cannot find the *Key Tronic* exception satisfied on the basis of Asarco's legal argument and offer of proof, it cannot award Davis's expert fees under *Key Tronic. See, e.g., Gussack Realty Co. v. Xerox Corp.,* 224 F.3d 85, 92 (2nd Cir. 2000) (denying expert fees when "Plaintiffs were able to and did identify Xerox as a potentially responsible party without the expenditure of any of the requested consultation services"). Nor can it do so under 28 U.S.C. § 1920, which does not authorize compensation for expert services. Because the remainder of Asarco's request for "other costs" is similarly flawed, the Court cannot award $817,075.63 in "other costs."

Atlantic Richfield also objects to Asarco's request for: (1) *pro hac vice* fees, (2) transcript fees, (3) fees and disbursements for printing, (4) witness fees, and (5) fees for exemplification and copies. The Court briefly considers each category in turn.

(1) *Pro hac vice* fees are not recoverable under § 1920, and the Court accordingly will not award $1,760 requested. *Kalitta Air LLC v. Cent. Tex. Airborne Sys. Inc.,* 741 F.3d 955, 958 (9th Cir. 2013).

(2) Transcript fees are recoverable only if they are "necessarily obtained for use in the case." 28 U.S.C. § 1920(2). The Local Rules presume that transcripts are necessary if used "at trial, after trial, or in supporting or opposing a motion for summary judgment."

L.R. 54.1(b)(1)(B)(ii). Neither party's argument has altered that presumption. Accordingly, the Court will disallow costs associated with the transcripts and videos that were not used in trial, after trial, or in Asarco's summary judgment briefing, which are those of: Christopher Pfahl ($688.25), Andy Davis ($934.20), Margaret Staub ($466.65), Paul Rosasco ($783.87), Brian Hansen ($3,583.95 + $1,594.20), Monte Brothers ($3,420.00 + $2,247.45), Thomas Voltaggio ($1,988.00 + $1,223.50), Jon Nickel ($968.00), and Thomas Aldrich ($1,102.95). The Court therefore will subtract $19,001.20 from Asarco's request.

(3) Asarco seeks $11,308.32 in printing costs, including $2,992.88 in office equipment rental. "Reasonable costs of reproducing exhibits on the moving party's will-offer exhibit list are allowed. Otherwise the moving party must establish the reasonable necessity of reproducing the exhibit." L.R. 54.1(b)(3). Asarco did not itemize its printing costs in a manner that allows Atlantic Richfield and the Court to analyze the appropriateness of every printing fee incurred. However, recognizing that it was reasonably necessary for Asarco to reproduce a great number of exhibits for trial purposes, the Court determines that 25% of the claimed printing costs incurred were reasonably necessary for trial purposes. Therefore, the Court subtracts $2,992.88 for

equipment rental and $6,236.58 for printing costs wrongfully claimed.

(4) Asarco seeks $9,082.07 in witness fees. "Costs and fees for witnesses paid under 28 U.S.C. § 1821 are allowed for each day a witness testifies at trial. Otherwise, the moving party must establish the witness's presence was required." L.R. 54.1(b)(2). The Court determines that Asarco did not establish the necessity of multiple days of witness fees for several witnesses and accordingly subtracts $2,233.00.

(5) Asarco seeks $38,780.93 for exemplification and copies. "Fees for exemplification and copying are permitted only for the physical preparation and duplication of documents, not for the intellectual effort involved in their production." *Zuill v. Shanahan,* 80 F.3d 1366, 1371 (9th Cir. 1996) (internal quotation marks and citation omitted). Thus, the Court subtracts $38,314.93 in consultants' fees improperly claimed.

All total, the Court determines that Asarco is not entitled to $887,614.22 of the requested costs.

Accordingly, IT IS ORDERED that:

(1) Atlantic Richfield's motion to alter or amend judgment (Doc. 277) is DENIED;

(2) Atlantic Richfield shall pay to Asarco $1,314,681.88 in prejudgment interest; and

(3) Atlantic Richfield shall pay to Asarco $37,194.27 in costs.

DATED this 5th day of October, 2018.

/s/ Dana L. Christensen
Dana L. Christensen, Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 12-53-H-DLC

[Filed: June 26, 2018]

ASARCO LLC, a Delaware corporation,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ATLANTIC RICHFIELD COMPANY, a Delaware corporation,	)
	)
Defendant.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

INTRODUCTION

This is a civil action for contribution brought by Plaintiff ASARCO LLC ("Asarco") pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9613, against Defendant Atlantic Richfield Company ("Atlantic Richfield" or "ARCO") for costs and damages incurred by Asarco at

a location in East Helena Montana, known as the East Helena Site, a National Priorities List or "Superfund" site ("East Helena Site" or "Site"). The parties are both citizens of the State of Delaware. This Court has subject matter jurisdiction based upon the existence of a federal question, 28 U.S.C. § 1331. Personal jurisdiction is not contested. Venue is proper in this Court as the events occurred in East Helena, Montana. D. Mont. L. R. 1.2(c)(4), 3.2(b).

The Court held a bench trial from May 29, 2018 to June 7, 2018. Asarco was represented by Kris McLean, Gregory Evans, and Rachel H. Parkin. Atlantic Richfield was represented by Randy J. Cox, Kenzo Kawanabe, and Benjamin B. Strawn. Approximately 160 exhibits were admitted and the subject of testimony by 12 witnesses, including 3 expert witnesses.[1] Having carefully reviewed the evidence, the applicable law, and the testimony and arguments of the parties as presented at trial and in their written submissions, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52.

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[1] The testimony of Asarco witness Antonio Toccafondo was presented by a perpetuation deposition. The parties hi-lited the transcript portions of this deposition for the Court's reading. The Court read these excerpts after hours outside the presence of counsel.

FINDINGS OF FACT

I. THE PARTIES AND HISTORICAL OPERATIONS AT THE EAST HELENA SITE

1. Plaintiff Asarco is a limited liability company organized under the laws of the State of Delaware.

2. Asarco is the successor in interest to the American Smelting and Refining Company. Asarco is the resulting corporate entity that emerged from the Chapter 11 bankruptcy reorganization of the American Smelting and Refining Company in 2009.

3. Asarco and its predecessors owned a lead smelting facility at the Site, which was in operation from approximately 1888 until 2001. Asarco brought various ores, concentrates, and other materials to the site for smelting, which contained as much as 19% arsenic (190,000 parts per million or "ppm"). It is undisputed by Asarco that its lead smelting facility was the largest operation at the site, and that its operations caused significant groundwater contamination. Asarco continued to own and manage the Site until it emerged from bankruptcy in 2009.

4. Defendant Atlantic Richfield is a Delaware corporation. Atlantic Richfield is the successor-in-interest to Anaconda, formerly named Anaconda Copper Mining Company. Atlantic Richfield was also referred to as ARCO throughout the proceedings in this case.

5. On March 1, 1927, Asarco and Anaconda entered into an Option Agreement whereby Anaconda agreed to

purchase blast furnace slag produced by Asarco's lead smelting operation, which Anaconda intended to process at the Site for the recovery of zinc fume.

6. On December 20, 1927, Asarco and Anaconda entered into a Lease Agreement whereby Anaconda leased a tract of land at the Site for the purposes of constructing and operating a zinc fuming plant for the recovery of zinc from the slag it purchased from Asarco.

7. Pursuant to these two Agreements, Anaconda constructed and operated a zinc fuming plant on land leased from Asarco at the site for 45 years, from 1927 to 1972. Anaconda's zinc fuming operation was directly adjacent to Asarco's lead smelting operation.

8. Anaconda had two sources of slag at the site. One source was molten slag which Anaconda conveyed from Asarco's lead smelter to its zinc fuming facility. The second source was hardened, cold slag stockpiled on the Site which Anaconda mined and transported to its zinc fuming facility. Both sources of slag were then fumed by Anaconda in its facility for the purposes of recovery and sale of zinc. Anaconda placed this molten and cold slag into its zinc fuming blast furnace, which heated the slag to approximately 2,000 degrees Fahrenheit, resulting in zinc fume. The molten and mined cold slag which was transported, purchased and utilized by Anaconda contained arsenic.

9. Anaconda used coal to fuel the blast furnace. Coal contains 0.0006% (6 ppm) arsenic. The coal was delivered to the facility by railcar. The coal arrived in relatively small pieces and first needed to be dried before it was used in the furnace. This process was

accomplished through the use of a coal or kiln dryer. The kiln dryer utilized a horizontal turning heater that served to drive off the moisture in the coal. The dried coal was then passed from the kiln dryer to a pulverizer, which involved a milling process that reduced the coal into fine pieces so that it could be conveyed by high pressure air to the blast furnace.

10. As a protective measure, the blast furnace was completely surrounded with water jackets. Cooling water was pumped through the water jackets under pressure to route the water around the furnace. In the furnace, coal and air were injected into the molten slag material, and as that oxygen made contact with the zinc, it created zinc oxide dust, which was then conveyed through a series of cooling flues into a large building referred to as the bag house.

11. Once in the bag house, the zinc oxide dust was collected on a row of large woolen bags. The remaining air and particulates which were not collected on the woolen bags were then released through vents in the bag house into the atmosphere outside the bag house. The woolen bags would be shaken to dislodge the material into a series of augers, which would then convey the white zinc oxide material to a series of other augers and eventually into open-top railcars, and later to close-top railcars.

12. Anaconda's zinc fuming plant operated 24 hours a day, 7 days a week, 355 days per year.

13. Anaconda sold the zinc fuming operation to Asarco in 1972. Asarco then operated the zinc fuming

plant for 10 more years, until 1982, at which time it ceased operations.

14. Two other entities operated at the Site. American Chemet Corporation ("ACC"), at various points in time, conducted operations at the Site, including a zinc oxide plant and a zinc fuming process, and produced a number of products, including roasted zinc dross, talc and copper oxides. Burlington Northern Santa Fe ("BNSF") operated railway lines on and near the Site. BNSF and its predecessors transported ores and other feed materials from mines and other facilities to Asarco's lead smelter beginning in 1888.

II. THE SITE AND CLEANUP EFFORT

15. The Site is located in Lewis and Clark County in the State of Montana. The Site is south of the City of East Helena, and separated by US Highway 12. The majority of the Site is at a higher elevation than the City of East Helena. Prickly Pear Creek is a naturally occurring stream that originates at a higher elevation south of the Site, and travels in a northerly direction along the eastern and northern boundaries of the Site, under US Highway 12, through a portion of the City of East Helena, and ultimately into Lake Helena.

16. In 1984, EPA added the Site to the National Priorities List of sites under CERCLA that require environmental remediation pursuant to federal law.

17. The groundwater underneath the Site is contaminated with arsenic and selenium. Arsenic is the primary contaminant of concern. Although passing mention of selenium was made during the course of the trial, neither party offered any testimony, expert or

otherwise, or evidence regarding the presence or absence of selenium in the groundwater, the source or sources of any selenium contamination, what costs are associated with the selenium contamination, or who should bear responsibility for any such costs. Thus, the focus of this order is the same as the focus at trial, arsenic contamination in the groundwater.

18. Atlantic Richfield does not dispute that Anaconda's operations may have caused some contamination at the site, but it does dispute that Anaconda's operations are the source of the arsenic found in the polluted groundwater under the Site that is the subject of the cleanup. In fact, as will be explained later in these findings of fact, Anaconda and its successor, Atlantic Richfield, have historically been consistent and steadfast in denying any contribution of arsenic to the groundwater from its operations at the Site. In contrast, Asarco has never denied that its operations at the Site contributed to the presence of arsenic in the groundwater, which is evidenced by the forthcoming approach it has taken with the State of Montana and the Environmental Protection Agency during the cleanup process. Thus, based on these diametrically opposed positions, it is no surprise that the focus of the cleanup effort has been on the Site activities of Asarco, and not Anaconda/Atlantic Richfield.

19. Asarco's acceptance of responsibility at the Site was manifested through three CERCLA consent decrees and one Resource Conservation and Recovery Act ("RCRA") consent decree, which are described in more detail below.

A. The 1990 CERCLA Consent Decree

20. In 1990, the district court approved and entered a Settlement and Consent Decree between Asarco and EPA regarding the Site, which resolved claims EPA brought against Asarco under CERCLA § 106 and § 107. The 1990 CERCLA Consent Decree concerned only specific Site features, which were the process water ponds and process water management systems, some of which were associated with only Asarco's operations, and some of which were associated with the operations of both Asarco and Anaconda (collectively, the "Process Ponds").

21. Specifically, Asarco was required to implement certain remedial measures selected in the Record of Decision ("ROD") for the Process Ponds, which EPA had issued on November 22, 1989.

22. The 1990 CERCLA Consent Decree covered four Process Ponds: (1) Lower Lake; (2) the speiss granulating pond and pit; (3) the acid plant water treatment facility; and (4) former Thornock Pond or Lake, and the associated process water management systems. The operations of both Asarco and Anaconda delivered wastewater to Thornock Pond or Lake and Lower Lake. The speiss granulating pond and pit and the acid plant water treatment facility were used solely by Asarco.

23. Asarco was required to carry out the remedial measures selected by EPA for the Process Ponds, in accordance with the 1990 CERCLA Consent Decree and Process Ponds ROD.

24. Asarco completed substantially all of the cleanup activities required under the 1990 CERCLA Consent Decree by 1997.

B. The 1998 RCRA Consent Decree

25. Prior to 1998, Asarco and EPA engaged in negotiations to resolve operational compliance issues at Asarco facilities nationwide in a cooperative manner, including at Asarco's facilities in East Helena.

26. In 1998, Asarco and EPA entered into another Settlement and Consent Decree relating to Asarco's facilities in East Helena (the "RCRA Decree"), which resolved claims EPA brought against Asarco under RCRA and the Clean Water Act, but did not include the settlement of any claims under CERCLA.

27. Under the RCRA Decree, jurisdiction over the cleanup at Asarco's facilities was transferred from EPA's CERCLA program to its RCRA program.

28. The only portion of the cleanup that was not transferred from the CERCLA program to the RCRA program was the cleanup of certain off-Site contaminated residential soils (e.g., yards, roads, parks) and other undeveloped lands in the City of East Helena, which were referred to as Operable Unit 2 ("OU2").

C. Asarco's Bankruptcy and the February and June 2009 CERCLA Consent Decrees

29. On August 9, 2005, Asarco filed a bankruptcy petition under Chapter 11 of the United States

Bankruptcy Code in the Bankruptcy Court for the Southern District of Texas (the "bankruptcy court").

30. In the bankruptcy, numerous governmental entities filed proofs of claim regarding Asarco's outstanding environmental liabilities, including the United States and State of Montana Department of Environmental Quality, alleging joint and several liability under CERCLA ("proofs of claim"). The proofs of claim made various allegations and provided placeholder claim demands, which were later supplemented by expert reports. The allegations were not restricted solely to Asarco owned properties, and included claims for contamination to off-Site properties not owned by Asarco.

31. In its initial proof of claim, the United States made a claim against Asarco for "response costs and costs of assessment of injuries to natural resources under the Comprehensive Environmental Response, Compensation, and Liability Act ('CERCLA'), 42. U.S.C. §§ 9601-9675, incurred by the United States . . ." at sites including the East Helena Superfund Site.

32. The United States filed its Supplemental Proof of Claim against Asarco for "response costs incurred and to be incurred by the United States under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 at various sites," including the East Helena Superfund Site.

33. The State of Montana Department of Environmental Quality filed a Proof of Claim alleging that "Asarco is liable under CERCLA . . . for all

remediation expense" with respect to the East Helena Superfund Site. Furthermore, the Department claimed future remediation expense, including "a protective contingent claim" "[t]o the extent Debtor does not undertake remedial action as required under CERCLA or RCRA and as directed by the United States, the Department cost match would be an estimated $14,300,000 in future remediation, operation, and maintenance expense. Pursuant to CERCLA, the Department would be entitled to recover $14,300,000 from Debtor."

34. In addition to the United States' claim and the Montana Department of Environmental Quality's claim for the East Helena Site, the State of Montana also submitted a Proof of Claim against Asarco in the bankruptcy proceedings for CERCLA Natural Resource Damages for an estimated $20 million.

35. Asarco understood that these Proofs of Claim were CERCLA claims asserted "for future response costs and injuries to natural resources going forward . . . response costs for groundwater contamination." Asarco further understood that because the governmental claims were CERCLA claims, that "Asarco could be held responsible for all of the cleanup costs, 100 percent, regardless of if there were other PRPs on the site."[2]

36. In support of the various claims, the State of Montana submitted the expert reports of William H. Bucher, P.E., and Ann Maest, Ph.D., which established

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[2] PRP is the acronym for potentially responsible party.

that a $99 million pump-and-treat system was necessary to remediate the off-site groundwater plume underlying the City of East Helena.

37. Ann Maest, Ph.D., a geologist and geochemist, served as an expert witness on behalf of the State of Montana during approval proceedings related to the CERCLA Decree and attested that since 2000, the focus of the cleanup has been on restoration of groundwater, with arsenic being the primary contaminant.

38. On February 6, 2009, a Settlement and Consent Decree between Asarco, the United States, and the State of Montana was entered by the bankruptcy court which resolved Asarco's liabilities under CERCLA with respect to OU2 (the off-Site residential soils and undeveloped lands), but did not address contaminated groundwater. Pursuant to this February 2009 CERCLA Consent Decree, Asarco was required to pay $13,209,783 to fund the remaining cleanup of OU2. Again, this Decree covered only OU2, and expressly stated it did not apply to any other aspect of the East Helena Site, including groundwater.

39. Asarco, the United States, and the State of Montana reached a second Settlement and Consent Decree (the "June 2009 CERCLA Consent Decree") which resolved all of Asarco's outstanding environmental liabilities at several sites in Montana, including the remaining liabilities under CERCLA at the East Helena Site.

40. The June 2009 CERCLA Consent Decree recognizes the previously entered February 2009

CERCLA Decree, which it refers to as the "Separately Settled East Helena Matters." The June 2009 CERCLA Consent Decree does not incorporate or cover the work required under the February 2009 CERCLA Decree.

41. Asarco's Director of Environmental Services, Donald Robbins, submitted a declaration in support of Asarco's motion in the bankruptcy proceedings for an order approving the June 2009 CERCLA Consent Decree, and stated in his declaration that the two major variable factors remaining at East Helena were "the size of the groundwater plume; and the scope of the remedy."

42. Notice of this CERCLA Decree was published in the Federal Register, and the EPA received public comments.

43. On June 5, 2009, the CERCLA Consent Decree and Settlement between Asarco, the United States, and the State of Montana was entered by the bankruptcy court. The June 2009 CERCLA Consent Decree resolved all Asarco's outstanding environmental liabilities at several sites in Montana, which collectively were referred to as the "Montana Designated Properties." The Montana Designated Properties included the East Helena Site.

44. The June 2009 CERCLA Consent Decree established a Custodial Trust for the Montana Designated Properties. The Custodial Trust was to be established on the effective date of Asarco's Plan of Reorganization, as approved by the bankruptcy court.

45. The Montana Environmental Trust Group ("METG") was appointed as the Custodial Trustee for

the East Helena Site to administer the Custodial Trust and Custodial Trust Accounts.

46. Asarco was required to "transfer all of their right, interest in, and title to" the Montana Designated Properties to the Custodial Trust.

47. The June 2009 CERCLA Decree established separate "Custodial Trust Cleanup Accounts" for each of the Montana Designated Properties. The purpose of the Cleanup Accounts was to provide funding for future "Environmental Actions" with respect to each Montana Designated Property.

48. "Environmental Actions" is defined as "all environmental activities related to the Montana Designated Properties, including but not limited to response or remedial actions, removal actions, corrective action, closure, or post-closure care, natural resource restoration, reclamation, investigations, studies, remediation, interim actions, final actions, emergency actions, water treatment, implementation of engineered structures and controls, obtaining and maintaining reasonable financial assurance, monitoring, repair and replacement of engineered structures, monitoring equipment and controls, operation and maintenance, and implementation, operation and maintenance of institutional controls, coordination and integration of reuse and remedial efforts and initiatives (including, without limitation, multi-stakeholder communications), and, if appropriate, long-term stewardship and perpetual custodial care activities . . ." in addition to ". . . any and all environmental activities related to the Designated Properties...and activities related to releases of

hazardous substances, hazardous waste, or hazardous constituents from any portion of the Montana Designated Properties, including all areas affected by natural migration of such hazardous substances, hazardous waste, or hazardous constituents from the Montana Designated Properties."

49. The June 2009 CERCLA Consent Decree designated EPA as the "Lead Agency" for the East Helena Site in charge of selecting, approving, and authorizing all work performed and funds expended from the Custodial Trust Cleanup Account for the East Helena Site by METG.

50. Under the June 2009 CERCLA Consent Decree, Asarco was required to pay a total of $138,300,000 to fund all of the Custodial Trust Cleanup Accounts for the Montana Designated Properties.

51. Asarco paid approximately $111.4 million to address environmental impacts caused by all parties, including Anaconda, at the East Helena Site. This includes the following payments:

a. $99.294 million into the East Helena Custodial Trust Cleanup Account for a groundwater remedy to clean up the off-site groundwater at the East Helena Site, which was based upon the estimates for a pump and treat remedy advanced by the State of Montana's experts, William H. Bucher, P.E., and Ann Maest, Ph.D.

b. $8.9 million to "establish the Custodial Trust and to fund the Custodial Administrative Account for the purposes of administration of

the Custodial Trust," of which the proportionate share for the East Helena Site would be $6,403,743.

c. $706,000 to fund United States Department of the Interior natural resource restoration and future oversight costs for the East Helena Site.

d. $5 million to the State of Montana for the East Helena Site in compensatory natural resource damages ("NRD").

52. Pursuant to the June 2009 CERCLA Consent Decree, Asarco received contribution protection and a covenant not to sue under CERCLA. Thus, Asarco's "outstanding obligations" were "fully resolved" under CERCLA.

53. In the June 2009 CERCLA Consent Decree, Asarco expressly reserved all claims past or future against third parties "for any matter arising at or relating in any manner to the Montana Sites and/or claims addressed herein."

54. Asarco's Seventh Amended Plan of Reorganization reserved Asarco's rights and interests in CERCLA contribution actions not discharged or settled in bankruptcy.

55. On December 9, 2009, Asarco's Seventh Amended Plan of Reorganization became effective, enabling disbursal of funds for environmental settlements, including funds for the East Helena settlements.

56. Notwithstanding the fact that the initial proofs of claim exceeded the amount paid by Asarco, Asarco nevertheless fully funded the agreed upon settlement amount in the June 2009 CERCLA Consent Decree at one hundred cents on the dollar.

57. Asarco paid $1.8 billion to settle all allowed environmental claims related to hazardous waste in the bankruptcy proceedings.

58. Atlantic Richfield did not contribute to Asarco's settlement with the United States and the State of Montana regarding the East Helena Site, and has paid nothing to clean-up the East Helena Site despite Anaconda's operation of the zinc fuming facility for 45 years.

59. Asarco admitted that BNSF shared some responsibility for its contamination at the Site. In the bankruptcy proceeding, Asarco listed BNSF as a PRP that Asarco could sue after bankruptcy. There was no evidence presented at trial regarding the contribution that BNSF's operations made, if any, to the arsenic in the groundwater at the Site. Regardless, in 2011, Asarco conclusively resolved any contribution from BNSF at the East Helena Site in a multi-site settlement agreement, in which BNSF paid Asarco a total of $675,000 as follows: $625,000 for environmental costs associated with the Tri States Lawsuit and $50,000 for all other claims and environmental costs, at over 40 sites including East Helena. In exchange for this consideration, Asarco

released BNSF from contribution liability for numerous sites, including East Helena.[3]

D. The Montana Environmental Trust Group and East Helena Site Remedial Work

60. METG administers and uses the trust account to fund environmental actions at the Site. Asarco made the payments described above in December, 2009, and METG assumed responsibility for the remediation work at the Site, under the direction of the EPA as the Lead Agency, in consultation with the State of Montana.

61. On January 17, 2012, the district court issued the 2012 First Modification to Consent Decree ("2012 Modification"), which, among other things, amended the 1998 RCRA Consent Decree to substitute METG for Asarco.

62. The 2012 Modification deleted certain requirements that Asarco was initially required to perform under the 1998 RCRA Consent Decree, including a supplemental environmental project and stipulated penalties. METG is no longer required to perform such obligations under the 1998 RCRA Consent Decree, as carried forward by the 2012 Modification.

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[3] American Chemet Corporation was named as a Defendant in this recovery action. Asarco subsequently moved to dismiss ACC as a Defendant on March 27, 2014 (Doc. 127), and the Court ordered ACC's dismissal on March 31, 2014. (Doc. 128.) The details of the settlement between Asarco and ACC are unknown to the Court.

63. The 2012 Modification lists the exclusive purposes of the Custodial Trust–one is "to manage and/or fund implementation of future investigation and cleanup activities approved by EPA with respect to the Asarco Properties and contaminated groundwater."

64. The 2012 Modification also consolidates all of Asarco's remaining obligations at the East Helena Site, including remediation of the groundwater, under the 1990 CERCLA Consent Decree, the OU2 ROD, and the MDEQ AOC with the remaining obligations of the 1998 RCRA Consent Decree.[4]

65. The 2012 Modification provides that "[b]ased upon new information and/or changed circumstances, EPA may determine or the Trustee of the Custodial Trust may propose that certain tasks, including investigatory work, engineering evaluations, or procedure/methodology modifications, are necessary in addition to or in lieu of the tasks included in any EPA-approved work plan."[5]

66. Under the 2012 Modification, METG is not limited to only doing work at the Site under the pre-existing Consent Decrees, and has a number of duties at the East Helena Site, including:

> ". . . own the ASARCO Properties, carry out administrative and property management functions related to them, manage and invest funds

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[4] ROD is the acronym for Record of Decision, and AOC is the acronym for Administrative Order of Consent.

[5] Ex. 25 at 25-0033 (¶¶ 50-54).

> transferred by ASARCO to the Trustee of the Custodial Trust under the Plan of Reorganization, manage and/or fund implementation of future investigation and cleanup activities approved by EPA with respect to the ASARCO Properties and contaminated groundwater, and ultimately to sell, transfer or otherwise dispose and/or provide for the long-term stewardship of all or part of the ASARCO Properties, if possible, and engage in activities related thereto consistent with the fiduciary obligations of the Trustee of the Custodial Trust all for the benefit of the Governments;"[6]

67. Since 2009, METG has used a portion of the $99.294 million Asarco paid into the trust to fund a series of environmental actions intended to address and remediate contaminated water at the Site. METG's Site activities are the focus of any potential allocation responsibility because it is the work being funded by Asarco. Asarco does not seek reimbursement for any remediation work it performed at the Site performed prior to July 2009.

68. METG's environmental actions to date consist of three projects referred to as interim measures ("IMs"). The general purpose of the IMs in this case "is to prevent and minimize the spread of hazardous waste and hazardous constituents while long term corrective measures were being evaluated."[7] EPA approved

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[6] Ex. 25 at 25-0012 (Recitals).

[7] Ex. 976-0037.

METG's planned IMs in 2012 and, since that time, all three IMs have been fully implemented.

69. The three IMs are summarized as follows:

a. The first IM, referred to as the South Plant Hydraulic Control IM, was implemented to reduce migration of inorganic contaminants in groundwater by changing the hydrogeologic conditions at the southern end of the Site, including lowering the groundwater table, which also reduced the velocity at which groundwater moves under and away from the site. This IM has included dewatering of Upper and Lower Lakes, realignment of Prickly Pear Creek by moving it eastward, removal of the Wilson Ditch Diversion Dam and the Smelter Dam to eliminate water impoundment, and removal of reservoir sediments.

b. The second IM, referred to as the Source Removal IM, was implemented to reduce the mass loading of contaminants to groundwater by reducing the volume of soil with high concentrations of inorganic contaminants that were subject to infiltration or flow-through leaching to groundwater. This was accomplished by excavating the most highly contaminated soils at the Site to prevent those soils from serving as an ongoing source of arsenic contamination to groundwater. This IM also removed sediments from Lower Lake and from the Upper Lake marsh area.

c. The third IM, referred to as the ET Cover System IM, involved the construction by METG of a new cover of soil and vegetation over the majority of the Site with the exception of the slag pile and the former Upper and Lower Lake areas, and was implemented to further reduce the potential for inorganic soil contaminants to leach to groundwater by eliminating or reducing the amount of infiltration through contaminated materials. This IM provides for a clean surface for runoff, and is designed to eliminate human and wildlife exposure to potentially contaminated soils, and prevent windblown or storm water induced migration of potentially contaminated soils. The ET Cover System encompasses a 57 acre area of the facility, which includes the area where Anaconda's zinc fuming plant and its process water circuits were located.

70. While remediation work has been done under the 1998 RCRA Consent Decree and the 2012 Modification, the work is supervised by EPA and has been done consistent with and pursuant to CERCLA standards, and as such the work is in substantial compliance with the National Contingency Plan.

71. In addition to the three completed IMs described above, METG proposes, as future remediation work, to cap the portion of the slag pile at the Site that consists of unfumed slag, which is slag that was not processed a second time for metals recovery in Anaconda's zinc

fuming process, due to the potential for the unfumed slag to leach arsenic to groundwater.

72. METG, working with local authorities, has established a set of institutional controls for the Site and surrounding areas. These institutional controls will not reduce the arsenic in the groundwater, but instead are intended to prevent property owners from using their domestic water wells in an effort to prevent contact with contaminated groundwater.

73. The EPA has determined that the remedial work done to address source areas contributing to ground water contamination "are expected to be protective of human health and the environment upon completion" and that "[i]n the interim, remedial activities completed to date have adequately addressed all exposure pathways that could result in unacceptable risk . . . ."

74. Though METG's remedial efforts have been focused on groundwater cleanup, that work has not been completed yet, and METG's own consultant has noted that the offsite arsenic plume will not achieve MCLs (maximum contaminant levels) or achieve drinking water standards within the next thirty years, a fact confirmed by both Asarco's and Atlantic Richfield's experts.

75. Based on the most recent accounting as of September 30, 2017, METG has spent approximately half of the trust funds, leaving METG with approximately $50 million for remaining cleanup and

groundwater remediation.[8] METG has recommended that the final remedies at the Site consist of the three IMs, a speiss-dross slurry wall built by Asarco, the cover for the unfumed portion of the slag pile, and the previously described institutional controls. Atlantic Richfield's expert, Brian Hansen ("Hansen") has estimated that the ongoing costs for operations and maintenance is $9.2 million, and METG has estimated the cost of covering the unfumed slag at $3.7 million. Thus, expert Hansen estimates that the final costs subject to the CERCLA claim total $61,447,991. Expert Hansen also predicts, without any basis, that EPA is likely to adopt and approve METG's proposed final remedies.[9]

76. Atlantic Richfield contends that METG has ruled out a pump-and-treat remedy, as not being cost effective. METG also contends that a pump-and-treat system would be technically ineffective and could affect the stability of the arsenic-contaminated groundwater plume, which extends from the Site in a northwesterly direction into the City of East Helena.

77. Asarco's expert, Margaret W. Staub ("Staub"), disagrees with expert Hansen. Her disagreement is based on the simple fact that the three IMs employed

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[8] Ex. 922.

[9] Expert Hansen relies on a 2-page EPA Fact Sheet (Ex. 925) in support of his opinion that EPA approval will be forthcoming. This Fact Sheet is nothing more than a cursory summary of METG's efforts to date, and concludes with the statement: "Groundwater remedy performance will be monitored for many years." The Fact Sheet is silent on the issue of EPA approval.

by METG, in combination with the final remedies described in paragraph 71 and 72 above, will not address the elevated levels of arsenic and selenium that exist in the groundwater plume that is migrating under the City of East Helena, and will not restore this groundwater to background levels or achieve MCLs and drinking water standards within the next thirty years as described in paragraph 74 above. Thus, expert Staub reasons that the recommendation made years ago by State of Montana experts Maest and Bucher (see paragraph 51.a. above) that a pump-and-treat system would be necessary to address arsenic and selenium contamination in the off-site groundwater, will be the most likely final remedial outcome.

78. Staub's opinion is bolstered by the fact that this was the remedy contemplated at the time of the bankruptcy settlement and associated consent decrees, and contemplated by the 2012 Modification, which authorizes the EPA to modify and enlarge the Site remediation work being performed by METG (see paragraph 65 above). The Court adopts Staub's reasoning and concludes that unless and until the groundwater is restored to achieve MCLs and drinking water standards, something more substantial will need to be done. Whether there remains sufficient funds in the trust to accomplish this task, and whether a pump and treat system is the ultimate solution, are not the controlling questions. Regardless of the answer to those two questions, and notwithstanding Atlantic Richfield's arguments to the contrary, the Court is convinced that the balance of the approximate $50 million in the trust will most likely be expended to achieve the mandated remediation results.

79. The Court now turns to an analysis of the relative contributions of arsenic to the groundwater caused by the respective operations of Asarco and Anaconda which are the subject of the clean-up costs incurred by Asarco pursuant to the June 2009 CERCLA Consent Decree.[10]

III. ASARCO'S CONTRIBUTION OF ARSENIC TO THE GROUNDWATER

80. Asarco concedes, and it was uncontroverted at trial, that the majority of the groundwater contamination METG is remediating at the Site was caused by Asarco's operations. Notwithstanding this concession by Asarco, Atlantic Richfield's case in chief

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[10] It is important to recognize that until the advent of federal and state environmental laws in the early 1970s, mining and smelter operations such as those involved in this case were largely unregulated with the exception of regulations designed to generally protect worker safety and address air pollution. In hindsight, compared to today's standards, the amount of pollution generated by these types of facilities is difficult to fathom. Pollutants were discharged to the air, groundwater, and naturally occurring rivers, streams and lakes with little regard for the long-term consequences. The Court makes this observation to provide context for the sparse historical record that exists in this case, which does not include, prior to the 1970s and 1980s, very much in the way of detailed information that would allow a fact finder to determine the precise nature and amount of pollutants that were released to the environment by Asarco's and Anaconda's operations. Nevertheless, the Court is satisfied that discovery in this case has revealed enough information to understand the history of the operations of Asarco and Anaconda at the Site. And, of greater importance, since the 1980s the Site has been the subject of extensive environmental study and analysis, allowing us to understand how these operations impacted the groundwater.

was largely dedicated to proving the nature and extent of Asarco's pollution, and in the process, minimizing Anaconda's contribution of pollution.

81. Asarco's lead smelter operation at the Site recovered lead and other metals by smelting a variety of foreign and domestic concentrates, ores, fluxes and other non-ferrous, metal-bearing materials and byproducts, referred to as feed stocks or feed materials. Although Asarco's smelting operation changed over time, the components of its operation included: (a) raw materials storage and handling; (b) a sintering plant; (c) an acid plant; (d) a blast furnace; (e) a dross plant; (f) a speiss handling area; and (g) a slag dump. In addition, Asarco's lead smelter operation utilized large quantities of water, which were circulated through the component operations utilizing several surface water features, such as pits, ponds and ditches, and underground water pipeline circuits.

82. In the early years of its operations, Asarco smelted arsenic-bearing ores using an open roasting process. These operations produced arsenic contamination in various locations at the Site.

83. The smelter feed stocks were delivered to the Site via railcar or truck. For a period of time, these feed stocks were stored in two primary locations: the Upper Ore Storage Area and the Lower Ore Storage Area. The ores Asarco smelted contained as much as 19% (190,000 ppm) arsenic. These materials were stored in uncovered piles on concrete slabs or on the bare ground, and were exposed to the elements, which includes wind, rain and snow. Asarco also regularly

performed high pressure washdowns throughout its facilities, utilizing contaminated process waters.

84. Later, Asarco modified its process by building furnaces. The first steps in Asarco's handling process involved sampling, crushing, blending, mixing, and proportioning crude ore materials to prepare them for the smelting process. Some of these materials were then sent directly to the blast furnace for smelting, but the majority of the feed materials were sent to the sintering plant, where the materials were pulverized and roasted on grates. This process reduced the sulfur content in the materials, creating a product known as sinter. The sinter, like the feed materials themselves, contained arsenic. The gas and dust produced in the sintering plant was either captured in a series of hooding systems and vented to the atmosphere, or, in more recent times, sent to Asarco's acid plant. The gases were converted to sulfuric acid, a marketable product, which was captured, stored in tanks and eventually shipped offsite. This process generated an arsenic-bearing sludge that was dried on a pad located near Lower Lake. The acid plant was a source of groundwater contamination.

85. After the sinter was conveyed to the blast furnace, it was mixed with coke–a form of coal used for fuel–as well as other materials, such as scrap metal. Asarco charged this mixture to its blast furnace and heated it to a temperature of approximately 2000 degrees Fahrenheit, which created lead bullion and slag. The lead bullion was then transferred from the blast furnace in 5-ton lead pots to the dross plant for further processing. Some spillage occurred from the 5-

ton pots. This spilled material contained arsenic, selenium, lead, and other constituents. At the dross plant, the molten lead was cooled, which caused a copper-bearing material known as dross to float to the surface. Asarco then cooked the dross in a reverberatory furnace to form copper-bearing materials known as matte and speiss. The speiss contained as much as 17% arsenic (170,000 ppm).

86. The lead smelting operation generated large volumes of waste slag, which was deposited at the slag dump located on the east-northeast portion of the Site. As previously indicated, from 1927 until 1982, some of the slag was processed at Anaconda's, and later Asarco's, zinc fuming plant located at the Site.

87. Managing arsenic was a constant problem for Asarco. There was an imbalance of arsenic at the site, that is, because of the processes employed by Asarco, there was more arsenic coming in to the Site than was going out.

88. Asarco used large amounts of process waters and four main process water ponds in its lead smelting operations: (1) Lower Lake; (2) the speiss granulating pond and pit; (3) the acid plant water treatment facility; and (4) Thornock Pond or Lake. The process ponds were connected to the lead smelting operations by an underground piping network known as the process water circuit.

89. The speiss granulating pond and pit are considered to be the most significant source of arsenic contamination to the groundwater at the Site because

they were connected to Asarco's process waters circuit and to Lower Lake.

90. Lower Lake was a man-made process water pond fed by Prickly Pear Creek. It was unlined, and approximately 7 acres in surface area, and 11 million gallons in volume.[11]

91. The acid plant water treatment facility was used to settle particulates from the acid plant scrubber blowdown water, which was recirculated to the scrubbers or to the sinter plant. The components of the acid plant treatment facility were a trough, settling dumpsters and a concrete lined settling pond. The settling pond was 68 feet long by 35 feet wide and 9 feet deep. Arsenic-bearing fluids migrated to the groundwater as a result of this treatment process.

92. Thornock Lake was constructed by Asarco in 1971 as a collection and settling pond for lead smelter process waters and storm water runoff. Thornock Lake was originally about 70 feet long by 40 feet wide and 8 feet deep, with a capacity of approximately 100,000 gallons. In October 1986, Asarco replaced Thornock Lake with a 100,000-gallon, 40-foot diameter steel holding tank. Before Thornock Lake was constructed, there was a natural depression in the same location which was used for the same purposes. This was referred to as Thornock Pond, or Pond 2.

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[11] In approximately 1990, Asarco replaced Lower Lake as an active process pond with two 1-million gallon storage tanks. As part of the remediation process, Lower Lake was subsequently de-watered and the sediments in the lake have been removed.

93. Asarco's process water circuit was a system of primarily underground pipes that conveyed water from Lower Lake to various portions of Asarco's smelting process. Prior to 1975, the process water circuit discharged directly to Prickly Pear Creek. Beginning in 1975, Asarco began discharging its process water into Lower Lake. Asarco used the process water to wash down various portions of its waters and to suppress dust around the plant, including the slag pile. Plant washdowns occurred on a daily basis. The process water circuit also included a system of drains that collected process waters and runoff from various parts of Asarco's operation and conveyed that water back into the circuit. This process water circuit was old and leaked, releasing process water into the ground below the smelter. Based on pressure testing of the main process water circuit pressure lines conducted in March 1988 and March 1989, the Comprehensive Remedial Investigation and Feasibility Study for the Site theoretically estimated that as much as 105,000 to 2.2 million gallons leaked from Asarco's process water circuit every year.[12]

94. The use by Asarco of arsenic-bearing materials and water resulted in contamination to the groundwater at the Site, again, a fact that Asarco has not contested in this case. Expert Hansen estimated that the concentrations of arsenic found in the soils and sediments at the most contaminated parts of the site are as follows:

- Speiss pond/pit - 14% arsenic (140,000 ppm)

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[12] Ex. 797-0180.

- Thornock Lake - 12% arsenic (120,000 ppm)
- Lower Lake - 2.25% arsenic (22,500 ppm)
- Acid Plant - 1.16% arsenic (11,600 ppm)

95. Expert Hansen also estimated that the fluids involved in Asarco's use of the process ponds contained the following concentrations of arsenic:

- Speiss pond/pit - 3,733 mg/L
- Acid plant - 2,867 mg/L
- Lower Lake - 200 mg/L
- Process fluids circuit - 60 mg/L
- Thornock Lake - 40 mg/L

96. There is a clear connection between Asarco's operations, which used arsenic-bearing materials and waters, and the arsenic portions of the groundwater plume mapped by METG. In fact, the majority of the arsenic found in the groundwater plume can be attributed to Asarco's operations, a fact which Asarco also does not contest. What is contested in this case is Anaconda's contribution of arsenic to the groundwater plume that has been the subject of METG's remediation efforts. As will be developed later in these findings of fact, Atlantic Richfield has steadfastly maintained for decades that its zinc fuming operation did not contribute any arsenic contaminants to the groundwater at the Site. Thus, it comes as no surprise to the Court that all of the studies and investigations performed at this Site since the 1980s focus on Asarco's operations. However, as explained in the next section

of these findings of fact, Anaconda's zinc fuming operation also contributed arsenic to the groundwater plume.

IV. ANACONDA'S CONTRIBUTION OF ARSENIC TO THE GROUNDWATER

97. Anaconda operated a zinc fuming plant at the Site for 45 years, from 1927 to 1972. During this period of time, Anaconda had at least eleven different discharge points at the East Helena Site where arsenic releases occurred: (1) zinc dust from the bag house; (2) zinc dust left on the ground by the flue; (3) the unlined burning coal area; (4) the unlined slag pile pond (Pond 3); (5) washdown waters; (6) unlined Thornock Pond and Lake (Pond 2); (7) unlined Wilson Ditch; (8) leaks in the pipe transporting process water from Lower Lake to the furnace; (9) the unlined return ditch to Lower Lake; (10) leaks from water jackets in the furnace; and (11) unlined Lower Lake (Pond 1).

A. Zinc Dust Released From the Anaconda Bag House

98. As previously explained, after the zinc fume traveled from the blast furnace through the flues, it was deposited at Anaconda's bag house, where the zinc particulates and dust collected on the outside of a long row of large woolen bags.

99. The bags were routinely shaken so that the zinc dust would drop off the bags into augers, and then was deposited into uncovered railcars for shipment.

100. Anaconda's fume bag house had five trapezoidal vents on the roof, which discharged zinc fume containing arsenic to the atmosphere.

101. Anaconda's bag house did not have a stack.

102. Throughout Anaconda's tenure, bag house dust was visible on the ground around the bag house, and along the railroad tracks where fumed zinc was loaded into open railcars.

103. In an internal Anaconda memorandum documenting an OSHA visit and exit interview, dated March 21, 1972, an Anaconda representative, in summarizing comments made by an OSHA assistant regional administrator, noted "[t]he fume loading area still has a lot of material blowing around there," and "[i]t still is fairly dusty in the area [around the bag house] due to the wind and openings."[13]

104. In the same memorandum, referring to comments made by another individual, an additional source of dust was identified: "One problem there is the loading of open rail cars . . ."[14]

105. In 1971, the Montana Department of Health specifically noted, "the Anaconda Company baghouse stacks were all putting out a very persistent particulate discharge–it was blowing toward the west southwest and was visible for about 3000 feet."[15]

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[13] Ex. 103 at 103-0002.

[14] Ex. 103 at 103-0003.

[15] Ex. 425.

106. In a letter dated June 1, 1970, the Montana Health Department issued a notice to Anaconda that the zinc fuming plant emissions violated health standards, and threatened enforcement proceedings. The letter was titled "Re: Dust Emissions from E. Helena Plant," and was addressed to Maurice Villeneuve, Superintendent, Anaconda Slag Treating Plant.[16]

107. According to Asarco's expert, Dr. Andy Davis ("Davis"), Anaconda's zinc fume bag house dust had a high arsenic concentration at 3500 milligrams per kilogram. Expert Davis further testified that Anaconda's zinc fume emissions from the bag house settled on the surrounding soils, as well as in open ponds (Lower Lake and Thornock Pond and Lake) and ditches which were filled with process water (Wilson Ditch and the unlined return ditch), where it would percolate into the groundwater and thereby contributed appreciably to arsenic in the groundwater.

B. Zinc Dust Left on the Ground by the Flue

108. A 1954 aerial photograph of the zinc fuming plant shows what appears to be zinc fume which was deposited on the ground around the flue.[17]

109. According to the testimony of expert Davis, soil samples from the METG database show 3300 parts per

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[16] Ex. 109.

[17] Exs. 517 and 520.

kilogram of arsenic in the soil in the area where the white dust is shown.

110. Jon Nickel, who began working at the zinc fuming plant in 1973, one year after Asarco purchased the zinc plant from Anaconda, testified to the practice of removing zinc dust from the flue system with the use of large hoe.

111. According to both experts Hansen and Davis, Anaconda's zinc dust contains 3500 milligrams per kilogram of arsenic.

112. Expert Davis further testified that the arsenic in this dust would percolate to the groundwater and increase the groundwater contamination at the Site.

113. METG's data shows that dissolved arsenic in the groundwater was measured at 56 mg/L and 22 mg/L in the area close to the flue, which is as much as three orders of magnitude above the MCL, or maximum allowable amount of a contaminant in drinking water.

C. Unlined Burning Coal Area

114. Anaconda's zinc fuming furnace required a heat source of approximately 1800 degrees Fahrenheit. Coal was the exclusive fuel source for the zinc fuming furnace. Before the coal was introduced into the furnace, it was pulverized in a grinding facility in order to create a particulate size that would ignite in the furnace and create a heat source sufficient to fume the zinc out of the slag. Anaconda routinely introduced 10 to 15 tons of pulverized coal and 57 tons of slag into the furnace during each two-hour furnace cycle, and

routinely used 140 tons of coal each day in its operations. Anaconda estimated that they used 45,000 tons of coal per year, totaling 2.025 million tons of coal over the 45 years of operations

115. From approximately 1927 until sometime in the early 1960s, Anaconda's coal fines that collected at Thornock Pond were reportedly flushed out with a fire hose and the discharge was carried by gravity flow through a pipeline to the base of the slag dump.

116. The coal burning area can be seen in the 1954 aerial photograph at the top left of the slag pile.[18]

117. In a letter dated July 31, 1958 from the superintendent of the zinc fuming plant to another Anaconda employee, a photograph of this area is provided, with the following written description:

> In the coal drying process, extremely fine particles of coal dust that passes through the dust collecting system of the dryer are sprayed with water and collected as a coal-water mixture which flows to a settling pond outside the dryer building. About twice each week, this pond is flushed out with a fire hose and the discharge is carried by gravity flow though a pipe line to the base of the slag dump. This picture shows in the distance the outlet of the pipe and the accumulation of coal extending from the outlet to the bottom of a dirt dike in the foreground. This coal may be 5 to 6 feet deep in places and is gradually covered by the approaching slag

[18] Demonstrative Ex. 520.

> dump. Coal is burning where the slag has reached the coal and also in the foreground along the base of the dirt dike.[19]

118. As indicated in the previous paragraph, the coal fines collected at the toe of the slag pile were combustible, and after catching fire would have generated coal ash or fly ash.

119. An Anaconda map designated this area as the "burning coal area."[20]

120. Anaconda knew of and acknowledged that "underneath the top layer of fine ash is burning coal" and that "this burning coal is a bad problem."[21]

121. In addition, in an undated "Emission Inventory Questionnaire", prepared by Anaconda for the Montana State Department of Health, Anaconda noted that it collected 234 tons of fly ash from their plant per month, which was "Mixed with slag and disposed on Dump."[22]

122. The combustion of the coal fines in this area generated readily-leachable coal ash in the vicinity of open settling ponds such as Thornock Pond and Lake and open ditches like Wilson Ditch and the return ditch to Lower Lake.

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[19] Ex. 410 at 410-0003.

[20] Ex. 755.

[21] Ex. 410 at 410-0001, -0005; *see also* Ex. 104; Ex. 105 at 105-0002 (¶ 11).

[22] Ex. 106 at 106-0009.

123. Expert Davis testified that the burning coal area was a contributing source to the arsenic plume.[23]

124. The plume map relied on by expert Hansen shows a light yellow (1 mg/L) plume of arsenic originating from the burning coal area.[24] Expert Hansen admitted during cross-examination at trial that fly ash is a federally regulated substance because of its toxicity.

125. Atlantic Richfield's designated corporate representative at trial, Richard Krablin ("Krablin"), admitted that Anaconda burned coal, creating fly ash which mobilizes the arsenic in the coal into a gas.

126. Anaconda released so much coal dust and burning coal on a regular basis that they were asked by the City Attorney for the City of East Helena to correct the emissions in a letter dated July 11, 1947. The City Attorney wrote that at a meeting of the city council, petitions were presented containing the signatures of numerous residents of the City of East Helena "requesting that some action be taken to eliminate and abate the condition created by coal smoke and dust issuing from your plant." He went on to state that "this dust and smoke settles upon houses and other property in the city, even penetrating into the interior of buildings."[25]

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[23] Demonstrative Exs. 516; 488 at 488-0037 and 488-0043; 488-037-A.

[24] Demonstrative Ex. 895 at 895-0020.

[25] Ex. 435.

D. Unlined Slag Pile Pond (Pond 3)

127. In the mid-1960s, Anaconda re-routed the coal fines it had previously been dumping into an unlined pond area, and began pumping the fines from the coal house to the top of the slag pile, which they called Pond 3, as depicted in a schematic sketch admitted and referenced at trial.[26]

128. This re-routed coal dust slurry was pumped to Pond 3, located at the top of the slag pile.

129. Anaconda employee A.B. Kane, who was the zinc fuming plant superintendent, wrote in a Memorandum dated August 12, 1962 that "[f]or the last 12 days we have successfully pumped the coal dust slurry to the top of the slag dump where it disappears into the slag. We have had to move the end of the pipe once during this time, when the voids in the slag dump filled up with coal."[27]

130. Anaconda continued pumping this effluent to Pond 3 until it sold the fuming plant in 1972.

131. Expert Davis testified that this documented discharge of coal slurry and fly ash to the slag pile impacted groundwater with arsenic and other metals.

E. Washdowns

132. Anaconda introduced approximately 50 tons of molten slag into its blast furnace per cycle, and added

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[26]Ex. 82.

[27] Ex. 243.

cold slag to bring each furnace charge to approximately 57 tons. A furnace cycle was completed approximately every two hours, and visible effluent was released into the atmosphere during the hot slag charging cycle. Because the hot metals and slag accumulated in the ladles and furnace, they would have to be removed through regular tapping cycles. The furnace was tapped approximately ten times per day.

133. During the process of introducing the slag into the furnace, and especially during tapping cycles, emissions and slag debris were deposited throughout the furnace house. Anaconda did not employ a hood or retention system.

134. So much effluent was released from the tapping and charging of the furnace, that the Montana Department of Health issued a Notice of Violation and ordered Anaconda to take corrective action to reduce air emission contaminants.[28]

135. Anaconda routinely pressure-washed the furnace building, including the walls, floors, furnace, and cooling flues, to remove the dust and debris that resulted from the tapping and charging of the furnace.

136. This washdown process occurred at least three times per day. No attempt was made to capture this washdown water. Anaconda simply washed the dust and debris out the furnace door where it was deposited into the soils and leached into the groundwater.

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[28] Ex. 111 to the Deposition of Antonio Toccafondo.

137. According to expert Davis, these washdown waste waters contained very high levels of arsenic, and would have migrated to Thornock Pond (Pond 2) because it was near the furnace and the lowest topographical point on the zinc plant property. This latter point was confirmed by Atlantic Richfield's designated representative, Richard Krablin.

138. Expert Davis testified that Anaconda's uncontrolled and daily releases of washdown water from the furnace contributed appreciably to arsenic in the groundwater at East Helena.

F. Thornock Pond and Lake (Pond 2)

139. It was uncontroverted that the area surrounding and including unlined Thornock Pond is a topographic low, so runoff water from washdowns emanating from the zinc fuming plant would settle in this area.

140. As previously stated, washdown waters were not controlled in any way.

141. Expert Davis testified that washdown water containing coal dust, fume dust and/or slag from the furnace with readily leachable arsenic and other metals migrated to and settled in Thornock Pond (Pond 2).

142. Expert Davis also testified that Thornock Pond received and stored water from the Anaconda circulating cooling system, and coal slurry from the coal pulverizer, and similar to the washdown water, the arsenic in the zinc plant's cooling water percolated to and contaminated area groundwater.

143. Anaconda pumped coal dust slurry from the coal dryer building to Thornock Pond, further contaminating Thornock Pond.

144. It is the opinion of expert Davis that Anaconda discharged significant amounts of coal dust slimes and coal slurry as well as contaminated process waters containing arsenic and selenium into the unlined Thornock Pond (Pond 2), and that these releases are a major contributing source to the arsenic groundwater plumes at the Site.

145. As previously indicated, Thornock Pond has been identified as a key contributor to the arsenic groundwater contamination at the Site.

G. Wilson Ditch

146. Wilson Ditch was initially used to transport cooling water from Thornock Pond to Prickly Pear Creek, and was a natural gravity drainage creek.

147. Arsenic-laden process waters would drain from Thornock Pond into a flue that connected to a natural ditch identified on the 1930 Sanborn maps as Wilson Ditch.[29] According to the same maps, Wilson Ditch then drained to Prickly Pear Creek.[30]

148. An Anaconda plant sketch, believed to be dated September 9, 1970, also shows zinc fuming plant process water being discharged to Pond 2 (Thornock

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[29] Ex. 461-0004 and 461-0005.

[30] Ex. 461-0004 and 461-0005..

Pond) and then out through Wilson Ditch to Prickly Pear Creek.[31]

149. Expert Davis testified that Anaconda's process water transported through the unlined Wilson Ditch contributed to the groundwater contamination in the area.

150. A letter from the Army Corps of Engineers to Anaconda dated July 29, 1971, stated that Anaconda's facility was identified as the source of a discharge or deposit of refuse matter into Prickly Pear Creek.[32]

H. Leaking Cooling Circuit Pipe

151. Anaconda pumped 2,000 gallons of water per minute through its cooling water circuit up to 1964.

152. In 1964, Anaconda installed a new pump and began pumping 5,000 gallons per minute of water through its cooling water circuit, which continued at this rate until the end of Anaconda's operations in 1972.

153. The cooling water circuit leaked. Anaconda documents indicate that approximately 60 million gallons of cooling circuit water was lost each year "through evaporation, leakage and general use where it is not returnable."[33]

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[31] Ex. 441.

[32] Ex. 107.

[33] Exs. 88, 447.

154. Anaconda used a 12-inch, 600-foot steel pipe and pump system to convey cooling water from Lower Lake up to the zinc fuming plant.

155. In a February 1, 1965 internal Anaconda Memorandum, A. B. Kane, superintendent of the zinc fuming plant, noted that Anaconda planned to replace this pipe in the next year after discovering the pipe metal had become thin and was leaking in multiple locations: "A new 12" water line will be installed to replace the 600' line that was put in when the plant was built. We have found several leaks in the present line and detected the metal is getting thin.".[34]

156. Anaconda's cooling water intake from the pump at the base of this pipe was measured as containing arsenic at 0.1933 ppm, which is also noted as being above the public health service drinking water standards in 1970.[35]

157. In addition, in a December 21, 1961 letter from A. B. Kane, Anaconda noted that the cooling water pump that had been used to pump water from Lower Lake to the plant since 1927 had holes in it: "The pumps were installed in 1927 when this plant was built and had been used in Anaconda before that. They are 60 years old and quite worn out. Just recently we had one of these pumps repaired and discovered that the

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[34] Ex. 99.

[35] Ex. 422 at 422-0001.

impeller had holes worn in it and the rings between the impeller and the casing were worn."[36]

158. It is the opinion of expert Davis that Anaconda's process water, which leaked from this supply pipe, contained arsenic and migrated to the groundwater at the Site.

I. The Unlined Return Ditch to Lower Lake

159. Anaconda constructed and used a second unlined ditch to return its cooling water from the zinc fuming furnace to Lower Lake.

160. The water was pumped from the furnace area in a pipe for a distance of approximately 50 feet, and then was delivered back to Lower Lake through an open ditch via gravity flow. The location of this return ditch from the zinc fuming plant to Lower Lake was marked on aerial photographs admitted at trial.[37] The return water was warmer in temperature than the inflow water. Thus, as the marked aerial photographs indicate, the return water was delivered to a different location in Lower Lake than the intake cooling water pipe and pumphouse.

161. Anaconda measured the flow in this ditch and reported that water was pumped through this unlined

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[36] Ex. 92.

[37] Ex. 451A; Ex. 451C.

ditch at a rate of 3,200 gallons per minute as of December 31, 1961.[38]

162. Anaconda continuously used this unlined ditch throughout its 45 years of operation.

163. Expert Davis testified that the return water contained arsenic and percolated through the base of this ditch during transit and ultimately reported to the groundwater.

164. A sample taken from a well at the top of this ditch marked as sample ZP-01 is noted as showing "moderately high levels of arsenic and metals. Total and dissolved arsenic range from a high of 42 mg/L and 16 mg/L, respectively."[39]

165. The sample is also noted as being "contained in an unlined ditch, and infiltrates into the ground prior to discharge to Lower Lake."[40]

166. Expert Hansen testified that the dissolved arsenic level is the amount of arsenic that would infiltrate through the soils and end up in the groundwater.

J. Furnace Leaks From Water Jackets

167. Anaconda's blast furnace was cooled by water jackets, and the flue transporting materials from the furnace to the bag house included a section of water

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[38] Ex. 92.

[39] Ex. 415 at 415-0079 and 415-0195.

[40] Ex. 415 at 415-0194.

jackets located above the tapping platform, which led from the furnace outlet into a brick section, where water sprays were used to further cool the gases. Anaconda pumped approximately 2,000 gallons of water per minute from Lower Lake to cool its furnace and flue jackets.

168. The exterior of Anaconda's water jackets for the fuming furnace and flues had ruptures and leaks during its years of operation. In fact, in a September 12, 1966 letter, Anaconda reported, ". . . we were plagued with many forced shutdowns because of water jacket leaks, cooling water pump trouble and coal valve failures."[41]

169. In addition, Anaconda used open troughs as part of their cooling loop at the top of the furnace where cooling water was exposed to metals in the slag and emissions in the air. The water in these open troughs would have encountered spillage or emissions from the smelting slag and contain arsenic from those materials.

170. In an April 24, 1952 letter from the State of Montana Industrial Accident Board to Anaconda, it was noted in regards to the furnace that "[t]here was a leak in the water wall that was allowing the cooling water to enter the slag. This was causing boiling and splattering of the slag as it was tapped from the furnace." This same letter noted that the area around the coal dock and dryer was "extremely dusty and can

[41] Ex. 100.

stand to have a good deal of work done on it to make it into a modern installation."[42]

171. It is the opinion of expert Davis that Anaconda's cooling water came into contact with arsenic and other metals through this process, and when the cooling water leaked, it ran through unlined ponds and ditches and migrated to groundwater contributing appreciably to the arsenic contamination of groundwater at the Site.

K. Lower Lake (Pond 1)

172. Lower Lake was unlined during Anaconda's operations.

173. Anaconda used Lower Lake water and discharged its used cooling water back into Lower Lake throughout all 45 years of its operations.

174. Lower Lake is a primary source of one of the two major arsenic groundwater plumes at the Site.

175. Anaconda pumped an average of 1.15 million gallons of cooling water per year to and from Lower Lake.

176. Through this process, Lower Lake received releases of arsenic and other metals from Anaconda's cooling water, which had come into contact with those metals at various points in the cooling circuit as described above.

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[42] Ex. 436 at 436-0001 (¶ 3).

177. Expert Davis testified that Lower Lake produced the hydraulic head that drove groundwater and affiliated contamination to the north under the slag pile and to the northwest under the City of East Helena, and was a major contributing factor to the arsenic plume in this area.

178. Based on the foregoing findings of fact, the Court has determined that the operations of Anaconda's zinc fuming plant contributed arsenic to the groundwater to an extent that a percentage of allocation should be assigned to Atlantic Richfield for the costs incurred by Asarco pursuant to the June 2009 CERCLA Consent Decree and Settlement.

V. TESTIMONY OF THE EXPERTS

179. Before proceeding to the subject of allocation, the Court will summarize the opinions of the two primary experts in this case, and the manner in which these opinions factor into the Court's analysis.

180. As previously indicated, Asarco's primary expert is Dr. Andy Davis. Dr. Davis has a B.S. Degree in Applied Biology from Liverpool Polytechnic, a M.S. Degree in Environmental Sciences (Geochemistry) from the University of Virginia, and a Ph.D. Degree in Geology (Geochemistry) from the University of Colorado. Atlantic Richfield's primary expert is Brian G. Hansen. Mr. Hansen has a B.S. Degree in Geology from Fort Lewis College, and a M.E. Degree in Geological Engineering from the Colorado School of Mines. Both experts performed a considerable amount of work in preparing their opinions in this case, and, of interest, both experts have previously performed

consulting work for the other party. Both have extensive experience in addressing issues similar to those involved in this matter, and both experts were credible. However, their respective approaches to the case differed in significant respects.

A. The Opinions of Dr. Davis

181. In general, expert Davis looked at the relative contributions of both Asarco and Anaconda to the groundwater contamination at the Site, and determined what he believed to be three different allocation strategies. Notwithstanding the fact that years of environmental studies have been conducted at this Site, many under the direction of the Environmental Protection Agency, it is the Court's belief that the work of expert Davis in this case represents the only truly comprehensive analysis to date of the contribution that was made by Anaconda's historical operations at the Site to groundwater contamination. His opinions were based upon a thorough review of all the documents produced in discovery, and the actual history of Anaconda's operations. Many of these documents, some of which are described in Section IV above, were never provided by Anaconda or Atlantic Richfield to the state and federal regulators. Davis carefully analyzed and mapped the arsenic plume as it is currently believed to be configured, and for purposes of Anaconda's contribution of contaminants to the groundwater, delineated two plumes, which he describes as the

Northwest Plume (consisting of 3,530,000 sq. ft.) and the North Plume (consisting of 5,660,000 sq. ft.).[43]

182. Based on his analysis, Davis proposes the following three allocation strategies for the Court's consideration, which are generally based on the geographic areas (measured in square feet) of the North and Northwest Plumes, as detailed in the immediately preceding paragraph:[44]

Strategy	**Allocation (%)**	
	Anaconda/ Atlantic Richfield	**Asarco**
I	34	66
II	41	59
III	25	75

183. Strategy I assumes that a pump-and-treat system would be employed to address the arsenic plume. Thus, five wells would be required at the property boundary, one in the northwest plume and four to capture the north plume. Davis assigns responsibility to Anaconda or Atlantic Richfield for 50% of the north plume, or 1,420,000 sq.ft., relating to contributions from Lower Lake, and an additional 370,000 sq. ft., or 20% of the northwest plume for the

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[43] Demonstrative Exs. 488-0037, 488-0037A, 488-00037B, 488-00038 and 488-00043.

[44] Demonstrative Ex. 519.

Thornock Pond and Lake area contributions, for a total of 1,790,000 sq. ft. Out of the total 5,230,000 sq.ft. at the Site, this results in a total allocation of 34% to Anaconda or Atlantic Richfield, and 66% to Asarco. Strategy I does not include any adjustment for the time periods of ownership of the respective parties, and does not consider any potential offsite remediation that may be required by EPA.

184. Strategy II allocates equal responsibility for discharges without consideration for the periods of ownership over the entire plume area as opposed to the site-specific contamination utilized in Strategy I. Under this scenario, Davis assigns to Atlantic Richfield 50% of the north plume, or 2,830,000 sq. ft., and 50% of the Thornock Pond and Lake area plume, or 930,000 sq. ft., for a total of 3,760,000 sq. ft. This results in a total allocation of 41% to Anaconda or Atlantic Richfield, and 59% to Asarco.

185. Strategy III is similar to Strategy II, but includes consideration of the respective periods of ownership of the parties. Anaconda discharged arsenic-contaminated water into Lower Lake for 45 years, from 1927 to 1972. Based on this period of use, Davis attributes 30% percent, or 1,730,000 sq. ft. of the north plume to Atlantic Richfield, corresponding to a 19% allocation. Because the Thornock Pond and Lake area was used by both Asarco and Atlantic Richfield, for 21 years, from 1951 to 1972, Davis concludes that Atlantic Richfield is responsible for 19%, or 660,000 sq.ft., of the northwest plume. In total, Atlantic Richfield is responsible for 2,390,00 sq. ft., or in aggregate, 25% of

the total plume. This results in a total allocation of 25% to Anaconda or Atlantic Richfield, and 75% to Asarco.

186. Davis recommends Strategy II, because it is uncertain whether EPA will require some form of groundwater remediation at the Site, which is an assumption in Strategy I. Davis disfavors Strategy III because he thinks it underestimates Anaconda's releases of arsenic to the groundwater. In any event, Davis argues that all three of these allocation strategies are conservative and favor Atlantic Richfield, because the focus of these three strategies is only on the contamination from Lower Lake and the Thomock Pond and Lake area, and excludes other sources of groundwater contamination caused by Anaconda's operations detailed in Section IV above.

B. The Opinions of Mr. Hansen

187. Expert Hansen employed a different approach in analyzing this case. Although he concedes that Anaconda's zinc fuming operations generated arsenic-bearing contaminants, he concludes that METG's remediation efforts are directed to remediating only Asarco's contribution to the contaminated groundwater, and that the remediation efforts made before the June 2009 CERCLA Consent Decree and Settlement addressed and alleviated any contribution of arsenic made by Anaconda at the Site.

188. Hansen focuses on the operations of Asarco, and endeavors to distinguish them from those of Anaconda, thereby minimizing Anaconda's responsibility. For example, Hansen argues that it is not scientifically possible for the concentrations of

arsenic in the materials involved in Anaconda's operation, being coal and zinc fume, to have caused the levels of contamination observed at the Site. Hansen specifically refers to coal, the fuel used in the zinc fuming operation, which has a concentration of 6 ppm of arsenic, and zinc fume, which has a concentration of 3,500 ppm of arsenic, and concludes that these sources of arsenic could not be the cause of the contamination of 120,000 ppm of arsenic found in the sediments underlying the Thornock Pond and Lake area. The logic of this approach is superficially compelling, but ignores the multiple sources of arsenic-bearing contaminants that Anaconda contributed to this Site over the 45 years of its operations. In fact, it was clear to the Court during expert Hansen's cross-examination, that he had failed to consider many of the historical documents referenced in Section IV above that document Anaconda's discharge of arsenic to the atmosphere and groundwater, including the extensive use by Anaconda in its operations of arsenic-laden waters from Lower Lake for 45 years.

189. Regardless, expert Hansen concludes that the allocation percentage to be assigned to Atlantic Richfield is zero.

VI. ALLOCATION

190. One could characterize the conflicting opinions of these two experts as leaving the Court with an "all or nothing" scenario. However, as explained in paragraphs 14, 45, 47 and 50 of the Conclusions of Law section of this order, mathematical certainty in determining the percentage of allocation is rarely possible, with the court having broad discretion in

allocating response costs among liable parties using such equitable factors as the court deems appropriate under the circumstances of the case. These equitable factors will be addressed later in this order.

191. The Court has carefully considered all of the evidence in this case, paying particular attention to the opinion testimony of the two experts summarized in Section V above. As between experts Hansen and Davis, the Court finds the opinions of expert Davis to be compelling and persuasive. Regarding the three allocation strategies proposed by Davis, the Court adopts Strategy III as the appropriate method of allocation, for the simple reason that it is the only strategy that includes the time periods of ownership, which the Court determines to be one of the important factors to be considered in determining allocation. It is not enough to consider only Asarco's contribution of arsenic to this site, as urged by Atlantic Richfield. Expert Davis was the only witness at trial who was qualified by education, training, experience, and the work he performed in this case, to quantify the contribution of arsenic made by Anaconda's 45 years of operation at the Site. Atlantic Richfield's strategy of incessantly focusing on Asarco's operations, while ignoring or minimizing Anaconda's operations, leaves the majority of expert Davis's opinions largely unchallenged.[45]

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[45] To be fair, Atlantic Richfield does propose three alternative allocation approaches in its proposed amended post-trial findings of fact and conclusions of law (Doc. 267, ¶ 54). The Court has

192. Therefore, the Court determines that Atlantic Richfield's equitable share of the response costs paid by Asarco under the June 2009 CERCLA Consent Decree and Settlement is 25%. The amount of the response costs subject to this 25% allocation is addressed in the Conclusions of Law, Section II below.

VII. ANACONDA MISLED THE EPA REGARDING ITS RELEASES AT THE SITE

193. From 1987 to 1990, Anaconda received four letters from the EPA either requesting information in the form of a 104(e) letter, or putting Atlantic Richfield on special notice of its liability for response costs under CERCLA as a PRP at the Site.[46]

194. Mr. Krablin assisted Anaconda in responding to the EPA's CERCLA 104(e) requests. Although Mr. Krablin is no longer employed by Atlantic Richfield, he was present throughout the trial and seated at counsel table as Atlantic Richfield's corporate representative, and during the time period in question, Krablin's title was an environmental engineer. Krablin was at the Site only once during his entire career with Anaconda, in 1971. He also testified twice during the trial, once in Asarco's case in chief, and later during Atlantic Richfield's case in chief. During cross-examination by Asarco's counsel, Krablin was at times evasive and his answers were frequently non-responsive. The Court

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considered the three options proposed by Atlantic Richfield in this single paragraph in reaching its conclusion regarding the appropriate percentage of allocation.

[46] Exs. 184; 185; 408; and 419.

was required on occasion to admonish Krablin to directly answer questions. Krablin was also the corporate representative who attested to Atlantic Richfield's discovery responses in this case.

195. On March 12, 1987, Anaconda received its first letter from the EPA which requested information pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 6901(e).[47]

196. The March 12, 1987 letter sought, among other things, the following information from Anaconda: "A narrative explaining the facility's operation throughout your period of ownership/operation. Please document all chemical constituents used in your treatment process and disposal methods practiced for any wastes or by-products. This should include copies of all existing documents relating to the subjects listed above."[48]

197. In response, Anaconda failed to provide documents to the EPA relating to Anaconda's disposal methods that were responsive to this request, including: (a) a document describing particulate discharge from the baghouse (Ex. 425); (b) a letter from the U.S. Army Corps of Engineers regarding Anaconda's illegal discharges of waste to Prickly Pear Creek (Ex. 107); (c) an internal Anaconda Company Memorandum regarding emissions of coal dust (Ex. 173); (d) an internal Anaconda document that indicated that Anaconda lost 60 million gallons of arsenic-

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[47] Ex. 184.

[48] Ex. 184 at 184-0002.

containing water through evaporation, leakage and general use (Ex. 447); and (e) an internal Anaconda Company document regarding leaks from the furnace (Ex. 103).[49]

198. Anaconda also failed to disclose any communications between Anaconda and the State of Montana health officials regarding emissions of pollution from the Anaconda zinc fuming facility, which were responsive to the 104(e) letter.

199. The March 12, 1982, the 104(e) request also asked Anaconda to identify the names of employees who were interviewed for purposes of responding to the request.[50] In response, Anaconda stated that it did not interview any of its former employees to find information responsive to the May 12, 1987, 104(e) request.[51]

200. On February 8, 1990, the EPA sent Anaconda a follow-up 104(e) request which stated that "EPA is trying to construct a data base of materials and processes pertaining to the industrial activities that took place and are taking place at the site. For the data base to be complete and accurate, EPA needs complete records of your industrial operations at East Helena." That request also sought "any records . . . of annual

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[49] All of the documents referenced in this section were in Anaconda's files and available for production to the EPA.

[50] Ex. 184.

[51] Ex. 407 at 407-0003.

primary and fugitive emissions" from Anaconda's operations or the "best estimates" of such emissions.[52]

201. Anaconda responded to that letter on March 15, 1990. In that response, Anaconda falsely claimed that: "Generally, annual emission records were not available for the period of Anaconda Company's operations of the zinc fuming plant."[53]

202. Anaconda had in its possession documents that indicated Anaconda lost 60 million gallons of arsenic-containing water through evaporation, leakage and general use annually, which were responsive to the February 8, 1990 request, but Anaconda did not disclose those documents to the EPA.

203. On February 23, 1990, the EPA sent Anaconda a Special Notice Letter pursuant to CERCLA Section 122, 42 U.S.C, § 9622, which formally demanded that Anaconda reimburse the EPA for all costs it incurred in connection with response actions at the East Helena Site.[54]

204. On April 25, 1990, Atlantic Richfield responded to the Special Notice Letter. In that response, Atlantic Richfield made the following misrepresentation: "Cooling water was pumped from Lower Lake through a closed transport piping system to non-contact cooling

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[52] Ex. 408 at 408-0001 and 408-0003.

[53] Ex. 459 at 459-0003.

[54] Ex.185.

cells in the furnace and then discharged back to the Lower Lake through a closed piping system."[55]

205. Atlantic Richfield knew, at the time it sent its April 25, 1990 letter, that the cooling water pumped from Lower Lake was not discharged back to Lower Lake through a closed piping system but was instead discharged through an open and unlined ditch.

206. Atlantic Richfield never contacted the EPA to correct this false statement.

207. On April 26, 1990, Atlantic Richfield sent the EPA another letter containing two affidavits, one by former Anaconda employee Walter H. Unger and another by former Anaconda employee A.B. (Bert) Kane, who was the former zinc plant superintendent.[56]

208. The Unger Affidavit contained the following false and misleading statement: "The system was designed so that no cooling water would escape from the closed-loop system and so that no material would be discharged into the cooling water. The heated water was then returned to Lower Lake. The system was designed such that the water that was being returned to Lower Lake from the cooling system would contain only those materials that were in the water when it was removed from Lower Lake."[57]

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[55] Ex. 113 at 113-0031.

[56] Ex. 156.

[57] *Id.* at Ex. 156-0003.

209. The Kane Affidavit contained the following false and misleading statement: "The water was kept in its own piping system and was designed so that no cooling water would escape from the system and so that no material would be discharged into the cooling water."[58] These two affidavits were the subject of extensive testimony at trial. Krablin reviewed these affidavits before they were submitted to the EPA. During his cross-examination at trial, Krablin labored to parse the words in these affidavits by attempting to explain, on multiple occasions, that these affidavits referred to the cooling system within the zinc fuming plant itself, and did not refer to the overall cooling water system, which involved the pumping of arsenic-contaminated water from Lower Lake to the furnace area, and the return of arsenic-laden process water from the furnace area back to Lower Lake through a lengthy, open, unlined ditch. In viewing these two affidavits, and listening to the testimony of Krablin, the Court has concluded that the intent of these affidavits was to mislead the EPA into believing that there was no loss of process water in connection with Anaconda's operations. As previously explained, the process water came from, and returned to Lower Lake. The pumps associated with this process leaked, the pipeline from Lower Lake to the zinc fuming plant furnace leaked, and the return open, unlined ditch to Lower Lake obviously leaked water. This water contained high levels of arsenic, and serves as one of the primary sources of groundwater contamination caused by Anaconda's operations.

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[58] *Id.* at Ex. 156-0004.

210. The Court was further confused and perplexed by Krablin's testimony on this subject when he attempted to explain his conflicting answers regarding the import of these two affidavits by contending that he did not appreciate the distinction between an affidavit and a declaration. In any event, during cross-examination, Krablin ultimately admitted that if Unger and/or Kane represented in their affidavits that it was a closed piping system, those representations would have been false.

211. On May 15, 1990, the EPA sent a letter to Atlantic Richfield explaining that it determined that "ARCO is a potentially responsible party for the Process Ponds Operable Unit at the East Helena Site."[59]

212. The May 15, 1990 letter from the EPA also concluded that there were "elevated concentrations of heavy metals in water being discharged from the zinc fuming plant into Lower Lake."[60]

213. On May 21, 1990, Atlantic Richfield responded to the EPA and made the following misleading claim: "Even assuming that the non-contact discharge water contained elevated concentrations of metals, no evidence exists that these metals were added by the non-contact cooling water system. Rather, the concentrations of metals discharged in the non-contact

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[59] Ex. 419 and 419-0002.

[60] Ex. 419 at 419-0001.

cooling water were the same as those in the withdrawal from Lower Lake."[61]

214. Anaconda and Atlantic Richfield made multiple false and misleading statements to the EPA regarding its discharges to and its use of cooling water from Lower Lake.[62]

215. Based on Atlantic Richfield's deliberate failure to tell the EPA the truth about its operations, EPA looked solely to Asarco to conduct remedial action at the Site.[63]

216. Additionally, based on Atlantic Richfield's misrepresentations during the subsequent clean-up investigations and issuance of environmental reports, the EPA and later METG, focused on Asarco's operations, and overlooked the contributions of Anaconda's zinc fuming facility. This focus on Asarco's operations, and not Anaconda's, to determine the sources of contamination to the groundwater was exacerbated by the fact that the zinc fuming facility ceased operations in 1982. The subsequent environmental investigations and reports were thus focused on the only operational facility at the Site, which was Asarco's.

217. Atlantic Richfield also repeated those false statements when responding to discovery in this case.

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[61] Ex. 186 at 186-0008.

[62] Exs. 113 & 156.

[63] Ex. 35 at 35-0019.

In its December 23, 2013 response to Asarco's Request for Admission Number 5, Atlantic Richfield stated the following: "the zinc fuming plant utilized a closed-loop, non-contact cooling water system to control the temperature of the furnace and reduce the temperature of zinc oxides and other gases before entry to the baghouse . . . . The cooling water system did not result in contaminant loading to Lower Lake."[64]

218. At the time Atlantic Richfield provided its response to Asarco's Request for Admission Number 5, Atlantic Richfield had documents in its possession that showed that Anaconda returned cooling water to Lower Lake via an open ditch, not a closed-loop, non-contact cooling water system.

219. Within days following the deposition of Richard Krablin, Atlantic Richfield amended its response to Asarco's Request for Admission Number 5, as well as other discovery responses by stating the following: "certain information provided in deposition testimony indicates that the closed-loop, non-contact cooling water system described in Atlantic Richfield's Previous Responses was modified after construction, but prior to December 21, 1961 to return cooling water from the zinc fuming plant to Lower Lake via an open ditch rather than a closed pipe."[65]

220. The foregoing misrepresentations by Anaconda constitute a lack of cooperation on the part of Anaconda with the EPA, warranting consideration by the Court

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[64] Ex. 482 at 482-0006.

[65] Ex. 487 at 487-0002 – 487-0003.

of an uncertainty premium or error factor under the sixth Gore Factor, which will be addressed in the following Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction based upon the exisence of a federal question, 28 U.S.C. § 1331, and Section 113(b) of CERCLA, 42 U.S.C § 9613(b).

2. CERCLA § 113(f) allows "[a] person who has resolved its liability to the United States . . . for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement" to seek contribution from other potentially responsible persons. 42 U.S.C. § 9613(f)(3)(B).

3. CERCLA has two primary policy goals: (1) to encourage the "expeditious and efficient cleanup of hazardous waste sites," and (2) to ensure that those responsible for hazardous waste contamination pay for the cleanup. *Asarco LLC v. Atl. Richfield Co.,* 866 F.3d 1108, 1115 (9th Cir. 2017). In keeping with these policy goals, CERCLA § 113 provides for reimbursement of costs incurred by a party that overpaid for its share of the cleanup. *Id.* at 1115.

4. In analyzing the merits of a contribution claim under § 113(f) of CERCLA, courts must conduct a two-part inquiry: "First, the court must determine whether the defendant is 'liable' under CERCLA § 107(a); Second, the court must allocate response costs among liable parties in an equitable manner." *United States v. Kramer,* 644 F. Supp. 2d 479, 488-89 (D.N.J. 2008)

(quoting *Goodrich Corp. v. Town of Middlesbury,* 311 F.3d 154, 168 (2d Cir. 2002)).

5. The burden of proof in a CERCLA case is a preponderance of the evidence. *Georgia-Pacific Consumer Products LP v. NCR Corp.,* 980 F. Supp. 2d 821, 829 (W.D. Mich. 2013).

I. ATLANTIC RICHFIELD'S LIABILITY UNDER CERCLA § 107(a)

6. In order to establish a *prima facie* case for liability under CERCLA § 107(a), the plaintiff must prove the following four elements:

a. The site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, Section 101(9), 42 U.S.C. § 9601(9);

b. A "release" or "threatened release" of any "hazardous substance" from the facility has occurred, Section 107(a), 42 U.S.C. § 9607(a)(4);

c. Such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," Section 107(a), 42 U.S.C. §§ 9607(a)(4) and (a)(4)(B); and

d. The defendant is within one of four classes of "persons" subject to the liability provisions of Section 107(a).

City of Colton v. Am. Promotional Events, Inc.-West, 614 F.3d 998, 1002-1003 (9th Cir. 2010).

A. Anaconda's Zinc Fuming Plant is a "Facility" Under CERCLA

7. Under Section 101(9) of CERCLA, the term "facility" means:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

8. The East Helena Superfund Site, including Anaconda's zinc fuming furnace, flues, bag house, water pipes, process ponds, and other appurtenances, is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

B. Anaconda "Released" a "Hazardous Substance" at the Site

9. A "release" means, in pertinent part, "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." Section 101 (22) of CERCLA, 42 U.S.C. § 9601(22).

10. A "hazardous substance" is defined under CERCLA to include arsenic. Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 49 C.F.R. § 172.101, App. A.

11. Anaconda is responsible for disposals or "releases" within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), into the environment at or from the East Helena Site.

12. "Hazardous substances" within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), including but not limited to arsenic, were disposed of, placed, released, or otherwise became located at the East Helena Site by and because of Anaconda and its zinc fuming operations.

C. Anaconda's "Release" at the Site Caused Asarco to Incur "Necessary" Response Costs Consistent with the National Contingency Plan ("NCP")

13. For a response cost claim, a plaintiff "need not establish a direct causal connection between the hazardous substance released by the Defendants and the incurrence of response costs." *Coeur D'Alene Tribe v. Asarco Inc.,* 280 F. Supp. 2d 1094, 1124 (D. Idaho 2003) (citing *U.S. v. Alcan Aluminum Corp.,* 964 F.2d 252 (3rd Cir. 1992)).

14. Once a party is liable, it is required to share the costs of response regardless of whether it is the sole cause of those costs. *Boeing v. Cascade,* 207 F.3d 1177, 1185-1186 (9th Cir. 2000).

15. "A CERCLA contribution plaintiff is not required to prove its case with 'mathematical precision' or 'scientific certainty;' rather, it must prove its right to contribution by a preponderance of the evidence." *Asarco LLC v. NL Industries, Inc.,* 106 F. Supp. 3d 1015, 1026 (E.D. Mo. 2015) (citations omitted).

16. CERCLA liability may be inferred from the totality of the circumstances; it need not be proven by direct documentary evidence. *NL Industries, Inc.,* 106 F. Supp. 3d at 1026; *Georgia-Pacific Consumer Products LP v. NCR Corp.,* 980 F. Supp. 2d 821, 829 (W.D. Mich. 2013) (citing *Tosco Corp. v. Koch Indus., Inc.,* 216 F.3d 886, 892 (10th Cir. 2000)); *Alcan.,* 964 F.2d 252 (holding that "virtually every court that has considered this question has held that a CERCLA plaintiff need not establish a direct causal connection between the defendant's hazardous substances and the release or the plaintiffs incurrence of response costs.")

17. The Court must construe the CERCLA statute "liberally to avoid frustration of the beneficial legislative purposes" of protecting and preserving public health and the environment. *NL Industries, Inc.,* 106 F. Supp. 3d at 1026 (citing *U.S. v. Mallinckrodt, Inc.,* 2006 WL 3331220, at *3 (E.D. Mo. Nov. 15, 2006).

18. Asarco produced substantial and convincing evidence establishing that releases occurred at the Anaconda zinc fuming furnace and flues, at the Anaconda bag house, at the Anaconda slag and coal dumps, through leaking cooling water pipes, and at the unlined process ponds and ditches utilized by Anaconda for cooling and wash-down water, including but not limited to Lower Lake, Thornock Pond and Lake, and Wilson's Ditch.

19. Asarco produced substantial and convincing evidence establishing that these Anaconda releases resulted in the migration of arsenic into the groundwater, which directly contributed to the arsenic plumes that are driving the East Helena Site cleanup.

20. Because Asarco has established that there were several plausible migration pathways via which arsenic released by the Anaconda zinc fuming operations migrated into the groundwater and contributed to the arsenic plume that is driving the East Helena Site cleanup, Asarco has met its burden on causation. Atlantic Richfield has not presented any compelling evidence that disproves Anaconda's causation.

21. Response costs are considered necessary when "an actual and real threat to human health or the environment exist[s]." *City of Colton,* 614 F.3d at 1003 (citing *Carson Harbor Village, Ltd v. Unocal Corp.,* 270 F.3d 863, 870-71 (9th Cir. 2001) (en banc)).

22. Response costs are considered consistent with the NCP "if the action, when evaluated as a whole, is in substantial compliance" with it. *City of Colton,* 614 F.3d at 1003; 40 C.F.R. § 300.700(c)(3)(i).

23. The NCP "is designed to make the party seeking response costs choose a cost-effective course of action to protect public health and the environment." *City of Colton,* 614 F.3d at 1003 (quoting *Carson Harbor Village LTD. v. County of Los Angeles,* 433 F.3d 1260, 1265 (9th Cir.2006)).

24. Where costs are incurred pursuant to an Administrative Order issued by the EPA or a Consent Order between the plaintiff and the EPA, there is an irrebuttable presumption that those costs are consistent with the NCP. 40 C.F.R. § 300.700 (c)(3)(ii); *Central Me. Power Co. v. F.J. O'Connor Co.,* 838 F. Supp. 641, 648 (D. Me. 1993); *Action Mfg. Co. v. Simon Wrecking Co.,* 2008 WL 2880324 (3rd Cir. 2008)

(unpublished) (citing *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.,* 100 F.3d 792, 796-97 (10th Cir. 1996)).[66]

25. Costs arising from RCRA compliance can be recovered in a CERCLA action, and work performed under a RCRA order or consent decree may still be consistent with the NCP such that the associated costs may therefore still be recoverable under CERCLA. *U.S. v. E.I. du Pont de Nemours & Co.,* 341 F. Supp. 2d 215, 235-37 (W.D.N.Y. 2004);

26. The EPA has stated that "even if a party takes a cleanup action under an authority other than CERCLA (*e.g.,* RCRA corrective action), it may have a right of cost recovery under CERCLA Section 107 if the action was a necessary response to a release of hazardous substances, and was performed consistent with the NCP." Nat'l Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666-01, 8796 (Mar. 8, 1990).

27. Asarco paid $111.4 million in response costs for the East Helena Site pursuant to the June 2009 CERCLA Consent Decree, which constitutes a Consent Order between the Plaintiff and the United States.

28. The response costs incurred by Asarco for the East Helena Site pursuant to the June 2009 CERCLA

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[66] This issue was the subject of pretrial briefing by the parties. *See* "Defendant Atlantic Richfield Company's Point Brief Regarding Asarco's Burden of Proof on Response Costs" (Doc. 241), and "Asarco's Response in Opposition to Defendant Atlantic Richfield Company's Point Brief" (Doc. 256).

Consent Decree, and the subsequent remediation measures paid for out of those response costs and implemented by the METG with the EPA's oversight, are necessary and consistent with the National Contingency Plan.

29. The remediation at the Site, funded by the June 2009 CERCLA Consent Decree, is and has been primarily focused on remediation of the groundwater plumes. This work is necessary to remediate Anaconda's releases of arsenic into the groundwater.

30. Anaconda's releases at the Site caused Asarco to incur response costs that were necessary and consistent with the National Contingency Plan.

D. Atlantic Richfield is Within the Classes of Persons Subject to Section 107(a) Liability

31. The term "person" means "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

32. The four classes of persons subject to CERCLA's Section 107(a) liability provisions include, in pertinent part: "(1) the owner and operator of . . . a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal

or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . ." Section 107(a) of CERCLA, 42 U.S.C. § 9607(a)(1-4).

33. CERCLA imposes "strict liability for environmental contamination" upon these four classes of potentially responsible parties. *BNSF v. U.S.,* 556 U.S. 599, 608 (2009).

34. A showing by a contribution plaintiff that a defendant falls into just one of these categories is sufficient to establish liability. *Control Data Corp. v. S.C.S.C. Corp.,* 53 F.3d 930, 934 (8th Cir. 1995).

35. Corporate successors to owners or operators of a facility succeed to those entities' CERCLA liabilities. *Atchison T. & S.F. Ry. v. Brown & Bryant, Inc.,* 159 F.3d 358, 361 (9th Cir. 1997).

36. Atlantic Richfield is a "person," within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

37. Anaconda is a former "owner" and/or "operator" of a "facility" pursuant to Sections 101(9) and (20) and 107(a)(2) of CERCLA, 42 U.S.C. §§ 9601(9) and (20) and 9607(a)(1) and (2).

38. Anaconda is a person who is liable for owning and/or operating facilities at or from which hazardous substances were disposed under 42 U.S.C. § 9607(a)(2), for arranging transport or disposal of hazardous substances under 42 U.S.C. § 9607(a)(3), and for transporting hazardous substances in or near the East Helena Site under 42 U.S.C. § 9607(a)(4).

39. Atlantic Richfield, as Anaconda's corporate successor, assumes Anaconda's CERCLA liability.

40. Because Asarco has established all of the required elements of § 107(a) liability, Atlantic Richfield is liable under § 107(a) of CERCLA, and Asarco may seek contribution pursuant to § 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f).

II. ATLANTIC RICHFIELD'S EQUITABLE SHARE OF CONTRIBUTION UNDER CERCLA § 113(f)

41. Asarco has resolved its CERCLA liability for response actions with the United States through the June 2009 CERCLA Consent Decree, which included any liability for the Site.

42. Asarco incurred $111,403,743 in response costs that are consistent with the National Contingency Plan pursuant to 42 U.S.C. § 9607(a)(4)(B).

43. Asarco has paid more than its equitable share of costs at the Site.

44. Atlantic Richfield is liable under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), for its equitable share

of Anaconda's contribution for the response costs paid by Asarco under the CERCLA Decree.

45. Courts regularly approve contribution claims made for future response costs, even where such costs are uncertain. *American Cyanamid Co. v. Capuano,* 381 F.3d 6 (1st Cir. 2004) (allocating future response costs and noting that the "fact that the monetary judgment is entered based on an estimate . . . does not on its own make that judgment unjust"); *RSR Corp. v. Commercial Metals Co.,* 496 F.3d 552 (6th Cir.2007) (permitting a contribution claim for costs that included future response costs); *PCS Nitrogen, Inc. v. Ross Development Corp.,* 104 F. Supp. 3d 729, 743 (D.S.C. 2015) (holding that "monetary relief for future response costs may be available to [plaintiff] as part of its § 113(f)(1) claim").

46. CERCLA mandates an equitable allocation. In formulating an allocation for contribution, the court may consider factors other than the actual amounts contributed to the Site, including "such equitable factors as the court determines are appropriate." Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

47. This is a "broad and loose standard" that gives the district court wide discretion, and is the type of decision particularly well suited for case-by-case analysis. *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat,* 195 F.3d 953, 957 (7th Cir. 1999); *Environmental Transp. Sys., Inc. v. Ensco, Inc.,* 969 F.2d 503, 572 (7th Cir. 1992); *Cadillac Fairview/ California, Inc. v. Dow Chemical Co.,* 299 F.3d 1019, 1027 (9th Cir. 2002), *United States v. Shell Oil Co.,* 294 F.3d 1045, 1060 (9th Cir. 2002) (decision only be reversed upon a finding of

"abuse of the discretion to select factors, or for clear error in the allocation according to those factors").

48. The Court is encouraged to apply standards of fairness and equity in awarding relief to the party that has stepped forward and settled for the cleanup of a contaminated site. *See Alcan I,* 964 F.2d at 264-266; *see* also *PCS Nitrogen Inc. v. Ashley II of Charleston LLC,* 714 F.3d 161 (4th Cir. 2013) (holding that the plain language of 42 U.S.C. § 9613 (f)(1) grants a court significant discretion to choose which factors to consider in determining equitable allocation of liability).

49. The creation of contribution claims and the reliance on equity stems from the fact that "[d]ue to financial constraints and other impracticalities, the EPA only focuses on a few financially viable PRPs to shoulder the *entire* cost of the EPA's remediation or removal measures under CERCLA § 107(a)." Jason E. Panzer, *Apportioning CERCLA Liability: Cost Recovery or Contribution, Where Does a PRP Stand?,* 7 FORDHAM ENVTL. L. REV. 437 (1996). Thus, given "[t]he combination of EPA's lack of resources and its ability to utilize joint and several liability militate against EPA compilation of more comprehensive PRP lists at each site." *Id.* at 442, fn. 33 (citing Jerome M. Organ, *Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency,* 62 GEO. WASH. L. REV. 1043, 1053-54 (1994) ("[I] t is not unusual for the EPA to identify the minimum number of parties to commence an action."). "As a result[,] the burden of remediation falls on those whom [the] EPA has identified." *Id.*

50. Mathematical precision in the allocation process is not realistic and is not part of Asarco's burden of establishing the basis for its claim of an equitable share to which it is entitled from Atlantic Richfield. *Kalamazoo River Study Group v. Rockwell lnt'l, Inc.,* 107 F. Supp. 2d 817 (W.D. Mich. 2000).

51. As a plaintiff that entered into a court approved settlement with the United States, Asarco is entitled to the "benefit of the doubt as to the equitable factors and factual uncertainty in allocating" responsibility for cleanup costs. *Goodrich Corp. v. Middlesbury,* 311 F.3d 154,166 (2d Cir. 2002).

52. While courts may consider any factors they deem relevant, they often use the so-called Gore Factors to guide their allocation analysis. *See Burlington N. & Santa Fe Ry. Co.,* 520 F.3d 918, 940, n.26 (9th Cir. 2008) (reversed on other grounds); *United States v. Consolidation Coal Co.,* 345 F.3d 409, 413–414 & n.1 (6th Cir. 2003); *United States v. Hercules, Inc.,* 247 F.3d 706, 718 (8th Cir. 2001), cert. denied 515 U.S. 1158, 115 S. Ct. 2609, 132 L. Ed. 2d 853 (2001); *Acushnet Co. v. Mohasco Corp.,* 191 F.3d 69, 81 (1st Cir. 1999); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.,* 153 F.3d 344, 354 (6th Cir. 1998); *In re Bell Petroleum Servs.,* 3 F.3d 889, 901 (5th Cir. 1993). The Gore factors include:

a. the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;

b. the amount of the hazardous waste involved;

c. the degree of toxicity of the hazardous waste involved;

d. the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

e. the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

f. the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to public health or the environment.

TDY Holdings LLC v. U.S., 885 F.3d 1142, 1146, n. 1 (9th Cir. 2018); *Matter of Bell Petroleum Services, Inc.,* 3 F.3d 889, 899-900 (5th Cir. 1993).

53. More than any other factor, cooperation touches directly upon CERCLA's objective of prompt cleanup at the expense of responsible parties. *United States v. Consolidation Coal Co.,* 184 F. Supp. 2d 723, 751 (S.D. Ohio 2002), *aff'd in part, and vacated in part,* 345 F.3d 409 (6th Cir. 2003). With cooperation that goal is realized, but without cooperation that goal of CERCLA is thwarted. *Ibid.*

54. Courts have considered "[t]he degree of cooperation with government officials to prevent any harm to the public health or the environment as very important to a contribution analysis." *Cent. Maine Power, Co. v. F.J. O'Connor Co.,* 838 F. Supp. 641, 646 (D. Me. 1993).

55. CERCLA § 104(e) provides the government with the means to enforce cost recovery provisions in CERCLA § 107 by enabling the EPA to obtain information regarding those responsible for hazardous waste disposal and their ability to pay for cleanup costs.

56. Specifically, CERCLA § 104(e)(1) authorizes information requests under CERCLA § 104(e)(2) for purposes of "determining the need for response, or choosing or taking any response action under this subchapter or otherwise enforcing the provisions of this subchapter." 42 U.S.C. § 9604(e)(1).

57. Indeed, "[t]he EPA's use of information request letters is the cornerstone of the Superfund enforcement program." *United States v. Ponderosa Fibres of America, Inc.,* 178 F. Supp. 2d 157, 160 (N.D.N.Y. 2001).

58. A court's consideration of "equitable factors" in determining an allocation extends to applying an "uncertainty premium" or "error factor" increasing a defendant's contribution where precise allocation or final costs cannot be determined. *See, e.g., Burlington Northern and Santa Fe Ry. Co. v. U.S.,* 556 U.S. 599, 616-17 (2009) (approving allocation based upon comparison of plaintiff and defendant's surface area use of the overall site, years of use of the site, and volume of release on the property, and then increasing allocable contribution of 6% by half so that defendant's allocable share was increased to 9% to account for "calculation errors"); *Action Mfg. Co. v. Simon Wrecking Co.,* 2008 WL 2880324 (3rd Cir. 2008) (unpublished) (noting with approval the district court's

use of an "uncertainty premium" which increased the defendant's allocable share by 50%, requiring it to pay 9.38% of the allocable costs rather than the 6.25% of the allocable costs the district court determined the defendant was actually responsible for).

59. In light of the foregoing, Atlantic Richfield's equitable share of the response costs is 25% of the $111,403,743 million Asarco paid under the June 2009 CERCLA Consent Decree for the East Helena Site, which is equal to $27,850,936.

60. Pursuant to the sixth Gore Factor, the degree of cooperation by the parties with Federal, State, or local officials, Anaconda and Atlantic Richfield's ongoing misrepresentations to the EPA, and to Asarco throughout the course of this litigation, supports an additional $1 million award.

III. THE 1972 PURCHASE AGREEMENT DOES NOT BAR ASARCO'S CLAIM

61. Under a Purchase and Sale agreement entered by the parties on July 3, 1972 ("1972 Sales Agreement"), Anaconda sold the zinc fuming plant to Asarco, and at the same time terminated the lease of the land from Asarco.[67] Under the 1972 Sales Agreement, Asarco agreed to purchase the zinc fuming plant, including all facilities, materials, and documents related to the operation. Anaconda agreed to leave all operational documents with Asarco at the plant.[68]

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[67] Ex. 49.

[68] Ex. 49-0002 to 49-0003.

62. Article VIII of the 1972 Sales Agreement contains the following provisions:

> 1. Except as provided in Paragraph 2 of this Article, Anaconda with respect to the purchased assets, agrees to indemnify and hold Asarco harmless against any and all claims, liabilities, damages, losses, costs or expenses whatsoever arising out of or resulting from the ownership and operation by Anaconda of the purchased assets prior to the effective date, or any breach of warranty or misrepresentation by Anaconda, or the non-performance of any covenant or obligation to be performed on the part of Anaconda under this Agreement, or from any misrepresentation or omission from any certificate, instrument or paper delivered or to be delivered by Anaconda to Asarco pursuant to this Agreement or in connection with the transactions herein contemplated.
>
> 2. Anaconda does not assume responsibility for any liability or claim of any nature arising out of the ownership or operation of the purchased assets after the effective date which may be asserted by any agency of the State of Montana or of the United States pursuant to state or federal laws or regulations relating to environmental, health, or safety matters, nor will Anaconda be liable for any cost or expense incurred in order to affect compliance with any such law or regulation.
>
> 3. Asarco hereby agrees to indemnify and hold Anaconda harmless against any and all claims,

> liabilities, damages, losses, costs or expenses whatsoever arising out of or resulting from the ownership and operation by Asarco of the purchased assets after the effective date, or arising out of or resulting from any non-performance of any covenant or obligation to be performed on the part of Asarco under this Agreement.[69]

63. Montana law governs interpretation of the 1972 Agreement.

64. If the terms of the contract are clear, the court must determine the intent of the parties from the wording of the contract alone. *Rich v. Ellingson,* 174 P.3d 491, 495 (Mont. 2007) (citing *Wray v. State Compensation Ins. Fund,* 879 P.2d 725, 727 (Mont. 1994)).

65. The court must also consider the document as a whole, giving effect to each part in interpreting it, rather than attaching a meaning to a single word not supported by the rest of the document. Mont. Code. Ann. § 28-3-202.

66. Under the plain language of Article VIII, ¶¶ 1-3 of the 1972 Agreement, Asarco does not assume any liability, environmental or otherwise, arising out of Anaconda's ownership and operation of the facility.[70]

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[69] Ex. 49-009

[70] Atlantic Richfield urges the Court to consider parole evidence in interpreting the indemnification paragraphs of the 1972 Agreement. Specifically, Atlantic Richfield refers to a meeting in 1988 between the EPA and Asarco, which was attended by an

IV. ASARCO'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

67. Under the "law of the case" doctrine, a court is precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case. *U.S. v. Miller,* 822 F.2d 828, 832 (9th Cir.1987) ("The rule is that the mandate of an appeals court precludes the district court on remand from reconsidering matters which were either expressly or implicitly disposed of upon appeal").

68. On appeal following this Court's grant of summary judgment on statute of limitation grounds, the Ninth Circuit expressly found that "Asarco has a cognizable claim for contribution under CERCLA § 113(F)(3)(B) because it brought a timely action under an agreement that resolved its liability." *Asarco LLC v.*

Atlantic Richfield attorney, Mr. Spaanstra. According to an ARCO letter memorializing this meeting, Asarco asked Mr. Spaanstra to leave the meeting: "Basing that request in part on the fact that certain private contractual indemnification relationships between ASARCO and ARCO made ARCO's presence superfluous and, for reasons not enumerated, potentially counter-productive." (Ex. 153.) Atlantic Richfield argues that the reference to "certain private contractual relationships" was in fact a reference to the 1972 Agreement, and an acknowledgment by Asarco that the agreement somehow mitigated Atlantic Richfield's obligations under CERCLA. Aside from the fact that the letter is vague at best, parole evidence is not admissible to modify the terms of an unambiguous agreement. Having found the agreement unambiguous, the Court need not resort to parole evidence, and attaches no weight to the contents of Ex. 153. Mont. Code. Ann. § 28-3-303, *see also Mary J. Baker Revocable Trust v. Cenex Harvest St. Cooperatives, Inc.* 164 P.3d 851 (Mont. 2007).

Atlantic Richfield Co., 866 F.3d 1108, 1129 (9th Cir. 2017).

69. The Ninth Circuit further explained:

> We hold that the 1998 RCRA Decree did not resolve Asarco's liability for at least some of its response obligations under that agreement. It therefore did not give rise to a right to contribution under CERCLA § 113(f)(3)(B). By contrast, the 2009 CERCLA Decree did resolve Asarco's liability, and *Asarco has brought a timely action for contribution under that agreement*. We therefore vacate the district court's grant of summary judgment and remand for further proceedings consistent with this opinion. On remand, the district court should determine whether Asarco is entitled to any financial contribution from Atlantic Richfield and, if so, how much.

Id. (emphasis added).

70. The Ninth Circuit's holding that Asarco brought a timely contribution claim under CERCLA § 113(f) is the law of the case, and precludes Atlantic Richfield's statute of limitations defense.

V. ASARCO IS ENTITLED TO RECOVER ITS ATTORNEY FEES AND COSTS

71. In 1987, the Environmental Protection Agency and the State of Montana began investigating the environmental impacts caused by Anaconda's operation of its zinc processing facility on Asarco's property during the period between 1927 and 1972.

72. Anaconda and Atlantic Richfield avoided state and federal environmental enforcement actions by, among other conduct, submitting misleading, untrue and incomplete responses to the EPA's official investigatory demands. As a result of Asarco's prosecution of this case, Anaconda's and Atlantic Richfield's misconduct has been brought to light.

73. Asarco has incurred attorneys' fees and costs in prosecuting this case, which has revealed Anaconda's and Atlantic Richfield's concealment and affirmative misrepresentations regarding their environmental impacts at the Site, and established that Atlantic Richfield and Anaconda caused and contributed arsenic contamination to the groundwater beneath the Site.

74. If there is a shortfall in available funds to remediate the groundwater, through Asarco's advocacy, EPA and the State of Montana now have evidence and a record with which to pursue Atlantic Richfield and Anaconda under CERCLA.

75. A lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of CERCLA § 107(a)(4)(B). *Key Tronic Corp. v. United States,* 511 U.S. 809, 820 (1994). Work performed in identifying other potentially responsible parties falls into this category. *Id.*

76. The work Asarco's attorneys have performed to identify Atlantic Richfield as a potentially responsible party is a necessary cost of a response.

77. Asarco is entitled to recover its costs and reasonable attorneys' fees for its work in refuting Atlanta Richfield and Anaconda's untrue

representations to federal and state regulators. As a result of this work, the EPA and the State of Montana are positioned to pursue each company for any necessary and additional environmental cleanup costs related to the Site.

VI. ASARCO IS ENTITLED TO RECOVER PREJUDGMENT INTEREST

78. Section 107(a)(4) of CERCLA provides for the recovery of prejudgment interest, which "shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." 42 U.S.C. § 9607(a)(4).

79. In calculating prejudgment interest, the district court is entitled to look to "the judgment creditor's actual cost of borrowing money or to other reasonable guideposts indicating a fair level of compensation." *Bosnor, S.A. De C.V. v. Tug L.A. Barrios,* 796 F.2d 776, 786 (5th Cir.1986).

80. On June 5, 2012, Asarco made a written demand on Atlantic Richfield for payment under CERCLA, through the filing of a complaint in this action (Doc. 1).

81. Asarco is entitled to recover prejudgment interest on the amount of Atlantic Richfield's calculated equitable share of $28,850,936 ($27,850,936 + $1 million) at a reasonable rate of return from June 5, 2012.

JUDGMENT

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Judgment shall be entered by the Clerk of Court in favor of Plaintiff Asarco, LLC, and against Defendant Atlantic Richfield Company as follows:

1. $27,850,936.00, representing Atlantic Richfield's equitable share of the response costs Asarco paid under the June 2009 CERCLA Consent Decree;

2. $1,000,000.00, representing an uncertainty premium or error factor under the sixth Gore Factor;

3. Prejudgment interest, to be determined in subsequent proceedings;[71]

4. Asarco's costs of suit and reasonable attorneys' fees, to be determined in subsequent proceedings.

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[71] The Court of Appeals for the Tenth Circuit has explained: "because interest determinations are compounded calculations, it may be impossible for parties to provide accurate calculations prior to the court's allocation of response cost liability. In such instances, parties may submit their interest calculations to the court subsequent to that finding." *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.,* 100 F.3d 792, 802 (10th Cir.), amended, 103 F.3d 80 (10th Cir. 1996). The Court acknowledges that Asarco indicated in its Proposed Findings of Fact and Conclusions of Law that prejudgment interest should be calculated at 7.5% per annum, however, that percentage has no foundation and requires documentation relating to the average rate of return during the time period in question (2012-2018). (Doc. 268 at 75-76.) Thus, the Court is unable to calculate the appropriate prejudgment interest at this time. The parties shall meet and confer about the appropriate prejudgment interest calculation in this case using the interest rate calculation provided in 26 U.S.C. § 9507(d)(3)(C).

5. Asarco shall submit to the Court by Friday, July 13, 2018, its claim for attorneys' fees and costs, with all supporting documentation, as well as briefing and documentation on the prejudgment interest rate to be applied to the judgment in this case. Defendant shall filed its response briefs by July 27, 2018.

DATED this 26th day of June, 2018.

/s/ Dana L. Christensen
Dana L. Christensen, Chief Judge
United States District Court

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35723

D.C. No. 6:12-cv-00053-DLC

[Filed: August 10, 2017]

ASARCO LLC, a Delaware corporation, *Plaintiff-Appellant*,	)
v.	)
ATLANTIC RICHFIELD COMPANY, a Delaware corporation, *Defendant-Appellee.*	)

OPINION

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, Chief Judge, Presiding

Argued and Submitted February 8, 2017
Seattle, Washington

Filed August 10, 2017

Before: Raymond C. Fisher, Richard A. Paez, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan

SUMMARY*

Environmental Law

The panel vacated the district court's summary judgment in favor of the defendant in a contribution action under § 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act.

CERCLA § 113(f) provides that after a party has, pursuant to a settlement agreement, resolved its liability for a "response" action or the costs of such an action, that party may seek contribution from any person who is not a party to the settlement.

The panel held that a 1998 settlement agreement under the Resource Conservation and Recovery Act between the plaintiff and the United States did not trigger the three-year statute of limitations for the plaintiff to bring a CERCLA contribution action concerning the East Helena Superfund Site. Agreeing with the Third Circuit, and disagreeing with the Second Circuit, the panel held that a settlement agreement entered into under an authority other than CERCLA may give rise to a CERCLA contribution action. In addition, a "corrective measure" under RCRA

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

qualifies as a "response" action under CERCLA. The plaintiff did not, however, "resolve its liability" under the 1998 RCRA settlement agreement.

Nonetheless, a later, 2009 agreement, on which the plaintiff based its present CERCLA contribution action, did resolve the plaintiff's liability. Because the plaintiff filed the present action within the three-year limitations period measured against entry of the 2009 agreement, it was timely. The panel remanded the case for further proceedings to determine whether the plaintiff was entitled to contribution for the response costs it incurred under the 2009 agreement.

COUNSEL

Gregory Evans (argued), Laura G. Brys, and Daphne Hsu, Integer Law Corporation, Los Angeles, California; Linda R. Larson, Marten Law PLLC, Seattle, Washington; for Plaintiff-Appellant.

Shannon Wells Stevenson (argued), William J. Duffy, and Mave A. Gasaway, Davis Graham & Stubbs LLP, Denver, Colorado; Elizabeth H. Temkin, Temkin Wielga & Hardt LLP, Denver, Colorado; Randy J. Cox and Randy J. Tanner, Boone Karlberg P.C., Missoula, Montana; for Defendant-Appellee.

OPINION

CALLAHAN, Circuit Judge:

Section 113(f)(3)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") allows persons who have taken

actions to clean up hazardous waste sites to seek monetary contribution from other parties who are also responsible for the contamination. 42 U.S.C. § 9613(f)(3)(B). The provision provides that a person that has "resolved its liability" for "some or all of a response action or for some or all of the costs of such action" pursuant to a settlement agreement with the government "may seek contribution from any person who is not party to a settlement." *Id.* In other words, "a [potentially responsible party] that pays money to satisfy a settlement agreement . . . may pursue § 113(f) contribution." *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007). CERCLA imposes a three-year statute of limitations after entry of a judicially approved settlement, during which a party may bring a contribution action. 42 U.S.C. § 9613(g)(3).

This case presents three issues of first impression in our circuit. First, we must decide whether a settlement agreement entered into under an authority other than CERCLA may give rise to a CERCLA contribution action. Second, we must decide whether a "corrective measure" under a different environmental statute, the Resource Conservation and Recovery Act ("RCRA"), qualifies as a "response" action under CERCLA. And third, we must decide what it means for a party to "resolve[] its liability" in a settlement agreement—a prerequisite to bringing a § 113(f)(3)(B) contribution action. Our answers to these legal questions guide our inquiry into whether a 1998 settlement agreement under RCRA (the "1998 RCRA Decree") between Appellant Asarco LLC ("Asarco") and the United States, which was approved and entered by a federal district court, triggered the three-year statute of

limitations for Asarco to bring a § 113(f)(3)(B) contribution action.

In this contribution action against Appellee Atlantic Richfield Company ("Atlantic Richfield"), the district court answered the first two questions in the affirmative but did not address the third. On Atlantic Richfield's motion for summary judgment, the district court concluded that Asarco's action accrued with entry of the 1998 RCRA Decree. Because Asarco brought its action in 2012—well beyond the three-year statute of limitations under CERCLA—the district court determined that its claim was time-barred.

We agree with the district court on the first two issues but, as to the third, conclude that Asarco did not "resolve[] its liability" under the 1998 RCRA Decree. Asarco therefore could not have brought its contribution action in 1998, and the statute of limitations did not begin to run with entry of the 1998 RCRA Decree. By contrast, a later, 2009 agreement, on which Asarco bases its present contribution action, did resolve Asarco's liability. And because Asarco filed that action within the three-year limitations period measured against entry of the 2009 agreement, it is also timely. The district court therefore erred in dismissing Asarco's action on statute of limitations grounds. Accordingly, we vacate the district court's judgment and remand for further proceedings to determine whether Asarco is entitled to contribution for the response costs it incurred under the 2009 agreement.

I. Factual Background

The East Helena Superfund Site (the "Site") is located in and around an industrial area in Lewis and Clark County, Montana. The Site includes the City of East Helena, Asarco's former lead smelter, and a nearby zinc fuming plant that was operated by Atlantic Richfield's predecessor, Anaconda Mining Company ("Anaconda"), and later by Asarco.

The Site has been a locus of industrial production for more than a century, resulting in decades of hazardous waste releases. The lead smelter, which Asarco operated from 1888 until 2001, discharged toxic compounds into the air, soil, and water, such as lead, arsenic, and other heavy metals. Asarco alleges that the zinc fuming plant, which Anaconda operated from 1927 to 1972, also contributed to the contamination. Asarco purchased the zinc fuming plant in 1972 and apparently ceased operations in 1982.[1] In 1984, the United States Environmental Protection Agency ("EPA") added the Site to the National Priorities List under CERCLA.

In the late 1980s, EPA identified Asarco and Anaconda as potentially responsible parties ("PRPs") under CERCLA, meaning—in CERCLA vernacular—that they bore at least some responsibility for the contamination. *See* 42 U.S.C. § 9607(a). EPA sought remedial action only from Asarco, which resulted in

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[1] It is unclear whether the plant remains active. Asarco and Atlantic Richfield both contend that the plant ceased operations in 1982, but the parties rely on authority from 1997, which states that "Asarco continues to operate the zinc fuming plant."

three CERCLA settlements between Asarco and the United States in the late 1980s and early 1990s. Those early settlements are not at issue in this litigation.

In 1998, the United States brought claims against Asarco for civil penalties and injunctive relief under RCRA and the Clean Water Act ("CWA"). The complaint alleged that Asarco had illegally disposed of hazardous waste at the Site, and sought an order requiring Asarco to, *inter alia*, "conduct corrective action pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h) . . . ." A "corrective action" under RCRA is a type of "response measure" necessary to protect human health or the environment, *see* 42 U.S.C. § 6928(h), and is "designed to clean up contamination," J. Stanton Curry, James J. Hamula, Todd W. Rallison, *The Tug-of-War Between RCRA and CERCLA at Contaminated Hazardous Waste Facilities*, 23 Ariz. St. L.J. 359, 369 (1991).

Asarco settled the case with the United States. The settlement agreement was approved by the federal district court in Montana, and entered on the court's docket as a consent decree. The 1998 RCRA Decree assessed civil penalties against Asarco and also required Asarco to take certain remedial actions to address past violations. Those actions included "[c]orrective [m]easures" to, *inter alia*, "remediate, control, prevent, or mitigate the release, potential release or movement of hazardous waste or hazardous constituents into the environment or within or from one media to another."

Despite the 1998 RCRA Decree's lofty goals, Asarco failed to meet its cleanup obligations. Further

complicating matters, in 2005 Asarco filed for Chapter 11 bankruptcy protection. The United States and Montana filed proofs of claim in the bankruptcy proceeding asserting joint and several liability claims under CERCLA. On June 5, 2009, the bankruptcy court entered a consent decree under CERCLA (the "CERCLA Decree") between Asarco, the United States, and Montana. The CERCLA Decree established a custodial trust for the Site, and turned over cleanup responsibility to a trustee. As part of the agreement, Asarco paid $99.294 million (plus other expenses), which, *inter alia*, "fully resolved and satisfied" its obligations under the 1998 RCRA Decree.[2]

II. Procedural Background

On June 5, 2012, Asarco brought an action against Atlantic Richfield under CERCLA § 113(f)(3)(B), seeking contribution for its financial liability under the CERCLA Decree. Atlantic Richfield filed a motion for summary judgment, arguing that Asarco's action was untimely because the three-year statute of limitations under § 113 began running with the 1998 RCRA Decree. Asarco countered that "RCRA, a statute that does not authorize contribution claims, [cannot] trigger the limitations period under another law, CERCLA." Asarco also argued that the CERCLA Decree created "new" and "different" work obligations from the 1998 RCRA Decree, thereby triggering a new statute of limitations period for at least the costs associated with those new obligations.

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[2] Asarco also paid $5 million to Montana to settle a claim for natural resource damages.

The district court granted summary judgment for Atlantic Richfield and dismissed the case. It concluded that the plain language of CERCLA § 113(f)(3)(B) requires only that a settlement agreement address a "response action," not that it be entered into under CERCLA. The court also determined that Asarco had incurred response costs under the 1998 RCRA Decree, and therefore held that the 1998 RCRA Decree provided the necessary predicate for a CERCLA contribution action. Finally, the court rejected Asarco's argument that the CERCLA Decree contained matters not addressed by the 1998 RCRA Decree. Accordingly, it held that the CERCLA Decree did not reset the statute of limitations for any response costs incurred under that agreement, and deemed Asarco's claim for contribution untimely. Asarco appealed.

III. Statutory Context

Congress enacted CERCLA in 1980 with two goals in mind: (i) to encourage the "'expeditious and efficient cleanup of hazardous waste sites,'" and (ii) to ensure that those responsible for hazardous waste contamination pay for the cleanup. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc) (quoting *Pritkin v. Dep't of Energy*, 254 F.3d 791, 795 (9th Cir. 2001)); *see* S. Rep. No. 96–848, at 13 (1980). Hazardous waste sites—also known as Superfund sites—contain toxic substances often deposited by multiple entities. *See* 42 U.S.C. § 9607(a)(1)–(4). In order to spread responsibility among those entities, Congress included a provision in CERCLA providing for reimbursement of costs incurred by the government or a liable PRP. Section 107(a)

provides a cause of action for a "cost recovery" claim against PRPs for a wide range of expenses, including "'any . . . necessary costs of response incurred'" that result from a release of a hazardous substance. *Whittaker Corp. v. United States*, 825 F.3d 1002, 1006 (9th Cir. 2016) (quoting 42 U.S.C. § 9607(a)).

"Response" is a term of art under CERCLA and means "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25). Congress even gave those defining terms their own definitions. A "removal" means, *inter alia*, "the cleanup or removal of released[3] hazardous substances from the environment" and any actions that may be necessary "in the event of the threat of release of hazardous substances into the environment." *Id.* § 9601(23). A "remedial action" means, *inter alia*, "actions consistent with permanent remedy taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." *Id.* § 9601(24). Put simply, a "response action" covers a broad array of cleanup activities.

Section 107(a) is limited to recovery of response costs the suing PRP itself directly incurred. *See Atl. Research*, 551 U.S. at 139 ("[Section] 107(a) permits

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[3] With exceptions, a "release" under CERCLA means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant) . . . ." 42 U.S.C. § 9601(22).

recovery of cleanup costs but does not create a right to contribution."). At the time of enactment, CERCLA included no express right to contribution for a PRP that did not itself incur response costs, but that reimbursed another party that did incur response costs. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162 (2004). Such a situation arises under two circumstances: (i) where the PRP is the defendant in a CERCLA § 106 or § 107(a) action and a money judgment issues against it; or, as with the CERCLA Decree in the matter before us, (ii) where the PRP pays the United States' or a State's response costs pursuant to a settlement agreement. *See id.* at 160–61; *Atl. Research*, 551 U.S. at 138–39; *Whittaker*, 825 F.3d at 1006–07.

Congress added an express right to contribution with the Superfund Amendments and Reauthorization Act of 1986 ("1986 CERCLA Amendments"), Pub. L. No. 99–499, to address these two circumstances. *See Atl. Research*, 551 U.S. at 132. Section 113(f)(1) captures the first, and provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)] of this title, during or following any civil action . . . under [§ 106 or § 107(a)] of this title." 42 U.S.C. § 9613(f)(1). Section 113(f)(1) is not at issue in the instant matter, but, as discussed *infra* in Part IV.A, it is relevant to resolving the first issue we must decide: whether the 1998 RCRA Decree may give rise to a CERCLA contribution action. Section 113(f)(3)(B), which is directly at issue, captures the second scenario, and provides that

> [a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement [that immunizes such person from a contribution action].

Id. § 9613(f)(3)(B). In other words, "a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue § 113(f) contribution." *Atl. Research*, 551 U.S. at 139; *see Cooper*, 543 U.S. at 163, 167 (recognizing that § 113(f)(1) and § 113(f)(3)(B) set forth separate rights of contribution).

While § 107(a) cost recovery actions and § 113(f) contribution actions offer "complementary yet distinct" remedies, there is overlap between them. *Atl. Research*, 551 U.S. at 138, 139 n.6. For example, a PRP may undertake its own response actions pursuant to a settlement agreement with the government. *See id.* That PRP will have incurred its own response costs, meaning it is eligible for cost recovery under § 107(a), but it has also settled with the government, giving rise to a contribution action under § 113(f)(3)(B). The question is whether both or only one of these avenues of relief is available. Our circuit, and "every federal court of appeals to have considered the question since *Atlantic Research*," has concluded that "a party who *may* bring a contribution action for certain expenses *must* use the contribution action [under § 113(f)(3)(B)], even if a cost recovery action [under § 107(a)] would otherwise be available." *Whittaker*, 825 F.3d at 1007

(emphasis in original); *see, e.g.*, *Bernstein v. Bankert*, 733 F.3d 190, 206 (7th Cir. 2013) (party may not pursue cost recovery claim where a contribution claim is available); *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1236–37 (11th Cir. 2012) (same); *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594, 603–04 (8th Cir. 2011) (same); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 229 (3d Cir. 2010) (same); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010) (same); *ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 458 (6th Cir. 2007) (same). Thus, a PRP that incurs its own response costs pursuant to a settlement agreement may only bring a claim for contribution.

Sections 107(a) and 113(f) have different statutes of limitations periods. An action for "recovery of . . . costs" under § 107(a) "must be commenced . . . within 6 years after initiation of physical on-site construction of the remedial action" or "within 3 years after the completion of the removal action." 42 U.S.C. § 9613(g)(2)(A), (B). An action for contribution of "response costs or damages" under § 113(f), by contrast, "may be commenced" no more than "3 years after . . . the date of . . . entry of a judicially approved settlement with respect to such costs or damages." *Id.* § 9613(g)(3)(B).[4] The shorter three-year limitations period for

[4] When comparing the limitations periods for §§ 107(a) and 113(f), courts generally interpret the limitations period for § 107(a) recovery actions to be a uniform six years, not six years *or* three years. *See, e.g.*, *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1006 (6th Cir. 2015); *Consol. Edison Co. v. UGI Utils.*, 423 F.3d 90, 98 (2d Cir. 2005).

contribution actions is intended "to ensure that the responsible parties get to the bargaining—and clean-up—table sooner rather than later." *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 559 (6th Cir. 2007); *see Whittaker*, 825 F.3d at 1013 (Owens, J., concurring in part) (observing that § 113(f) was intended to "'bring[] all such responsible parties to the bargaining table at an early date'" (quoting H.R. Rep. (Energy and Commerce Committee) No. 99–253, pt. 1, at 80 (1985),[5] *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862)).

IV. Discussion

Asarco's action is untimely if it could have brought a contribution action after judicial approval and entry of the 1998 RCRA Decree. Such would be the case if three conditions are met: (i) a non-CERCLA authority

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[5] With a wary eye trained on the potential pitfalls of gleaning congressional intent from legislative history, we note that the version of the bill to which H.R. Rep. No. 99-253 refers, H.R. 2817, included a contribution provision substantially similar to the final version included in the enacted statute. That bill, which was introduced in the House of Representatives on June 20, 1985, and which remained the same in relevant part when reported out of the House Committee on Energy and Commerce, contained a contribution provision stating in part:

> Nothing in this subsection shall affect or modify in any way the rights of . . . any person that has resolved its liability to the United States or a State in a good-faith settlement, to seek contribution or indemnification against any persons who are not party to a settlement [with the United States or a State in a judicially approved good-faith settlement].

H.R. 2817, 99th Cong. § 113 (June 20, 1985).

may give rise to a CERCLA contribution action, (ii) Asarco took a response action or incurred response costs under the 1998 RCRA Decree, and (iii) the 1998 RCRA Decree resolved Asarco's liability for at least some of those response actions or costs. The district court analyzed the first two conditions but not the third. We evaluate all three issues.

Our review of the district court's grant of summary judgment is de novo, as is our review of the court's determination that Asarco's contribution claim under the CERCLA Decree is barred by the statute of limitations. *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Our review of the district court's interpretation of the RCRA and CERCLA Decrees is also de novo, except that we defer to any factual findings unless they are clearly erroneous. *City of Emeryville v. Robinson*, 621 F.3d 1251, 1261 (9th Cir. 2010).

A. A Non-CERLCA Settlement Agreement May Form the Basis for a CERCLA Contribution Action

1.

We begin by considering whether § 113(f)(3)(B) applies to non-CERCLA settlement agreements. "As in any case of statutory construction our analysis begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). But it does not end there. We must heed the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the

overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). "A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (alteration in original and internal quotation marks omitted).

The plain text of § 113(f)(3)(B) is unilluminating. A "response" action is a defined term under CERCLA, but it is unclear from the text of § 113(f)(3)(B) whether it is a CERCLA-exclusive term. *See* 42 U.S.C. § 9601(25). In the same vein, § 113(f)(3)(B) requires a PRP to enter into a settlement agreement that is "administrative[ly] or judicially approved," but the text says nothing about whether the agreement must settle CERCLA claims in particular. *See id.* § 9613(f)(3)(B).

Expanding our analysis to the broader context of the statute, we consider § 113(f)(3)(B)'s companion provision, § 113(f)(1). That section expressly requires a CERCLA predicate by providing that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)] of this title, during or following any *civil action under [§ 106] of this title or under [§ 107(a)] of this title*." *Id.* § 9613(f)(1) (emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United*

States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Applying this principle here, Congress' express requirement of a CERCLA predicate in § 113(f)(1) and its absence in § 113(f)(3)(B) is strong evidence that Congress intended no such predicate in the latter provision.

Our understanding of § 113(f)(3)(B) is consistent with CERCLA's broad remedial purpose. "In ascertaining the meaning of an ambiguous [statutory] term, we may use canons of statutory construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1011 (9th Cir. 2011) (internal quotation marks omitted). With the 1986 CERCLA Amendments, Congress sought to get parties to the negotiating table early to allocate responsibility for cleaning up contaminated sites. H.R. Rep. No. 99–253, pt. 1, at 80. Granting a settling party a right to contribution from non-settling PRPs provides a strong incentive to settle and initiate cleanup. Congress gave no indication that it matters whether the authority governing the settlement is CERCLA or something else. Its focus was, instead, on cleaning up hazardous waste sites. An interpretation that limits the contribution right under § 113(f)(3)(B) to CERCLA settlements would undercut private parties' incentive to settle (except, of course, where the agreement was entered into under CERCLA), thereby thwarting Congress' objective and doing so without reaping any perceptible benefit.

Our interpretation also aligns with EPA's own view. In *Niagara Mohawk Power Corp. v. Chevron, U.S.A.,*

Inc., 596 F.3d 112 (2d Cir. 2010), EPA argued that "'settlement of federal and state law claims other than those provided by CERCLA fits within § 113(f)(3)(B) as long as the settlement involves a cleanup activity that qualifies as a "response action" within the meaning of CERCLA § 101(25), 42 U.S.C. § 9601(25).'" *Id.* at 126 n.15 (quoting Brief for the United States as Amicus Curiae Supporting Appellant at 15). "[EPA's] views, as expressed in [its *amicus*] brief, are persuasive because [its] reasoning is consistent with the statutory language," statutory context, and CERCLA's overall structure and purpose. *See Van Asdale v. Int'l Game Tech.*, 763 F.3d 1089, 1093 (9th Cir. 2014) (deferring to the Secretary of Labor's *amicus* brief). Its interpretation therefore merits some deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (deference to an agency's interpretation depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all [other] factors which give it power to persuade"); *see also Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 401–02 (2008) (according an agency's non-binding interpretation *Skidmore* deference where the interpretation was "consistent with the statutory framework" and the statute was susceptible to "[n]o clearer alternatives").

2.

Whether a non-CERLCA settlement agreement may give rise to a contribution action has split the circuits. In *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013), the Third Circuit arrived at the conclusion we adopt here in evaluating a

settlement agreement entered into under state law, reasoning that "Section 113(f)(3)(B) does not state that the 'response action' in question must have been initiated pursuant to CERCLA." *Id.* at 136. *Trinity* relied on that court's prior holding in *United States v. Rohm & Haas Co.*, 2 F.3d 1265 (3d Cir. 1993), *overruled on other grounds by United States v. E.I. Dupont De Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) (en banc), where it held that CERCLA § 107(a)—which provides a cause of action for recovery of response costs—was available "even when the waste removal [wa]s not undertaken pursuant to CERCLA." *Trinity*, 735 F.3d at 136. In *Rohm & Haas*, as in the matter before us, the remedial action was taken under RCRA. 2 F.3d at 1267. The court in *Rohm & Haas* noted that § 107(a) lacks any "CERCLA-specific requirement," and concluded that

> given the similarity of the provisions of RCRA and CERCLA authorizing EPA to order private parties to conduct corrective activity, we fail to perceive any reason why Congress might have wished to make government oversight expenses recoverable if the government invoked CERCLA statutory authority, but not if it invoked RCRA.

Id. at 1275.

The Second Circuit has gone the other way. In *Consolidated Edison Co. of N.Y., Inc. v. UGI Utilities, Inc.*, 423 F.3d 90, 95 (2d Cir. 2005), the court held that § 113(f)(3)(B) creates a "contribution right only when liability for CERCLA claims . . . is resolved." That case, like *Trinity*, involved a party's § 113(f)(3)(B) contribution action to recoup costs spent pursuant to a

settlement agreement under state law. *Id.* at 96. But unlike *Trinity*, the Second Circuit read the term "response action" to be a "*CERCLA*-specific term," and relied on a House of Representatives Committee report for the 1986 CERCLA Amendments creating § 113. *Id.* at 95–96. That report states that § 113 "'clarifies and confirms the right of a person held jointly and severally liable *under CERCLA* to seek contribution from other potentially liable parties.'" *Id.* (quoting H.R. Rep. No. 99–253, pt. 1, at 79) (emphasis in opinion).[6]

The Second Circuit's approach is not persuasive and may be shifting. First, the court misreads the pertinent legislative history. *Consolidated Edison* relied on a portion of the House report that is specific to § 113(f)(1) for the proposition that Congress intended to require a CERCLA predicate under § 113(f)(3)(B). *See* 423 F.3d at 96; H.R. Rep. No. 99–253, pt. 1, at 79. But, as previously noted, those two provisions diverge in a crucial way: § 113(f)(1) expressly requires that a party first be sued *under CERCLA* before bringing a contribution action, whereas § 113(f)(3)(B) makes no reference to CERCLA *at all*. Second, in a subsequent case, *Niagara Mohawk*, the Second Circuit indicated agreement with EPA's position that a CERCLA-specific settlement agreement is not necessary to maintain a § 113(f)(3)(B) contribution action. 596 F.3d at 126 n.15.

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[6] Several district courts—including one in the Ninth Circuit—have agreed with the Second Circuit's approach. *See, e.g.*, *Differential Dev.-1994, Ltd. v. Harkrider Distrib. Co.*, 470 F. Supp. 2d 727, 739–43 (S.D. Tex. 2007); *ASARCO, Inc. v. Union Pac. R.R. Co.*, No. CV 04-2144-PHX-SRB, 2006 WL 173662, at *7–9 (D. Ariz. Jan. 24, 2006); *City of Waukesha v. Viacom Int'l Inc.*, 404 F. Supp. 2d 1112, 1115 (E.D. Wis. 2005).

While the court addressed a distinct issue, and so did not have an opportunity to revisit its holding in *Consolidated Edison*, it commented that EPA "understandably takes issue with our holding in *Consolidated Edison*." *Id.*

We agree with the Third Circuit. Consideration of CERCLA's statutory context, structure, and broad remedial purpose, combined with EPA's reasonable interpretation, lead us to the inexorable conclusion that Congress did not intend to limit § 113(f)(3)(B) to response actions and costs incurred under CERCLA settlements. We therefore hold that a non-CERLCA settlement agreement may form the necessary predicate for a § 113(f)(3)(B) contribution action. We turn next to considering whether the 1998 RCRA Decree is such an agreement.

B. The 1998 RCRA Decree Required Asarco to Take "Response" Actions

The second condition necessary for the 1998 RCRA Decree to have triggered Asarco's ability to bring a § 113(f)(3)(B) contribution action is that the agreement required Asarco to take response actions or incur response costs. Asarco suggests that the 1998 RCRA Decree did not actually require any response actions, but was instead focused on assessing penalties for RCRA violations, such as noncompliance with RCRA's land disposal restrictions. Asarco argues that the agreement "at best" only resolved "Asarco's liability for civil penalties stemming from alleged operating violations." The district court barely acknowledged this issue.

Asarco dramatically understates the scope of its obligations under the Decree. The agreement clearly required Asarco to take response actions to clean up hazardous waste at the Site. Specifically, the 1998 RCRA Decree obligated Asarco to:

- Implement interim measures to "control or abate[] . . . imminent threats to human health and/or the environment";
- Prevent or minimize the spread of hazardous waste "while long-term corrective measure alternatives are being evaluated";
- Remove and dispose of contaminated soil and sediment at the Site; and, more generally, to
- Fulfill the Decree's "remedial objectives" and "remedial activities"—specifically by (i) implementing "corrective measures" to "reduce levels of hazardous waste or hazardous constituents to applicable standards"; (ii) remediating "any contamination in groundwater, surface water and soils, and the ore storage areas"; (iii) taking actions that "will result in the remediation of contaminated media"; and (iv) "provid[ing] the minimum level of exposure to contaminants and the maximum reduction in exposure."

The agreement's requirement that Asarco take various "corrective measures" is particularly noteworthy because RCRA expressly defines "corrective action" as a *type of* "response" action: Under RCRA, EPA "may issue an order requiring corrective action or

such *other response measure* as [it] deems necessary to protect human health or the environment."[7] 42 U.S.C. § 6928(h) (emphasis added). In short, we hold that the 1998 RCRA Decree included response actions for purposes of bringing a CERCLA § 113(f)(3)(B) action.

C. Asarco Did Not "Resolve Its Liability" Under the 1998 RCRA Decree

The third condition necessary for the 1998 RCRA Decree to have triggered Asarco's ability to bring a § 113(f)(3)(B) contribution action is that the agreement "resolved its liability to the United States or [Montana] for some or all of" its response action or the "costs of such action" in the 1998 RCRA Decree. *See* 42 U.S.C. § 9613(f)(3)(B). Asarco argues that it did not, and therefore the statute of limitations to bring the instant action did not expire three years later, in 2001.

1.

Atlantic Richfield contends that Asarco waived this argument by not raising it in the district court, and that we should therefore not consider it. Atlantic Richfield is correct that Asarco failed to raise this precise issue below. Waiver, however, is not an absolute bar to our consideration of arguments on appeal. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). We may reach an otherwise waived issue in three circumstances: (i) to prevent a miscarriage of justice or preserve the integrity of the judicial process, (ii) when a new issue

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[7] We do not suggest that other authorities that lack the term "response" could not support a § 113(f)(3)(B) contribution action.

arises on appeal because of a change in the law, and (iii) "'when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.'" *Id.* (quoting *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985)).

Determining whether Asarco "resolved its liability" under the 1998 RCRA Decree falls into the first and third categories. If Asarco did not, as it contends, resolve its liability under the 1998 RCRA Decree, then justice would not be served by upholding the district court's decision. The correct interpretation of the phrase "resolved its liability" is also a pure question of law. While deciding whether Asarco "resolved its liability" requires application of the law to the particular terms of the 1998 RCRA Decree, those terms are not in dispute and the record requires no further development. Moreover, deciding this issue will bring certainty to the state of the law in the Ninth Circuit and thereby "'preserve the integrity of the judicial process.'" *Id.* We therefore proceed to the merits.

2.

As we did in Part IV.A, *supra*, we begin our analysis with the plain text of the statute. *Hughes*, 525 U.S. at 438. Where Congress has not defined specific statutory terms, we look to their ordinary meanings. *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009). The commonly understood meaning of "resolve" is "to deal with successfully," "reach a firm decision about," or to "work out the resolution of" something. *Resolve*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/resolve (last accessed July 13,

2017). Black's Law Dictionary similarly defines the term to mean "to find an acceptable or even satisfactory way of dealing with (a problem or difficulty)." *Resolve*, Black's Law Dictionary 1504 (10th ed. 2014). Implicit in these definitions is an element of finality. If the parties reach a "firm decision about" liability, then the question of liability is not susceptible to further dispute or negotiation. As the Seventh Circuit explained in interpreting the same statutory provision, "[a]n issue which is 'resolved' is an issue which is decided, determined, or settled—finished, with no need to revisit." *Bernstein*, 733 F.3d at 211. "To meet the statutory trigger for a contribution action under § 9613(f)(3)(B), the nature, extent, or amount of a PRP's *liability* must be decided, determined, or settled, at least in part, by way of agreement with the EPA." *Id.* at 212 (emphasis in original).

But even if an agreement decides with finality the scope of a PRP's legal exposure and obligations, is its liability "resolved" where the government reserves certain rights, or where the party refuses to concede liability? For example, the statutory provision setting forth EPA's settlement authority allows EPA to include a covenant not to sue in a settlement agreement. 42 U.S.C. § 9622(f). But such covenant must be conditioned on a PRP's completed performance. Section 122(f)(3) provides that

> [a] covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the

> requirements of this chapter at the facility that is the subject of such covenant.

Id. § 9622(f)(3). EPA must therefore preserve its ability to bring an enforcement action even after the settlement agreement is executed. This requirement is reflected in EPA's model CERCLA consent decree, which provides that "covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree." *Superfund Program; Revised Model CERCLA RD/RA Consent Decree*, 60 Fed. Reg. 38,817, 38,833 (July 28, 1995). Similarly, EPA has, in the past, included in settlement agreements releases from liability that are conditioned on a PRP's completed performance. *See, e.g.*, *Bernstein*, 733 F.3d at 212–13; *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1004 (6th Cir. 2015); *RSR*, 496 F.3d at 558. Furthermore, parties often expressly refuse to concede liability under a settlement agreement, even while assuming obligations consistent with a finding of liability.

The Sixth and Seventh Circuits have decided that these reservations of rights tip the scales against a finding that a party has resolved its liability. In *Bernstein*, the Seventh Circuit held that settling PRPs had not resolved their liability where (i) the agreement expressly stated that the PRPs had not conceded liability; (ii) EPA reserved its right to "seek legal [] or equitable relief to enforce the terms of the [agreement]"; and (iii) EPA only "*conditionally* promised to release the [PRPs] from liability" upon the PRPs' "complete performance, as well as certification

thereof." 733 F.3d at 212–13 (emphasis in original). In rejecting the PRPs' argument that the agreement's covenant not to sue amounted to the requisite resolution, the court reasoned that because the release from liability was conditioned on completed performance, the covenant could only take effect when "performance was complete." *Id.* at 212.

The Sixth Circuit conducted a similar analysis in *ITT Industries*. 506 F.3d 452. The court found no resolution of liability where (i) EPA reserved its right to bring legal action for failure to comply with the agreement or for past, present, or future response costs; and (ii) the agreement expressly stated that the PRP did not concede liability. *Id.* at 459–60. And more recently, in *Florida Power*, the Sixth Circuit found no resolution where (i) EPA reserved its right to bring a CERCLA enforcement action for violations of the agreement; (ii) the agreement expressly stated that the PRP "shall have resolved [its] liability to EPA" only "[f]ollowing satisfaction of the requirements of this Consent Order"; (iii) the agreement provided that "participation of [the PRP] in this Order shall not be considered an admission of liability"; and (iv) the agreement was not titled an "administrative settlement." 810 F.3d at 1004.

By comparison, in *Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757 (6th Cir. 2014), the Sixth Circuit held that a PRP had resolved its liability where the agreement (i) stated that, "for purposes of Section 113(f)(3)(B) . . . [the PRPs] have, *as of the Effective Date*, resolved their liability to the United States"; (ii) immunized the settling parties from

contribution actions *as of the Effective Date*; (iii) included the title, "Administrative Settlement Agreement"; and (iv) contained a covenant prohibiting EPA from suing under CERCLA "[i]n consideration of the actions that will be performed and the payments that will be made by [the PRPs] under the terms of th[e] Settlement Agreement." *Id.* at 768–69 (emphasis added and omitted). Yet, as pointed out by the dissent in *Florida Power*, the agreement in *Hobart* also included a broad reservation of rights, specifying that "nothing herein shall prevent U.S. EPA . . . from taking other legal or equitable action as it deems appropriate or necessary." *Florida Power*, 810 F.3d at 1016 (Suhrheinrich, J., dissenting) (internal quotation marks omitted). Similar provisions precluded a finding that the parties had resolved their liability in *ITT* and *Florida Power*, thus creating what appears to be an inconsistent approach within the Sixth Circuit.

Further complicating the law in the Sixth Circuit is an earlier case, *RSR*, in which the court held that the PRP's promise of future performance "resolved [its] liability to the United States" because RSR "agree[d] to assume *all* liability (vis-à-vis the United States) for future remedial actions." 496 F.3d at 558 (emphasis in original). But, as noted again by the dissent in *Florida Power*, the agreement at issue in *RSR* also included a covenant not to sue *conditioned* on a Certification of Completion of Remediation Action issued by EPA. *Florida Power*, 810 F.3d at 1012 (Suhrheinrich, J., dissenting); *see id.* (contemplating that the covenant might "not take effect until the remedial action was complete"). The *RSR* court indicated that a promise of

future performance in an agreement suffices to constitute resolution of liability. *See* 496 F.3d at 558.

We adopt a meaning of the phrase "resolved its liability" that falls somewhere in the middle of these various cases. We conclude that a settlement agreement must determine a PRP's compliance obligations with certainty and finality. *See Bernstein*, 733 F.3d at 211–12 ("An issue which is 'resolved' is an issue which is decided, determined, or settled—finished, with no need to revisit."); *see also Florida Power*, 810 F.3d at 1002–03. However, we disagree with the Sixth and Seventh Circuits' holdings in *Florida Power* and *Bernstein* that the government must divest itself of its ability to enforce an agreement's terms. If a covenant not to sue conditioned on completed performance negated resolution of liability, then it is unlikely that a settlement agreement could *ever* resolve a party's liability. That is because CERCLA prevents a covenant not to sue from "tak[ing] effect until the President certifies that remedial action has been completed . . . ." 42 U.S.C. § 9622(f)(3); *see* 60 Fed. Reg. at 38,833 (model consent decree, conditioning a covenant not to sue on completed performance).

Nor do we agree—as the court held in *Bernstein*—that a release from liability conditioned on completed performance defeats "resolution." An agreement may "resolve[]" a PRP's liability once and for all without hobbling the government's ability to enforce its terms if the PRP reneges. This reasoning applies equally to a covenant not to sue conditioned on

completed performance.[8] It is also consistent with the 1986 CERCLA Amendments. A House of Representatives Committee report expresses Congress' intent to encourage settlements by creating a right to contribution. H.R. Rep. 99–253, pt. 1, at 80. That same report criticizes EPA's inclusion of releases from liability in settlement agreements. *Id.* at 102–03 ("[T]he Committee specifically notes its disapproval of the releases granted in the settlements entered into in the *Seymore Recy[c]ling* case and the *Inmont* case and expects and intends that any compara[b]le releases that might be presented for court approval would be rejected as not in the public interest."). Indeed, the

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[8] *Bernstein* held that an agreement containing a covenant not to sue conditioned on completed performance could give rise to a § 113(f)(3)(B) contribution action *after* performance was completed. 733 F.3d at 204. The court reasoned that once the condition was satisfied, the PRP had resolved its liability. *Id.* But such an interpretation renders another part of § 113—the statute of limitations provision—anomalous. The statute of limitations provision requires a PRP to bring a contribution action "no more than 3 years after . . . *entry of a judicially approved settlement* . . . ." 42 U.S.C. § 9613(g)(3)(B) (emphasis added). Thus, under the Seventh Circuit's approach, a party's contribution action could accrue *after* the statute of limitations had already expired. For example, if a settlement agreement included a covenant not to sue conditioned on completed performance, and the cleanup took four years, then—in the Seventh Circuit's view—the PRP would be precluded from ever bringing a contribution action, even though it (eventually) satisfied the requirements for doing so. And this would necessarily be the case because, as discussed, CERLCA *requires* that a covenant not to sue be conditioned on completed performance. *See* 42 U.S.C. § 9622(f)(3). Where possible, we avoid construing statutes in a way that results in such internal inconsistencies. *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

report goes one step further, expressing an intent to "authorize[]" EPA "to include in an agreement . . . *any provisions allowing future enforcement action . . . that [EPA] determines are necessary and appropriate* to assure protection of public health, welfare, and the environment." *Id.* at 102 (emphasis added). Having sung the praises of settlements providing for a right of contribution in one part of the report, it would make little sense for Congress to encourage EPA to craft settlements in a way that nullifies that right in another.

Moreover, unlike the court in *Florida Power*, we conclude that it matters not that a PRP refuses to concede liability in a settlement agreement. Congress' intent in enacting § 113(f)(3)(B) was to encourage prompt settlements that establish PRPs' cleanup obligations with certainty and finality. A PRP's refusal to concede liability does not frustrate this objective so long as the PRP commits to taking action. Indeed, requiring a PRP to concede liability may discourage PRPs from entering into settlements because doing so could open the PRP to additional legal exposure. *See* 42 U.S.C. § 9607(a) (setting forth obligations of *liable* PRPs).

In sum, an examination of § 113(f)(3)(B)'s plain language, with due consideration for CERCLA's structure and purpose, leads us to the conclusion that a PRP "resolve[s] its liability" to the government where a settlement agreement decides with certainty and finality a PRP's obligations for at least some of its response actions or costs as set forth in the agreement. A covenant not to sue or release from liability

conditioned on completed performance does not undermine such a resolution, nor does a settling party's refusal to concede liability. Whether this test is met depends on a case-by-case analysis of a particular agreement's terms.

3.

Turning to the 1998 RCRA Decree, we conclude that it fails to resolve Asarco's liability for any of its response actions or costs. First, the Decree's release from liability covers none of the "corrective measures"—i.e., response actions—mandated by the agreement. Paragraph 209, under "Effect of Decree," states that

> ASARCO's payment of all civil penalties due, and ASARCO's commitments to pay all stipulated penalties due and owing under this Decree, and ASARCO's commitment to fully and successfully complete the *requirements of this Decree*, shall constitute full satisfaction of the claims *for civil penalties* for civil violations alleged in the complaint of the United States that occurred prior to the date of lodging of this Decree, except as provided in this Paragraph . . . . This release is conditioned upon the complete and satisfactory performance by ASARCO of its obligations under this Decree.

1998 RCRA Decree ¶ 209 (emphasis added). The release is expressly limited to liability with regards to the United States' claims for civil penalties. Yet the complaint that prompted the parties to reach the agreement specifically sought both civil penalties and

injunctive relief—only the latter of which could "require ASARCO to conduct corrective action."

Second, the 1998 RCRA Decree is replete with references to Asarco's continued legal exposure. For example, in paragraph 122, under the header "Off-Site Access," the agreement states unequivocally that "[n]othing in this section shall be construed to limit or otherwise affect ASARCO's liability and obligation to perform corrective measures . . . ." Similarly, in setting forth a limited covenant not to sue, paragraph 214 states that the

> Decree shall not be construed as a covenant not to sue, release, waiver or limitation of any rights, remedies, powers and/or authorities, civil or criminal, which EPA has under RCRA, CERCLA, or any other statutory, regulatory, or common law authority, except as provided in Paragraph 209 above . . . .

Because paragraph 209 does not address—let alone resolve—the United States' claims for injunctive relief, the covenant not to sue does not restrict the United States' authority to bring an action under CERCLA §§ 106 or 107, which could result in additional response obligations. 42 U.S.C. §§ 9606, 9607.

Lest there be any doubt, the Decree makes the point at least three more times. Paragraph 216 states that "except as specifically provided in Paragraph 209," compliance with the Decree "shall be no defense to any action commenced" under federal or state law. 1998 RCRA Decree ¶ 216. And the next paragraph provides that

> [e]xcept as expressly provided herein, nothing in this Decree shall constitute or be construed as a release from any claim, cause of action or demand in law or equity, against any person, firm, partnership, or corporation for any liability it may have arising out of, or relating in any way to, the generation, storage, treatment, handling, transportation, release, management or disposal of any hazardous wastes . . . found at, on, or under, taken to or from, or migrating to, from or through the [lead smelter and contiguous areas].

Id. ¶ 217 (emphasis added). Finally, paragraph 137 states that Asarco's CERCLA liability for response costs would not be released even if Asarco fully complied with the Decree:

> Notwithstanding compliance with the terms of this Decree, ASARCO is not released from liability, if any, for the costs of any response actions taken or authorized by EPA under any applicable statute, including CERCLA.

Simply put, the 1998 RCRA Decree did not just leave open *some* of the United States' enforcement options, it preserved all of them. Because the Decree did not settle definitively *any* of Asarco's response obligations, it did not "resolve[] [Asarco's] liability." *See* 42 U.S.C. § 9613(f)(3)(B). Accordingly, Asarco could not have brought a contribution action pursuant to the 1998 RCRA Decree and the corresponding limitations period did not run with that agreement.[9]

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[9] Asarco was not without recourse to seek reimbursement for costs incurred under the RCRA Decree. As discussed in Part III, *supra*,

D. Asarco "Resolved Its Liability" Under the 2009 CERCLA Decree

The district court held that Asarco's contribution claim for response costs incurred under the 2009 CERCLA Decree was time-barred based on the erroneous conclusion that Asarco could have brought its action under the 1998 RCRA Decree. Asarco argues the district court erred because it brought its action no more than three years after entry of the June 2009 CERCLA Decree, which it argues "resolved its liability" for the first time, and therefore its action is timely. We agree with Asarco.

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where a § 113(f) contribution action is unavailable, a PRP may be able to bring a § 107 "cost recovery" action against other PRPs to recoup "any . . . necessary costs of response incurred" that result from a release of a hazardous substance. 42 U.S.C. § 9607(a); *see Bernstein*, 733 F.3d at 214. Put another way, a PRP that has taken a response action but has not entered into a settlement agreement that resolves its liability has satisfied the criteria for bringing a § 107 action. A § 107 action has at least three advantages and one disadvantage compared to a § 113(f)(3)(B) action: (i) § 107(a) comes with a longer statute of limitations period than § 113(f)(3)(B) (six years versus three), (ii) it provides the possibility of joint and several liability, and (iii) it comes with limited defenses—e.g., acts of God, acts of war, and third-party omissions. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (joint and several liability is available under § 107 unless the harms caused by multiple entities "are capable of apportionment"); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 690 (7th Cir. 2014) (discussing limited defenses under § 107); 42 U.S.C. § 9607(a)(4)(B) (listing defenses). On the other hand, a party that is ineligible to bring a § 113(f) contribution action—and therefore must resort to § 107(a)—does not enjoy protection from other PRPs' contribution actions. *See* 42 U.S.C. § 9613(f)(2).

Asarco has a timely contribution claim under the CERCLA Decree if three conditions are met. First, Asarco must have brought its action within three years after the date the settlement was judicially approved. 42 U.S.C. § 9613(g)(3)(B). Second, the CERCLA Decree must cover response actions or costs of response. *Id.* § 9613(f)(3)(B). And third, the CERCLA Decree must "resolve[]" Asarco's liability for at least some response actions or costs. *Id.*

Statute of limitations. Section 113(g)(3) requires a party seeking contribution to bring its action no more than "3 years after . . . the date of . . . entry of a judicially approved settlement." *Id.* § 9613(g)(3). The bankruptcy court approved and entered the CERCLA Decree on June 5, 2009. Asarco brought its contribution action on June 5, 2012. In its denial of Atlantic Richfield's motion to dismiss, the district court held that Asarco's claim was timely. Dist. Ct. Dkt. 49, at 6–7. On appeal, Asarco reiterates that its action "was filed within three years of a settlement that did in fact resolve Asarco's liability at the Site." Conspicuously absent from Atlantic Richfield's brief is any contention that the district court erred on this issue. We therefore deem abandoned Atlantic Richfield's argument that Asarco's claim is time-barred as measured against the CERCLA Decree. *See Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988) (issue abandoned where not raised on appeal).

Even if Atlantic Richfield did not abandon this claim, we would conclude Asarco's claim is timely. Under § 113(g)(3), the day of the event that triggers the period is excluded for purposes of computing the

period's end date. *See Asarco, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1007–08 (9th Cir. 2014). Therefore, the first day of the period would be June 6, 2009, and the last day for filing would be June 5, 2012. *See id.* at 1007. Asarco met this deadline.

Response actions or costs. The CERCLA Decree required Asarco to pay $99.294 million (plus other expenses) into a custodial trust account to clean up the East Helena Site. The account covers expenses for past and future response actions, including, *inter alia*, "remedial actions, removal actions, [and] corrective action" at the Site. The CERCLA Decree also settled all obligations under the 1998 RCRA Decree, which, as described in Part IV.B, *supra*, itself addressed response actions. It is therefore beyond cavil that the CERCLA Decree covers "response" actions or costs of response.

Resolution of liability. Asarco argues that the CERCLA Decree "unequivocally" resolved its liability for all of its response costs at the Site. Atlantic Richfield does not directly address this issue, but instead asserts that the CERCLA Decree did not "trigger a new limitations period for costs incurred under the 1998 [RCRA] Consent Decree" because the CERCLA Decree served only as a "funding mechanism" for Asarco's "preexisting commitments." Atlantic Richfield asserts that deeming Asarco's contribution claim timely would work an injustice by allowing Asarco to incur cleanup obligations, sit on its rights and do nothing for years, and then pursue a stale claim through bankruptcy by virtue of its own indolence.

We agree with Asarco and hold that the CERCLA Decree "resolved" its liability for all of its response

costs at the Site.[10] For example, the Decree sets forth a covenant not to sue that is immediately effective and covers all of Asarco's response obligations. The covenant provides, in relevant part, that

> upon the Effective Date and Debtors'[11] full funding of all Custodial Trust Accounts . . . the United States [and Montana] covenant[] not to sue or assert any civil claims or civil causes of action against[Asarco] . . . pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606, 9607(a), and RCRA, 42 U.S.C. § 6901, et seq., Sections 301(a), 309(b), and 311 of CWA, 33 U.S.C. §§ 1311(a), 1319(b), and 1321, or any similar state law, including any liabilities or obligations asserted in the United States' [and Montana's] Proofs of Claim with respect to the East Helena Site.

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[10] While the district court did not address whether the CERCLA Decree resolved Asarco's liability, we need not remand to the district court for consideration of this issue in the first instance. Whether the CERCLA Decree resolved Asarco's liability is an "issue fairly included within the question presented," namely, whether the district court erred in holding that Asarco could not maintain a contribution action under the CERCLA Decree. *See Lewis v. Clarke*, 137 S. Ct. 1285, 1293 n.3 (2017). It was also raised before the district court, *see* Asarco Opp. to Mot. for Summary Judgment, Dist. Ct. Dkt. 161, at 11 ("The CERCLA Decree resolved Asarco's CERCLA liability at East Helena for the first time."), requires no supplementation of the record, and is pressed by Asarco on appeal. We therefore proceed to the merits and decide whether the CERCLA Decree resolved Asarco's liability. *See Lewis*, 137 S. Ct. at 1293 n.3.

[11] Asarco is a "debtor" under the agreement.

CERCLA Decree ¶¶ 28–29. Thus, so long as Asarco funds the Custodial Trust Accounts,[12] it is released from liability for all response obligations under prior settlements, including "corrective measures" under the RCRA Decree.

Other parts of the Decree are similarly all-encompassing. For example, the section setting forth reservations of rights by the government is, in pertinent part, limited to Asarco's "future acts." Under that provision, the United States and Montana "specifically reserve . . . liability for[, *inter alia*,] response costs [and] response actions . . . under CERCLA, RCRA, CWA, [the Montana Comprehensive Environmental Cleanup and Responsibility Act] or *any other law* for Debtors' . . . *future acts creating liability*" under those statutes "that occur after the Closing Date." CERCLA Decree ¶ 39 (emphasis added). The section expressly does *not* reserve any rights to hold Asarco liable under *any* legal authority with respect to then-existing contamination beyond its payment obligations under the agreement. *See id.*

The agreement also caps Asarco's "total financial obligations" for past contamination at the amount specified in the agreement. CERCLA Decree ¶ 8.h. While it leaves open the possibility that Asarco may owe certain additional costs, those costs do not include response costs. *Id.* In other words, Asarco's financial

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[12] Asarco asserts that it has funded the custodial trust account, and Atlantic Richfield's brief concedes the point. We assume that Asarco has complied with the CERCLA Decree's payment obligations with respect to the East Helena Site.

liability was "resolved"—i.e., determined with finality—under the agreement itself; the agreement did not expose Asarco to future liability for past hazardous waste releases.

The agreement also provides Asarco with protection against contribution actions by non-settling parties, as provided under CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2). CERCLA Decree ¶ 43. Contribution protection applies only to "[a] person who has *resolved its liability* . . . in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f)(2) (emphasis added). The agreement's incorporation of that provision is further evidence that Asarco "resolved its liability" under the agreement. *See Hobart*, 758 F.3d at 768–69 (incorporation of provision immunizing a settling PRP from contribution weighed in favor of finding that the agreement resolved its liability).

Finally, we consider Atlantic Richfield's concern that deeming Asarco's contribution claim timely would allow Asarco to benefit from its own alleged neglect under the RCRA Decree. We sympathize with Atlantic Richfield's position but cannot agree with its conclusion. Whether a right of contribution is available does not depend on whose ox gets gored: the fact that Asarco and not some other party was liable under the RCRA Decree does not change the fact that that agreement did not give rise to a right of contribution, whereas the CERCLA Decree did.

In sum, the CERCLA Decree constitutes a "firm decision about" Asarco's liability that lends it the requisite degree of finality. *See Bernstein*, 733 F.3d at 211 n.12. We therefore hold that Asarco has a

cognizable claim for contribution under CERCLA § 113(f)(3)(B) because it brought a timely action under an agreement that resolved its liability.[13]

V. Conclusion

We hold that the 1998 RCRA Decree did not resolve Asarco's liability for at least some of its response obligations under that agreement. It therefore did not give rise to a right to contribution under CERCLA § 113(f)(3)(B). By contrast, the 2009 CERCLA Decree did resolve Asarco's liability, and Asarco has brought a timely action for contribution under that agreement. We therefore vacate the district court's grant of summary judgment and remand for further proceedings consistent with this opinion. On remand, the district court should determine whether Asarco is entitled to any financial contribution from Atlantic Richfield and, if so, how much.

Costs are awarded to the Appellant.

VACATED and REMANDED.

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[13] We express no opinion on the scope of contribution and protection rights where a settlement agreement, unlike this CERCLA Decree, resolves a PRP's liability only for *some* of its response obligations. *Cf. Whittaker*, 825 F.3d at 1008 (a party may not seek contribution for expenses that are not "at issue in the triggering . . . settlement").

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

CV 12-53-H-DLC

[Filed: August 26, 2014]

ASARCO LLC, a Delaware corporation,

Plaintiff,

vs.

ATLANTIC RlCHFIELD COMPANY, a Delaware corporation,

Defendant.

ORDER

Before the Court is Defendant Atlantic Richfield Company's ("Atlantic Richfield") motion for summary judgment, the resolution of which hinges on two issues. First, does a consent decree ASARCO entered into with the United States in 1998 trigger CERCLA's 3-year statute of limitations for contribution actions despite the fact that the decree does not expressly address CERCLA liability. This issue has not been addressed by the Ninth Circuit Court of Appeals, and in the two

circuits which have addressed this issue, the Second and Third, conflicting conclusions were reached. Second, to what extent does a 2009 consent decree between ASARCO and the United States create new cleanup costs or obligations not covered in the 1998 consent decree. For the reasons articulated herein, the Court finds that the 1998 consent decree did trigger the statute of limitations, and that the 2009 consent decree extended ASARCO's obligations no further than the 1998 decree. The Court grants summary judgment in favor of Atlantic Richfield.

Factual Background

ASARCO operated a lead smelter at the East Helena Site ("Site") from 1888 until 2001. Atlantic Richfield's predecessor, the Anaconda Company, constructed and operated a zinc fuming plant on land leased from ASARCO at the site from 1927 to 1972. ASARCO purchased the zinc plant from Anaconda in 1972 and continued to operate it until 1982. Operations at the site released numerous hazardous substances, causing the Environmental Protection Agency ("EPA") to add the site to the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), more commonly known as "Superfund," in 1984.

ASARCO and the EPA entered into several consent decrees, including one dated May 5, 1998 ("1998 Decree") that resolved claims EPA had brought against ASARCO for multiple violations of the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA"). Under this Decree, jurisdiction over all Site-related cleanup was

transferred from the CERCLA program to the RCRA program. While the contents and scope of this Decree are addressed at length below, suffice it to say that the Decree was comprehensive, and required ASARCO to conduct a wide range of activities regarding the contamination.

In 2005, ASARCO filed for Chapter 11 bankruptcy protection. The United States and the State of Montana (collectively referred to as "governments") filed proofs of claim in the bankruptcy proceeding for cleanup of the Site. During the bankruptcy proceeding, ASARCO and the governments entered two settlements regarding the East Helena Site, the second of which was a judicially approved consent decree entered into in June of 2009 ("2009 Decree"). The June 2009 Decree is the subject of the instant motion. It resolved ASARCO's environmental liabilities to the governments at several sites, including East Helena, and created a custodial trust and trust account for each of the Montana properties. The 2009 Decree also required ASARCO to transfer all property rights and interests in the East Helena Site to the trust, and pay $99.294 million into the trust account for that Site. The Montana Environmental Trust Group ("METG") was appointed custodial trustee to oversee the trust and trust account for the Site. The bankruptcy court approved ASARCO's plan of reorganization in November of2009.

ASARCO filed its Complaint in this case in June of 2012, which it amended on September 11, 2012. ASARCO seeks contribution pursuant to CERCLA for the $99.294 million it paid under the 2009 Decree.

Atlantic Richfield now seeks summary judgment, arguing that CERCLA's 3-year statute of limitations for such contribution claims began to run upon entry of the 1998 Decree, and that the 2009 Decree does not create any specific or new obligations as to the East Helena Site that were not covered in the 1998 Decree.

Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.Civ. P. 56(a). The movant bears the initial burden of informing the Court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (internal quotation marks omitted). The movant's burden is satisfied when the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986). Where the moving party has met its initial burden, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 248 (internal quotation marks omitted).

Analysis

In response to widespread public outcry following the Love Canal tragedy in Niagara Falls, New York, Congress enacted CERCLA in 1980 to facilitate the

prompt cleanup of hazardous waste sites. CERLCA is a unique and powerful statute, imposing strict and joint and several liability on countless parties for contamination reaching back to the Nineteenth Century. It grants the federal and state governments broad power to effectively and efficiently remediate hazardous contamination, and creates incentives for parties to actively participate in removal and remedial actions.

In 1986, Congress passed the Superfund Amendments and Reauthorization Act ("SARA"), which amended CERCLA and created mechanisms by which parties that have taken certain specific affirmative actions to address contamination can seek contribution against other potentially liable parties. This motion hinges on one such mechanism, CERCLA § 113(f)(3)(B), which provides:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such an action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. § 9613(f)(3)(B). Contribution claims based on judicially approved settlements are subject to a 3-year statute of limitations. 42 U.S.C. § 9613(g)(3)(B) ("No action for contribution for any response costs or damages may be commenced more than 3 years after . . . entry of a judicially approved settlement with respect to such costs or damages").

Neither the law nor common logic supports the concept that a statute of limitations could run on a claim that has not yet accrued. Atlantic Richfield's argument that the 3-year statute of limitations has run is predicated on its assertion that the court's approval of the 1998 Decree – which admittedly makes no express reference to CERCLA liability – gave rise to a contribution claim under § 113(t)(3)(B).[1] This is a multi-faceted question that involves a novel question of law that has yet to be resolved by the Ninth Circuit and a fact specific inquiry as to the 1998 and 2009 Decrees.

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[1] Atlantic Richfield relies heavily on a paragraph contained in the Court's order of November 30, 2012, stating:

> To the extent that [the 1990, 1998, and February 2009] agreement[s] covered a portion of the costs for which ASARCO seeks contribution here [based on the June 2009 Decree], the statute of limitations was triggered for those specific costs when the agreement was entered. Three of the four agreements were entered more than three years before ASARCO filed this action. Thus, the statute of limitation to seek contribution for the costs covered in the 1990. 1998, and February 2009 consent decrees had expired.

(Doc. 49 at 5.) The Court declined to resolve any potential overlap at the early stage of the litigation before the parties had the benefit of complete discovery. At that time, none of the parties raised the issue of whether the 1998 Decree even gave rise to a CERCLA contribution claim, which is the dispositive legal issue now before the Court. Thus, although the Court essentially reaches the same conclusion as it did in November of 2012, it does so not based on its 2010 statement, but on CERCLA's plain text and overarching purpose in light of the parties well crafted arguments. and the guidance of other courts that have tackled the issue.

The Court first considers whether CERCLA § 113(f)(3)(B) provides a contribution claim where a party has not expressly settled its CERCLA liability. While the Ninth Circuit has yet to address this issue, as previously stated the Second and Third Circuits have. Unfortunately, although not surprisingly given the widely-shared opinion that CERCLA is not a model of legislative draftsmanship,[2] those courts have taken opposing positions.

The Second Circuit interprets § 113(f)(3)(B) "to create a contribution right only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved." *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.,* 423 F.3d 90, 95 (2d Cir. 2005). In *Consolidated Edison,* Con Ed sued UGI Utilities to recover costs it had incurred and would incur in cleaning up several sites on which UGI allegedly operated manufactured gas plants. Con Ed alleged that UGI was liable for remedial costs under CERCLA, as well as under New York State law. After filing suit, Con Ed entered into a voluntary agreement with the New York State Department of Environmental Conservation ("NYDEC"), in which it agreed to cleanup over 100 sites, including those subject to its suit against UGI, as a means to resolve its liability under state law. The court did not discuss the

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[2] As the Second Circuit stated in *W.R. Grace* & *Co.-Conn. v. Zotos Intern. Inc.,* "[u]nfortunately, CERCLA, which was enacted on the eve of the lame-duck session of the 96th Congressional term, is known neither for its concinnity nor its brevity." 559 F.3d 85, 88 (2d Cir. 2009) (quoting several cases that pre-date § 113(f)(3)(B), which was enacted in 1986 under SARA).

issue at length, basing its holding on § 113(f)(3)(B)'s requirement that the party seeking contribution must have resolved its liability for "response action[s]," which it characterized as a "CERCLA-specific term describing an action to clean up a site or minimize the release of contaminants in the future." *Id.* at 95-96. The court also looked to SARA's legislative history, quoting from the report of the House Committee on Energy and Commerce that § 113 "'clarifies and confirms the right of a person held jointly and severally liable *under CERCLA* to seek contribution from other potentially liable parties.'" *Id.* at 96 (citing and quoting H.R.Rep. No. 99-253(I), at 79 (1985) (emphasis added by the court)). On those bases, the Court held that "section 113(f)(3)(B) does not permit contribution actions based on the resolution of liability for state law – but not CERCLA – claims." *Id.*

Several years after its decision in *Consolidated Edison,* the court revisited the issue of what type of liability must be "resolved" for a party to bring a claim under § 113(f)(3)(B) in *W.R. Grace & Co.-Conn. v. Zotos International, Inc.,* 559 F.3d 85 (2d Cir. 2009). Plaintiff W.R. Grace acquired a site that ECI had used as a landfill for wastes generated by one of its facilities that manufactured organic compounds and hair care products that it then sold to defendant Zotos and other customers. In 1983, several years after acquiring the site, W.K Grace entered into a consent order with the NYDEC in which it agreed to reimburse the State for response costs incurred in investigating the site, to perform a remedial investigation and feasibility study, and to remediate the site. In exchange, NYDEC agreed to release W.K Grace from all New York State law

claims "arising from the disposal of hazardous or industrial waste at the Site" upon successful completion of remediation. *W.R. Grace,* 559 F.3d at 87. Grace remediated and maintained the site pursuant to the agreement, and sued Zotos in 1998 seeking contribution pursuant to CERCLA based on a theory of arranger liability, and under New York law for the costs incurred during the investigation and remediation of the site. The district court concluded that W.R. Grace was not entitled to reimbursement pursuant to CERCLA § 113(f) because it was not a party to either a civil suit or a settlement. On appeal, W.R. Grace argued that it was permitted to seek contribution under § 113(f)(3)(B) as the result of the consent order.

The Second Circuit maintained its position, holding that "'the operative question in deciding whether [Grace's] claims arise under section 113(f)(3)(B) . . . is whether [Grace] resolved its CERCLA liability before bringing suit.'" *Id.* at 90-91 (citing *Consolidated Edison,* 423 F.3d at 96). The court did not engage in an analysis or discussion of its reasoning beyond "the principles enunciated in *Consolidated Edison*," *id.* at 90, which were limited to a sentence contained in the House's SARA Report and the determination that "response action" is a "CERCLA-specific term," *Consolidated Edison,* 423 at 95-96. The court examined the text of the consent order, including the release of state law liability and the NYDEC's reservation of its right to bring an action "with respect to areas or resources that may have been damaged as a result of the release or mitigation of hazardous or industrial wastes from the Site." *W.R. Grace,* 559 F.3d at 91. It held that the

consent order did not resolve Grace's CERCLA liability, and left open "the possibility that the DEC or the EPA could, at some future point, assert CERCLA or other claims." *Id.* The court concluded that "[u]nder the principles enunciated in *Consolidated Edison* . . . Grace may not seek contribution under section 113(f)(3)(B)." *Id.* at 90.

Although *Consolidated Edison* and *W.R. Grace* clearly establish that within the Second Circuit § 113(f)(3)(B) does not give rise to a contribution claim unless the administrative or judicially approved settlement specifically resolves CERCLA liability, that court's most recent opinion touching upon this issue casts doubt on the continued viability of that holding – which it referred to as "the *Consolidated Edison/W.R. Grace* problem." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.,* 596 F.3d 112, 126 n. 15 (2d Cir. 2010). In *Niagara Mohawk* the panel included a footnote in which it quoted the following passage from an amicus brief filed by the EPA, which it characterized as "understandably tak[ing] issue with our holding in *Consolidated Edison*":

> The United States was not a party to *Consolidated Edison* and believes it was not correctly decided. Section 113(1)(3)(B) applies where a PRP "has resolved *its liability to* . . . a State for some or all of a response action or for some or all of the costs of such action." 42 U.S.C. § 9613(1)(3)(B). The settlement of federal and state law claims other than those provided by CERCLA fits within § 113(1)(3)(B) as long as the settlement involves a cleanup activity that

> qualifies as a "response action" within the meaning of CERCLA § 101(25), 42 U.S.C. § 9601(25).

Id. The court went on to comment that while "there is a great deal of force to this argument given the language of the statute," it need not address the issue because the consent order at issue in that case clearly encompassed CERCLA liability. *Id.*

The Third Circuit expressly rejected the Second Circuit's interpretation of § 113(f)(3)(B) in *Trinity Industries. Inc. v. Chicago Bridge & Iron Co.,* 735 F.3d 131 (3d Cir. 2013), adopting a position that addresses the *Niagara Mohawk* panel's concern – and one that this Court believes is truer to the express language of that provision. Trinity sought § 113(1)(3)(B) contribution based on a consent order absolving it of liability under two Pennsylvania statutes. The court held "[n]otwithstanding the rule adopted by the Court of Appeals for the Second Circuit and by various district courts . . . § 113(f)(3)(B) does not require resolution of CERCLA liability in particular." *Id.* at 136. The court first looked to the plain language of the statute itself, finding that it "requires only the existence of a settlement resolving liability to the United States or a state 'for some or all of a response action.' Section 113(f)(3)(B) does not state that the 'response action' in question must have been initiated pursuant to CERCLA – a requirement that might easily have been written into the provision." *Id.* In support of this conclusion, the court looked to its case law in the context of CERCLA's cost-recovery provision, § 107(a), citing *United States v. Rohm Haas* in which it

held that if a government action qualifies as a "removal action" under the definition contained in CERCLA, the government's costs are recoverable under the unambiguous language of § 107, regardless of what statutory authority was invoked by EPA in connection with its actions. 2 F.3d 1265, 1274-75 (3d Cir. 1993) (the court continued, stating "We find no support in the text or legislative history of CERCLA for the suggestion that identical oversight activity on the part of the government should be considered a removal if the government invokes CERCLA, but not a removal if other statutory authority is invoked"). The court also addressed the statement from the House Report relied upon by the *Consolidated Electric* court, clarifying that it "refers to contribution claims under § 113(f)(1), not § 113(f)(3)(B), as it is only through a civil action under . . . [CERCLA § 113(f)(1)] that a PRP may be held jointly and severally liable for response costs under CERCLA." *Trinity Industries*, 735 F.3d at 136 (internal citations and quotation marks omitted). The Court concluded that § 113(f)(3)(B) does not require that a party have settled its liability under CERCLA in particular to be eligible for contribution." *Id*.

This Court agrees with the Third Circuit and the *Niagara Mohawk* panel. The plain language of § 113(f)(3)(B) provides a contribution claim to parties that have resolved their liability for "some or all of a *response action* or for some or all of the costs of such action in . . . [a] judicially approved settlement." 42 U.S.C. § 9613(f)(3)(B) (emphasis added). The *Consolidated Edison* court is correct that "response action" is a highly significant term under CERCLA; it has, despite its brevity, sparked an enormous volume

of litigation, giving it an outsize role in contributing to CERCLA's reputation as "the lawyer employment act." However, the significance of that term within the statute and the jurisprudence that has developed around it does not somehow permit it to become subsumed by that statute as *Consolidated Edison* suggests. While the court in that case deemed the term "CERCLA-specific," *Consolidated Edison,* 423 F.3d at 95, its holding indicates it actually interpreted the term "response action" to be CERCLA-exclusive. The most logical and appropriate construction is simply to apply CERCLA's definition of the term "response," which encompasses the terms "remove, removal, remedy, and remedial action . . . includ[ing] enforcement activities related thereto." 42 U.S.C. § 9601(25) [CERCLA § 101 (25)]. These terms are in turn defined under CERCLA, which states:

> The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access,

> provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

42 U.S.C.A. § 9601(23) [CERCLA § 101(23)]. And,

> The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

> The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C.A. § 9601(24) [CERCLA § 101(24)]. The broad sweep of what can constitute a "response action" is immediately apparent. The Court thus interprets the plain language of § 113(f)(3)(B) to give rise to a claim for contribution after a party resolves some or all of its liability to the United States or a State for any "response action," or the costs of such action, that falls under the wide umbrella created by §§ 101(23)-(25).

If Congress intended to narrow the scope of § 113(1)(3)(B) to cover only settlements that expressly resolve CERCLA liability, it could have done so, as it did in § 113(1)(1). Under that provision, "Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following *any civil action under section 106 or under section l07(a).*" 42 U.S.C. § 9613(1)(1) (emphasis added). The absence of any analogous qualifying language in a provision that creates an alternate basis

for a contribution claim – contained within the same subsection – is telling. The Court declines to read into § 113(1)(3)(B) the limiting language that Congress omitted and ASARCO urges, especially since doing so would have the effect of precluding contribution for a settlement that would otherwise qualify based on its content, but that lacked express reference to CERCLA. This would impede the statute's dual primary purposes, which "are axiomatic: (1) to encourage the 'timely cleanup of hazardous waste sites;' and (2) to "place the cost of that cleanup on those responsible for creating or maintaining the hazardous condition.'" *W.R. Grace,* 599 F.3d 85,88 (quoting *Consol. Edison,* 423 F.3d at 94); *see also Burlington Northern & Santa Fe Ry. Co. v. U.S.,* 556 U.S. 599, 602 (2009) ("[CERCLA] was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were bourne by those responsible for the contamination") (internal citations and quotation marks omitted). Courts must "construe the statute liberally in order to effect these congressional concerns." *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996) (citing *B.F. Goodrich* v. *Murtha,* 958 F.2d 1192, 1198 (2d Cir. 1992). Contribution is perhaps the primary tool by which parties effectuate CERCLA's second goal, and this Court will not limit that tool given the plain language of §§ 113(f)(1) & (3)(B) and the absence of any supporting evidence of congressional intent. Finally, the Court concurs with the *Third Circuit* that the passage from the House Report relied upon by the *Consolidated Edison* court, H.R. Rep. No. 99-253(1) at 79 (1985), refers to § 113(f)(1), not to subsection (f) as a whole, nor to (f)(3)(B) specifically.

For these reasons, the Court holds that Section § 113(f)(3)(B) does not require resolution of CERCLA liability in particular. Instead, that provision gives rise to a contribution claim based upon a judicially approved settlement that resolves a party's liability for some or all of a "response action," as that term is defined in §§ 101(23)-(25). As a result, such a settlement starts the clock on the 3-year statute of limitations imposed by § 113(g)(3)(B), which mirrors the language of § 113(f)(3)(B) stating "[n]o action for contribution for any response costs or damages may be commenced more than 3 years after . . . entry of a judicially approved settlement with respect to such costs or damages." 42 U.S.C. § 9613(g)(3)(B).

The Court now turns to the consent decrees in order to determine (1) whether the 1998 Decree compelled response actions or costs as defined under CERCLA, and if so, (2) the precise extent to which the actions and costs covered in the 2009 Decree overlap with those covered in the 1998 decree. As the Court has previously stated, the statute of limitations has not run on any new costs covered in the June 5, 2009 consent decree. (Doc. 49 at 5.); *see also American Cyanamid Co. v. Capuano,* 381 F.3d 6, 15 (2d Cir. 2004) ("The entry of a judicially approved settlement provides contribution protection only regarding matters addressed in the settlement and allows a settling PRP to seek contribution within three years of that settlement for costs incurred within the settlement").

Upon review of the 1998 Consent Decree, the Court has little difficulty concluding that virtually all of the actions it compels fall into the broad statutory

definition of either a "removal" and/or "a remedial" action. The closer and more critical question is whether the 2009 Decree contained any matters not addressed in the 1998 Decree. "The test for determining the extent of 'covered matters' is fact-intensive. 'In determining whether a claim is made regarding matters not addressed in the settlement, a court must consider various factors, including the particular hazardous substance at issue in the settlement, the location or site in question, the time frame covered by the settlement, and the cost of the cleanup." *ASARCO LLC v. Shore Terminals,* 2012 WL 2050253, *7 (N.D. Cal. 2012) (not reported in F.Supp.2d) (quoting *United States v. Pretty Products, inc.,* 780 F.Supp. 1488, 1494-95 n. 4 (S.D. Ohio 1991)).

Atlantic Richfield maintains its long held position that the 1998 Decree established the actions that are to be funded by the $99.294 million ASARCO paid under the 2009 Decree, the purpose of which was to secure the requisite funds prior to ASARCO's discharge in bankruptcy.[3] Atlantic Richfield points to the voluminous discovery materials generated in this case, arguing that the 2009 Decree created no new or additional cleanup obligations with respect to the East Helena Site, but merely constituted a means of funding pre-existing obligations. ASARCO argues that the 2009 Decree requires new actions and costs that fall outside

[3] The Court is reassured that its holding in this case will not result in an unfunded clean-up liability. Sufficient funds have been dedicated to this site in the 2009 Decree, thereby addressing the numerous hazardous substances that have plagued this property and its surroundings since 1888.

the parameters of the 1998 Decree, primarily related to off-site remediation of groundwater contamination and the broad powers and wide discretion given to the trust it creates and funds.

The Court has scrutinized the extensive materials submitted by both parties. However, the Decrees themselves are clear and comprehensive. They are not ambiguous, and no extrinsic evidence of intent or effect is necessary or appropriate. The contents of those documents compel the conclusion that the 1998 Decree was comprehensive in scope, and that the 2009 Decree memorialized and funded obligations originally established in the 1998 Decree in the context of bankruptcy proceedings. ASARCO fails to point to any new actions that the 2009 Decree imposes with respect to the East Helena Site.

ASARCO's primary argument relates to its off-site obligations. ASARCO relies heavily on a provision in the "Background" section of the 1998 Decree which states in full: "WHEREAS, the United States and ASARCO have been engaged in national negotiations to resolve major environmental compliance issues at ASARCO facilities in a cooperative, innovative manner, without the transaction costs associated with protracted litigation." (Doc. 156-12 at 6.) ASARCO claims this is the express purpose of the Decree, and places strong emphasis on the words "at ASARCO facilities" in order to argue that the Decree was limited in scope to include only ASARCO properties. Thus, as its theory goes, contamination – including groundwater contamination – migrating outside the boundaries of ASARCO property falls outside the purpose of the 1998

Decree. The Court will not interpret this prefatory language in the introductory sentence of the Decree to mean that everything that follows applies exclusively to the East Helena land owned by ASARCO. Such an conclusion is not warranted, particularly when viewed in the context of the extensive provisions that follow, many of which implicate contamination outside of the circle ASARCO now wishes the Court to draw. The subsection of the 1998 Decree dedicated to ASARCO's obligations as to corrective actions detail numerous requirements related to investigation, studies, and implementation of corrective measures, all of which were imposed to prevent or mitigate the migration of hazardous materials "*at and/or from the Facility*." (Doc. 156-12 at 26 (emphasis added).) Additionally, the provisions detailing the possible "RFI work plan" contain requirements that apply to the migration of hazardous material "at or from the Facility," and in at least one instance "from the Facility." (*Id.* at 33-34.) The requirements of the corrective measures study ("CMS") are even more externally focused. The CMS is to address "the entire Facility, including areas to which hazardous waste or hazardous constituents have, or may reasonably be expected to migrate beyond the Facility boundaries." (Doc. 156-12 at 38, ¶ 60.) Specifically, ASARCO is to "identify, screen and develop alternatives for removal, containment, treatment, and/or other remediation of releases of hazardous waste or hazardous constituents, at or migrating from the facility." (*Id.* at ¶ 62.) Thus, the plain language of the 1998 Decree simply cannot support ASARCO's position on this point.

ASARCO also contends that these "scattered references to the performance of off-site remediation activity" are limited to obligations to study and investigate such activity, and not act, claiming that the $99.24 million groundwater remediation project at the heart of Montana's subsequent CERCLA claim was thus outside the parameters of the 1998 Decree. (Doc. 161 at 26.) However, the Decree describes the painstaking process by which the EPA, ASARCO, and the public at large will ultimately settle on what is to be done after all the studies and investigations of contamination at or from the Facility are completed. (Doc. 156-12 at 43-46). After seemingly endless rounds of comment, revision, and approval "ASARCO shall commence work to implement the tasks required" by the resulting document. (*Id* at 46, ¶ 82.) Thus, while the precise contours of the specific remedial actions are ultimately to be established through the exhaustive process established in the 1998 Decree, the Decree itself clearly addresses liability and remedial actions pertaining not just to ASARCO's Facility, but to contamination that has migrated from that facility, including to the groundwater (Doc. 156-12 at 40, ¶ C). The 1998 Decree anticipates sweeping remedial actions that ASARCO is obligated to undertake.

The Court now turns to the June 2009 Decree to determine what response actions or costs (or, as the parties refer to it generally, "new work"), if any, it requires that were not covered in the 1998 Decree. ASARCO's main argument is based on the $99 million pump-and-treat groundwater remedy executed by METG pursuant to its authority under the 2009 Decree. This is the only "new" work that ASARCO

contends is required under the 2009 Decree. However, the Decree only requires the "payment of $99.294 million to fund future Environmental Actions and certain future oversight costs of the Governments with respect to the East Helena Designated Property." (Doc. 159-4 at 19.) It makes no specific mention of how the money is to be spent, and does not mention a pump-and-treat system. That is, the 2009 Decree does not mention groundwater, nor does it require the Trust to spend the $99.294 million on a pump-and-treat system. Thus, the Court concludes from its reading of the two consent decrees that the only work the Trust is required to perform and fund under the 2009 Decree are the pre-existing obligations ASARCO had yet to complete under the previous agreements, including primarily the 1998 Decree. Stated simply, there was no "new" work created by the 2009 Decree.

Conclusion

Because ASARCO failed to file a claim for contribution within three years of the 1998 consent decree, its contribution action now before the Court is time-barred pursuant to CERCLA Section 113(g)(3)(B). The 2009 consent decree does not create any additional work or liability as to the East Helena Site outside of the 1998 consent decree, and ASARCO has failed to raise any genuine issue for trial.

As a final matter, ASARCO has filed a motion to strike materials referenced in and attached to Atlantic Richfield's reply brief on its motion for summary judgment (Docs. 180-1, 180-2, 180-3). Because these materials had no bearing on the Court's decision on the

motion for summary judgment, the motion to strike will be denied as moot.

IT IS ORDERED that:

(1) Plaintiff ASARCO's motion to strike (Doc. 181) is DENIED as moot;

(2) Defendant Atlantic Richfield's motion for summary judgment (Doc. 153) is GRANTED;

(3) This case is DISMISSED, and the Clerk of Court is directed to enter judgment in favor of Defendant Atlantic Richfield Company.

Dated this 26th day of August, 2014.

/s/ Dana L. Christensen
Dana L. Christensen, Chief Judge
United States District Court

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-35723

D.C. No. 6:12-cv-00053-DLC
District of Montana, Helena

[Filed: October 18, 2017]

ASARCO LLC, a Delaware corporation,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
ATLANTIC RICHFIELD COMPANY, a Delaware corporation,	)
	)
Defendant-Appellee.	)

ORDER

Before: FISHER, PAEZ, and CALLAHAN, Circuit Judges.

Atlantic Richfield Company's Petition for Panel Rehearing or Rehearing En Banc is **DENIED.**

APPENDIX G

42 U.S.C.S. § 9613

§ 9613. Civil proceedings

* * * *

(f) Contribution.

(1) Contribution. Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [*42 USCS § 9607(a)*], during or following any civil action under section 106 [*42 USCS § 9606*] or under section 107(a) [*42 USCS § 9607(a)*]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107 [*42 USCS § 9606* or *9607*].

(2) Settlement. A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so

provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement.

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B)A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought.

(1) Actions for natural resource damages. Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 101(6) [*42 USCS § 9601(6)*]) under this Act, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 301(c) [*42 USCS § 9651(c)*].

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 120 [*42 USCS § 9620*] (relating to Federal facilities), or any vessel or facility at which a remedial action under this Act is otherwise scheduled, an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this Act with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 [*42 USCS § 9604(b)* or *§ 9620*] (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before the enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986].

(2) Actions for recovery of costs. An initial action for recovery of the costs referred to in section 107 [*42 USCS § 9607*] must be commenced—

> **(A)**for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) [*42 USCS § 9604(c)(1)(C)*] for continued response action; and
>
> **(B)**for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 107 [*42 USCS § 9607*] for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 [*42 USCS § 9607*] for recovery of costs at any time after such costs have been incurred.

(3) Contribution. No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A)the date of judgment in any action under this Act for recovery of such costs or damages, or

(B)the date of an administrative order under section 122(g) [*42 USCS § 9622(g)*] (relating to de minimis settlements) or 122(h) [*42 USCS § 9622(h)*] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation. No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this title [*42 USCS §§ 9601* et seq.] more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments. Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 119 [*42 USCS § 9619*], an action under section 107 [*42 USCS § 9607*] for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents. The time limitations contained herein shall not begin to run—

(A)against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B)against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

* * * *

APPENDIX H

RCRA CONSENT DECREE
EAST HELENA PLANT

LODGED VERSION: JANUARY 23, 1998

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

CONSENT DECREE

Civil Action No.: CV 98-3-H-CCL

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
ASARCO INCORPORATED,	)
	)
Defendant.	)
	)

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TABLE OF EXHIBITS

I. BACKGROUND

WHEREAS, the United States and ASARCO have been engaged in national negotiations to resolve major environmental compliance issues at ASARCO facilities in a cooperative, innovative manner, without the transaction costs associated with protracted litigation;

WHEREAS, as a result of Phase I of these national negotiations, an agreement has been reached embodied in this consent decree and a related consent decree in the District of Arizona which provides for resolution of alleged claims by the United States against ASARCO under the Federal Resource Conservation and Recovery Act and the Federal Clean Water Act;

WHEREAS, the national agreement includes implementation of compliance measures, corrective action, and a supplemental environmental project at the East Helena Lead Smelter Facility, environmental protection and management measures at ASARCO's facilities nation-wide, and payment of civil penalties for alleged past violations at the East Helena Lead Smelter Facility under this consent decree; and, implementation of an extensive compliance plan at ASARCO's Ray Mine in Arizona and payment of civil penalties for alleged past violations under the decree in the District of Arizona;

WHEREAS, as the national agreement is embodied in two consent decrees the United States reserves the right to withdraw its consent from this Decree based on public comment received on either decree;

WHEREAS, concurrently with the lodging of this Consent Decree, Plaintiff, the United States of America

("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), is filing a complaint (the "Complaint") against Defendant, ASARCO Incorporated ("ASARCO");

WHEREAS, ASARCO owns and operates a lead smelting facility in East Helena, Montana ("East Helena Facility" or "the Facility");

WHEREAS, the United States' claims are brought pursuant to the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 et. seq. ("RCRA") and the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1301 et. seq., and seek the imposition of civil penalties and injunctive relief pursuant to the authority of Section 3008(a), (g) and (h) of RCRA, 42 U.S.C. §§ 6928(a), (g) and (h), and Section 309 (b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d);

WHEREAS, ASARCO disputes the allegations of the Complaint, and its assent to this Consent Decree shall not constitute or be construed as an admission of liability; and

WHEREAS, the parties agree and the Court, by entering this Decree, finds that settlement of this matter, without protracted litigation, is fair, reasonable, and in the public interest.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

* * *

[pp. 19]

VII. CORRECTIVE ACTION AT EAST HELENA

Purpose

18. The purpose of this Part of the Decree is to provide for the efficient and effective transfer of responsibility for certain remedial activities at ASARCO's East Helena Facility from EPA's CERCLA program to its RCRA program. This transfer of lead responsibility is based upon a determination by EPA that the RCRA corrective action program is better suited for application to this operating industrial facility than is the CERCLA program since it can allow the framing of remedial investigation steps and the adoption of corrective measures in a manner tailored to circumstances at this operating facility.

19. In conducting RCRA corrective action at this facility, EPA intends to take full account of the remedial investigation/feasibility study ("RI/FS") and remedial measures already undertaken at this facility with respect to five "operable units": the process ponds, groundwater, surface water and soils, the slag pile and the ore storage areas. To the extent that such work fully addresses the requirements of the RCRA corrective action program, no additional work on these matters will be required. Should it be determined, however, that additional work is required on any of these matters, remedial investigations shall take full account of all previously gathered information in a manner which reflects the thoroughness and quality of such information; and any corrective measures

required shall take full account of all information gathered, as well as the previously conducted and ongoing work. In particular, EPA recognizes that the facility has already implemented substantial remedial measures with respect to its process ponds pursuant to a record of decision (ROD) of November 22, 1989, and that an RI/FS for the slag pile operable unit was completed. Accordingly, the primary focus of further remedial investigation and potential corrective measures pursuant to this Decree will be on any contamination in groundwater, surface water and soils, and the ore storage areas.

20. A further purpose of this Part of the Decree is to come to a conclusion in an expedited manner on ASARCO's proposed vehicle for disposition of certain contaminated soil and sediment that have been accumulated at the East Helena Facility as a result of implementation of the process ponds ROD and other excavation activities. ASARCO has submitted to EPA an application for approval of a new onsite landfill for disposition of the approximately 75,000 cubic yards of contaminated soil and sediment presently at the site. EPA plans to expeditiously complete its responsibilities with regard to ASARCO's proposal. EPA has preliminarily determined that should ASARCO's proposal be approved prior to approval of corrective measures pursuant to the corrective measures implementation provisions below, the approved proposal should qualify as an "interim measure" that, by definition, will be consistent with the objectives of any long-term remedy at the Facility.

Basis For Corrective Action Jurisdiction

21. This Part of the Decree is based upon Section 3008 (h) of RCRA, 42 U.S.C. § 6928(h). ASARCO admits that it accepted and stored without a RCRA permit or interim status approximately 166 drums of spent caustic waste in the period February-April 1996. Approximately one-half of this spent caustic waste was charged to the blast furnace. For purposes of this Decree, ASARCO concedes that it should have had a permit or interim status to receive this material under hazardous waste manifest and, accordingly, EPA has corrective action authority at the Facility.

Statement of Requirements

22. Through this Part of the Decree, ASARCO agrees to:

a. Identify, and provide to EPA on request, studies performed at, and data and information collected regarding environmental conditions at the Facility prior to the effective date of this Decree;

b. Review the effectiveness of any measures which would meet the definition of interim measures, performed at the Facility prior to the effective date of this Decree and submit this information to EPA in combination with the information required in Subparagraph a. above in a report entitled Current Conditions/Release Assessment;

c. Perform interim measures where possible and appropriate, at the Facility;

d. Perform a RCRA Facility Investigation ("RFI") to determine the full nature and extent of any and all releases of hazardous wastes and/or hazardous constituents at or from the Facility;

e. Perform a Corrective Measure Study ("CMS") to identify and evaluate alternatives which will prevent or mitigate the continuing migration of or future release of hazardous waste or hazardous constituents at and/or from the Facility, and to restore contaminated media to standards acceptable to EPA;

f. Implement all Corrective Measures ("CMI") chosen by EPA after review of the CMS and public input, which will be chosen because they best prevent or mitigate the continuing migration of or future release of hazardous waste or hazardous constituents at and/or from the Facility, and will result in the remediation of contaminated media in a manner protective of human health and the environment; and

g. Conduct such activities in accordance with existing regulations and guidance, including, the preamble to the regulations EPA proposed in 1990 to promulgate as 40 C.F.R. Part 264, Subpart S, the CAP and the ANPR; then applicable EPA regulations which supersede presently existing EPA regulations or guidance; or Montana regulations which have been incorporated into the federally authorized program which supersede existing EPA regulations or guidance.

Current Conditions/Release Assessment

23. Within one hundred twenty (120) days from the effective date of this Part of the Decree, ASARCO shall submit a current conditions and release assessment

report (the "CC/RA Report") for the Facility to EPA. The purpose of the CC/RA Report is to assess the completeness and quality of the existing data to be used to define, in whole or in part, the nature and extent of any hazardous waste and hazardous constituent releases, if any, at, or migrating from, the Facility.

24. The CC/RA Report shall:

a. list any and all sources of existing data which might be used to define, in whole or in part, the nature and extent of any hazardous waste or hazardous constituent releases, if any, at, or migrating from, the Facility, including whether a data quality analysis exists for such data;

b. explain whether ASARCO believes that EPA has a copy of each such source of data; and

c. for each source of data which ASARCO does not believe EPA already has a copy of, identify:

(1) its then present location;

(2) the intended retention time by ASARCO;

(3) any privilege or confidentiality claims which may attach, or would be asserted by ASARCO if EPA were to request a copy of such source; and

(4) any other relevant information.

25. The CC/RA Report shall address existing data quality issues, including:

a. summary of the quality of the existing data;

b. identification of data ASARCO proposes not be used in assessing site conditions based on data quality concerns;

c. identification of the areas of the Facility for which existing data are adequate to define releases and supply information for identification and evaluation of interim and corrective measures;

d. identification of the areas of the Facility for which existing data are adequate to demonstrate that there are, or have been, no releases of hazardous waste and/or hazardous constituents from any source and that no additional consideration is needed;

e. identification of the areas of the Facility for which existing data are adequate to demonstrate that remedial work is underway, or has been completed, which, when completed, will remediate that area in a manner, and to the degree, equivalent to the remedial goals of the RCRA corrective action program;

f. identification of the areas of the Facility for which existing data are not adequate for such determinations; and

g. identification of additional Facility data needs, including a discussion of whether such data should be gathered as an interim measure, or through the RFI.

26. The CC/RA Report shall detail the nature and extent of each known or legitimately suspected release of hazardous waste and/or hazardous constituent, whether the source is a solid and/or hazardous waste management unit, or other source (such as a one time release), and migration pathways of releases, at or

from the Facility. A discussion of any significant impacts quality assurance/quality control issues might have on such releases should also be provided.

27. In the CC/RA Report, ASARCO shall describe information regarding any existing interim measures as follows:

a. the objectives, design, construction, operation and maintenance requirements of any measures which are, or may be used as, interim measures;

b. whether each is consistent with and may be integrated into any long term corrective measures;

c. any changes/additions which would increase their effectiveness; and

d. all additional or alternative interim measures which might better stabilize the releases of hazardous waste and hazardous constituents, at or migrating from the Facility.

28. In the CC/RA Report, ASARCO shall describe information regarding any final remedial actions as follows:

a. the objectives, design, construction, operation and maintenance requirements of any final remedial measures;

b. whether each such measure is consistent with and may be integrated into any long term corrective measures; and

c. any changes/additions which would increase their effectiveness either as interim measures or corrective measures.

29. The geographic area for study under this Part of the Decree shall include the Facility plus any off-site areas to which hazardous wastes or hazardous constituents may have migrated.

30. EPA shall review the CC/RA Report and shall notify ASARCO in writing which data, if any, not already in EPA's possession, ASARCO must submit. Unless a different time frame for submittal is specified, with justification therefor, ASARCO shall have thirty (30) days to submit such additional information.

31. EPA shall then review the CC/RA Report, and all data in its possession, and shall notify ASARCO in writing which data EPA has determined are sufficient for the purposes of this Part of the Decree.

32. Unless the CC/RA Report is not acceptable, EPA shall provide written justification to support EPA's determination that any portion of the CC/RA Report is incomplete.

33. ASARCO shall modify the CC/RA Report to reflect any EPA comments, and shall resubmit it within forty-five (45) days of receipt of EPA comments, unless a different period is agreed to by ASARCO and EPA.

Interim Measures and Stabilization

34. Interim measures, in addition to those which may already be in place, shall, for the purposes of this

Part of the Decree, be used whenever possible and appropriate to achieve the goal of stabilization, which is defined for purposes of this Part of the Decree to mean the control or abatement of imminent threats to human health and/or the environment, and prevention or minimization of the spread of hazardous waste or hazardous constituents while long-term corrective measure alternatives are being evaluated.

35. EPA will review ASARCO's CC/RA Report and other relevant available information and select all appropriate interim measures for implementation by ASARCO. If deemed appropriate by EPA such selection may be deferred until additional data is collected.

36. Upon written request of EPA, ASARCO shall submit an interim measures work plan ("IM Work Plan") which is no less comprehensive than the IM Work Plan described in the Final CAP, within sixty (60) days of such request.

37. All IM Work Plans shall ensure that the interim measures are designed to mitigate immediate or potential threat(s) to human health and/or the environment, and are consistent with the objectives of and contribute to the performance of any long-term remedies which may be required at the Facility.

38. All IM Work Plans shall discuss all changes and/or additions which may significantly increase the effectiveness of any existing interim measures as well as additional or alternative interim measures which would significantly increase the stabilization or containment of releases of hazardous waste or

hazardous constituents, if any, at or migrating from the Facility.

39. Each IM Work Plan shall also include the following sections:

a. Public Involvement Plan;

b. Data Collection Quality Assurance;

c. Data Management; and

d. Interim Measure Construction Quality Assurance.

40. Concurrent with the submission of an IM Work Plan, ASARCO shall submit to EPA a Health and Safety Plan ("HSP") using the Final CAP as a guideline. The HSP shall conform to applicable health and safety regulations. EPA will not approve the HSP but will review to confirm that all necessary elements are included and that the plan provides for protection of human health.

RCRA Facility Investigation (RFI)

41. If, after reviewing the Final CC/RA Report EPA determines that an RFI is necessary, within one hundred and twenty (120) days of receipt of EPA's determination, ASARCO shall submit to EPA for review and approval a Work Plan for RCRA Facility Investigation ("RFI Work Plan"); provided, however, that if at least one IM Work Plan has been required pursuant to this Part of the Decree, the period for submission shall be within two hundred ten (210) days following ASARCO's receipt of EPA's determination. Any RFI Workplan shall use the CAP as a guideline

and incorporate any elements noted in the CAP as appropriate for facility-specific conditions unless superseding regulations or guidance significantly modify or eliminate any such elements.

42. Relevant EPA guidance may include, but is not limited to the "RCRA Facility Investigation (RFI) Guidance" (Interim Final, May 1989, EPA 530/SW-89-031 (OSWER Directive 9502.00-6D)); "RCRA Ground-Water Monitoring Technical Enforcement Guidance Document" (OSWER Directive 9950.1, September 1986); and the Final CAP.

43. The RFI Work Plan shall document the procedures ASARCO will use in conducting investigations necessary to:

a. characterize the source(s) of hazardous waste or hazardous constituent releases or potential releases of any hazardous waste or hazardous constituent;

b. identify and determine the nature, extent, and the rate of migration of releases of hazardous wastes or hazardous constituents at or from the Facility;

c. determine the likely routes of migration of releases of hazardous waste or hazardous constituents, if any, at or from the Facility including characterization of the geology and hydrology of the Facility;

d. determine the degree and extent of, or threat of, migration of releases of hazardous waste and hazardous constituents at or from the Facility;

e. identify actual and potential receptors;

f. support the development of corrective measure alternatives; and

g. be definitive enough to support the selection of corrective measures.

44. In addition to the work required under paragraph 43.e. immediately above, the RFI Work Plan may describe the methods to be used to gather information to support a risk assessment of the conditions at the Facility, and to conduct an assessment of risk to identified receptors and their environment.

45. The RFI Work Plan shall address all areas of the Facility, and any contamination which has, or can be expected to have, migrated from the Facility.

46. The RFI Work Plan shall list all Areas to be Investigated.

47. The RFI Work Plan shall describe the investigation to be done at each Area to be Investigated, including an investigation of the complete lateral and vertical extent of any releases of hazardous waste or hazardous constituents from such areas.

48. The RFI Work Plan shall define the methods of analysis to evaluate the presence, magnitude, extent, direction, and rate of migration of any releases of any hazardous waste or hazardous constituents.

49. The RFI Work Plan shall be developed so that, if followed, ASARCO can elicit data of adequate technical quality to support the development and evaluation of corrective measure alternatives during

any Corrective Measures Study; and to support a risk assessment.

50. If additional Areas to be Investigated are found on the Facility, or significant new information relating to hazardous waste or hazardous constituent releases not included in the CC/RA Report is discovered at the Facility, ASARCO shall include such information in its next progress report.

51. The RFI Work Plan shall be modified within sixty (60) days of notification from EPA, to address newly identified releases, threatened releases, or Areas to be Investigated.

52. The RFI Work Plan shall include:

a. a Project Management Plan;

b. a Data Collection Quality Assurance Plan;

c. a Data Management Plan for each unit/area or groups of units/areas as appropriate;

d. a Health and Safety Plan;

e. a Community Relations Plan;

f. a Borehole Abandonment Plan; and

g. a schedule for implementation of all activities described in the RFI Work Plan, including preparation and submission of preliminary and final reports to EPA.

53. The RFI Work Plan and activities conducted pursuant to the RFI Work Plan are subject to

acceptance and approval by EPA. Such shall not be unreasonably withheld by EPA.

RFI Reports

54. In compliance with the schedule developed in the RFI Workplan, ASARCO shall prepare an analysis and summary of the RFI and its results. The objective is to ensure that the investigative data collected pursuant to the RFI Work Plan are sufficient in quality and quantity to describe the nature, extent and rate of releases of hazardous waste or hazardous constituents, threat(s) to human health and/or the environment (including risk assessment analysis), and to support any Corrective Measures Study.

Data Analysis

55. ASARCO shall analyze all data collected pursuant to this Part of the Decree and prepare reports on whether the gathering and analysis of such data met quality assurance and quality control and other applicable data gathering and analysis procedures.

a. The reports shall describe the extent of all releases of hazardous wastes or hazardous constituents in relation to site or background levels at (i) the source; (ii) the boundaries of the Area to be Investigated; and (iii) off-site locations, if any, to which the releases have migrated. Background groundwater values for all applicable hazardous constituents described in the RFI Work Plan shall be obtained from analyses of water extracted from appropriate upgradient wells.

b. All sampling and analyses shall be conducted in accordance with the Data Collection Quality

Assurance Plan included as part of the approved RFI Work Plan.

c. All sampling locations, methods and equipment used shall be documented in a field log and all locations shall be identified on detailed site maps.

56. Laboratory, Bench-Scale, and Field Pilot-Scale Studies.

a. With prior EPA approval, ASARCO may conduct laboratory and/or bench-scale studies and field and pilot-scale testing to determine the applicability of a corrective measure technology or technologies to site conditions.

b. ASARCO shall provide EPA with a work plan defining proposed laboratory and bench scale studies and field and pilot-scale testing.

c. ASARCO shall analyze the technologies based on literature review, vendor contacts, and past experience, to determine the testing requirements.

Corrective Measures Study (CMS)

57. Unless as part of the RFI Final Report (as defined in the approved RFI Work Plan) ASARCO thoroughly supports and documents in writing that the risk assessment investigations and analyses conducted during the RFI demonstrate that no Corrective Measures Study is warranted and EPA accepts such demonstration, within ninety (90) days following receipt of notification in writing by EPA of EPA approval of the RFI Final Report (as defined in the approved RFI Work Plan), ASARCO shall prepare and

submit to EPA a Corrective Measure Study ("CMS") Work Plan using as a guideline; then applicable EPA regulations; the CAP or other applicable guidance then in effect; or Montana regulations which have been incorporated into the federally authorized program.

58. EPA will review and comment on an acceptable CMS Work Plan pursuant to Paragraphs 77-82 (Agency Review, Acceptance and Approvals) below.

59. ASARCO shall revise and resubmit the CMS Work Plan within thirty (30) days of receipt of EPA's written comments.

60. The CMS shall address the entire Facility, including areas to which hazardous waste or hazardous constituents have, or may reasonably be expected to migrate beyond the Facility boundaries.

61. The CMS shall consist of four tasks: (1) Identification and Development of Corrective Measures Alternative(s); (2) Evaluation of the Corrective Measure Alternative(s); (3) Recommendation on Corrective Measure(s), and justification therefor; and (4) Corrective Measure Study Reports.

62. CMS TASK 1 - Identification and Development of Corrective Action Alternatives. Based on the results of the CC/RA, including the RI/FS previously conducted for the CERCLA program to the degree the information gathered and analyzed therein is of sufficient quality, and based on the RFI, including risk assessment work conducted pursuant to an approved RFI Work Plan, ASARCO shall identify, screen and develop alternatives for removal, containment, treatment,

and/or other remediation of releases of hazardous waste or hazardous constituents, at or migrating from the Facility.

63. CMS TASK 2 - Evaluation of the Corrective Measure Alternatives. ASARCO shall describe each corrective measure alternative that passes through the initial screening in CMS TASK 1 and assess each remaining corrective measure alternative and its components. The assessment shall consider technical, environmental, and human health concerns.

64. CMS TASK 3 - Recommendation of Corrective Measure(s) and justification therefor. ASARCO shall justify and recommend corrective measure alternative(s) using technical, human health, environmental, and other appropriate criteria.

a. This recommendation shall include summary tables,

b. as appropriate, designed to allow the alternative or alternatives to be understood and compared.

65. ASARCO will propose the corrective measure alternative or alternatives to be implemented based on the results of the evaluation discussed immediately below. At a minimum, the following criteria will be used to justify the proposal of the final corrective measure or measures:

a. Target Remedial Objectives - Generally. The corrective measures must comply with applicable Federal and/or state statutes and regulations for the protection of human health.

(1) Target remedial objectives shall be developed using, and ASARCO shall explicitly identify, all applicable and/or relevant State and Federal standards for the protection of human health and the environment (e.g., Safe Drinking Water Act ("SDWA") the Clean Water Act ("CWA"), National Ambient Air Quality Standards, federally approved state water quality standards).

(2) If ASARCO chooses to conduct a risk assessment, the results of that risk assessment shall be included.

(3) Corrective Measures required by regulation shall be implemented. Corrective Measures otherwise described as preferred (e.g., in preambles or guidance) by EPA or the State of Montana, shall be noted.

b. Human Health. Corrective measures which provide the minimum level of exposure to contaminants and the maximum reduction in exposure over the shortest period of time are preferred.

c. Groundwater. ASARCO shall provide information to support the selection/development of ground-water protection standards for all of the hazardous constituents described in the RFI Work Plan or Final RFI Report as either found in the ground water during the RFI, or reasonably expected to migrate to groundwater over time. ASARCO shall specifically list applicable SDWA standards for such constituents and describe where and, if they cannot be

practicably met, why they may not be met after implementation of this Part of the Decree is complete.

(1) The applicable ground-water protection standards list shall consist of all of the following (others may also be listed):

(a) for any hazardous constituents described in the RFI Work Plans, the respective value given in Table 1 at 40 C.F.R. § 264.94, if the background level of the hazardous constituent is below the level given in Table 1;

(b) the background level of that constituent in the ground water;

(c) an EPA approved risk based level developed by ASARCO in accordance with the "Risk Assessment Guidance for Superfund: Volume 1 - Human Health Evaluation Manual (Part B, Development of Risk-Based Preliminary Remediation Goals) (OSWER Directive 9285.7-01B)"; and

(d) applicable State standards.

d. Environmental. The Corrective Measure or Measures posing the least adverse impact (or greatest improvement) over the shortest period of time on the environment will be favored.

e. Technical. (NOTE: The HSWA permit appendices may be useful in developing this portion of the CMS.)

(1) Performance - Corrective Measures which are most effective at performing their intended functions and maintaining performance over extended periods of time will be given preference;

(2) Reliability - Corrective Measures which do not require frequent or complex operation and maintenance activities and that have proven effective under conditions similar to those anticipated at the Facility will be given preference;

(3) Implementability - Corrective Measures which can be constructed and operated to reduce levels of hazardous waste or hazardous constituents to applicable standards, or less, in the shortest period of time will be preferred;

(4) Safety - Corrective Measures which pose the least threats to the safety of area residents and the environment, as well as workers during implementation, will be preferred; and

(5) Other Factors - such other relevant factors as are appropriate, including projected costs and other site-specific factors.

66. CMS TASK 4 - reports, including one designated as the "Draft-Final CMS Report", shall be submitted per the approved CMS Work Plan, shall follow the guidelines in the CAP as appropriate, and shall be subject to EPA acceptance and approval. Such shall not be unreasonably withheld by EPA. The Final CMS

Report shall not become final until after the completion of the public comment and modification procedures described in this Part of the Decree.

Corrective Measures Implementation

67. After the procedures described in Paragraphs 23-69 and 85-88 of this Decree (CC/RA, Interim Measures, RFI, CMS, Additional Work) have been completed (except for ongoing requirements thereunder), and the Draft-Final CMS Report is complete, EPA shall select the appropriate corrective measure(s), and notify ASARCO of it's determination on the corrective measures to be implemented ("EPA Decision Document"). The EPA Decision Document shall be in writing and shall state the basis for the measure(s) selected, and shall respond to all significant comments made during the comment period.

68. Within ninety (90) days of receipt of the EPA Decision Document, ASARCO shall submit to EPA a Corrective Measures Implementation ("CMI") Work Plan using as a guideline: then applicable EPA regulations; the CAP and/or other applicable guidance then in effect; or Montana regulations which have been incorporated into the federally authorized program. The CMI Work Plan shall be developed to implement the decisions set forth and supported in the EPA Decision Document, and shall detail all work and related requirements and schedules for the timely implementation and completion of such corrective measures.

69. EPA shall conduct its review of and comment on an acceptable CMI Work Plan pursuant to Paragraphs

77-82 (Agency Review; Acceptance and Approvals) below.

70. ASARCO shall revise and resubmit the CMI Work Plan within thirty (30) days of receipt of EPA's written comments.

71. The CMI Work Plan and activities conducted pursuant to the CMI Work Plan are subject to acceptance and approval by EPA. Such shall not be unreasonably withheld by EPA.

72. Upon ASARCO's conclusion that it has achieved the requirements specified in the EPA Decision Document and elsewhere in and through implementation of this Part of the Decree, ASARCO shall submit to EPA for review and approval, a draft Corrective Measure Completion Report ("CMC Report"). The Draft CMC Report shall provide all information necessary to support ASARCO's conclusions.

73. If the Draft CMC Report is acceptable, EPA shall make the Draft CMC Report available to the public for review and comment pursuant to Paragraphs 108-116 (Public Comment) of the Decree.

74. Following review of the Draft CMC Report and taking into account comments made during the public comment period; and pursuant to Paragraphs 77-82 (Agency Review; Acceptance and Approvals) below, EPA will provide its comments on the Draft CMC Report and/or notify ASARCO of its determination regarding ASARCO's conclusions, and EPA's basis therefor, in writing.

75. ASARCO shall modify and resubmit the Draft CMC Report within thirty (30) days of receipt of EPA's written comments, if necessary.

76. ASARCO's obligations under this Part of the Decree shall terminate upon EPA's written approval of the Final CMC Report.

Agency Review; Acceptance and Approvals

77. EPA will provide ASARCO with its written approval, conditional approval, approval with modification, rejection as not acceptable, disapproval with comments and/or modifications, or notice of intent to draft and approve, for any work plan, report (except progress reports), specification or schedule submitted pursuant to or required by this Part of the Decree.

78. EPA may reject and not comment on, any submittal which EPA determines is not acceptable. Submittal of a document not acceptable is a violation of this Decree, unless such document is resubmitted prior to the due date for such submittal, and EPA determines that the submittal is acceptable.

79. ASARCO shall revise any work plan, report, specification or schedule in accordance with EPA's written comments, and in accordance with the due date specified herein, or otherwise in writing by EPA. Revised submittals are subject to EPA approval, approval with conditions, rejection as not acceptable, disapproval with comments and/or modifications, or notice of intent to draft and approve.

80. Any report, work plan, specification or schedule approved by EPA, including those drafted by EPA,

shall be automatically incorporated in this Decree upon such written approval.

81. Prior to written approval, no report, work plan, specification or schedule shall be construed as approved and final. Oral advice, suggestions, or comments given by EPA will not constitute an official approval, nor shall any oral approval or oral assurance of approval be considered binding on either party, except as otherwise expressly provided for above.

82. Within thirty (30) days of approval, or approval with modifications of any document, or receipt of a document drafted by EPA after failure by ASARCO to draft an approvable document after receipt of comments from EPA, ASARCO shall commence work to implement the tasks required by such document in accordance with the standards, specifications and schedules set forth in the document approved by EPA.

Submittals

83. ASARCO shall provide draft and final work plans and reports to EPA in accordance with the following schedule:

ACTIVITY	DUE DATE
CC/RA Report	120 days after entry of this Decree
IM Work Plan	60 days after receipt of EPA request

RFI Work Plan	120 days after receipt by ASARCO of EPA findings on CC/RA Report unless IM Work Plan was required, in which case 210 days after receipt of EPA findings
RFI Report	Per schedule contained in EPA-approved RFI Work Plan as amended for Additional Work
CMS Work Plan	90 days after receipt of EPA approval of the RFI Report
CMS Reports	Per schedule contained in approved CMS Work Plan
CMI Work Plan	90 days after receipt of EPA notification of selection of corrective measures to be implemented
CMI Reports	Per schedule contained in approved CMI Work Plan
Progress Reports	Monthly, report to be sent within 20 days after end of each month.

84. Two bound hard copies of all documents required to be submitted pursuant to this Part of the Decree shall be hand delivered, sent by certified mail, return receipt requested, or by overnight express mail or courier to the EPA Project Manager. In addition, with the exception of progress reports, ASARCO shall simultaneously submit a copy of all reports, tables and spreadsheets, on IBM compatible diskettes. Progress reports are to be submitted in original hard copy only. The ASARCO and EPA Project Managers shall determine what computer software is appropriate prior to delivery of the first documents.

Additional Work

85. Based upon new information and/or changed circumstances, EPA may determine or ASARCO may propose that certain tasks, including investigatory work, engineering evaluations, or procedure/ methodology modifications, are necessary in addition to or in lieu of the tasks included in any EPA-approved work plan.

86. If EPA determines that it is necessary for ASARCO to perform additional work, EPA shall specify in writing the technical support and other bases for its determination. Within ten (10) days of the receipt of such determination, ASARCO shall have the opportunity to meet or confer with EPA to discuss the additional work prior to beginning such work.

87. If required by EPA, ASARCO shall submit for EPA approval a work plan for the additional work. Such work plan(s) shall be submitted within sixty (60) days of receipt of EPA's determination that additional

work is to be performed, or according to an alternative schedule in the work plan established and justified by EPA.

88. Upon approval of a work plan modified to reflect additional work, ASARCO shall implement the work plan in accordance with the revised schedule and provisions contained therein.

Proposed Contractor/Consultant

89. All work performed pursuant to this Part of the Decree shall be under the direction and supervision of a professional engineer, hydrogeologist, geologist, or environmental scientist with expertise in hazardous waste site investigation and remediation. This person shall have the technical expertise sufficient to adequately perform and/or direct all aspects of work for which he or she is responsible.

90. Within fourteen (14) days of the effective date of this Decree, ASARCO shall notify EPA in writing of the name, title, and qualifications of the engineer, hydologist, geologist, or environmental scientist and of any contractors and/or consultants ASARCO then plans to use in carrying out the terms of this Part of the Decree.

91. EPA shall identify whether any contractor proposed by ASARCO is on the List of Parties Excluded from Federal Procurement or Non-Procurement Programs.

92. EPA reserves the right to disapprove ASARCO's identified contractor/consultant for reasons that shall be specified to ASARCO in EPA's written notice of

disapproval. If EPA disapproves of an identified contractor/consultant, then ASARCO must, within thirty (30) days of receipt of written notice of disapproval, notify EPA, in writing, of the name, title, and qualifications of any replacement.

Quality Assurance

93. All sampling and analytical activities undertaken pursuant to this Part of the Decree shall follow EPA-approved quality assurance (QA), quality control (QC), and chain-of-custody procedures, which procedures shall be part of the approved Work Plan.

94. In addition, except to the extent alternate arrangements have been made with and approved by EPA, ASARCO shall:

a. Follow the EPA guidance for sampling and analysis contained in the document entitled "Standard Operating Procedures for Field Samplers" (March 1986);

b. Consult with the EPA Project Manager in advance regarding which laboratories will be used by ASARCO and use its best efforts to ensure that EPA personnel and EPA-authorized representatives have reasonable access to the laboratories and personnel used for analyses;

c. Require that laboratories used by ASARCO for analyses perform such analyses according to EPA methods as found in "Test Methods for Evaluating Solid Wastes," Third Edition (SW-846) or other methods deemed satisfactory by EPA, which such other methods will be identified in advance and approved in

writing by EPA. If other methods are to be used, ASARCO shall submit all alternative protocols to EPA at least forty five (45) days prior to the commencement of analyses for EPA approval;

d. Require that laboratories used by ASARCO for analyses have a QA/QC program at least equal to that which is followed by EPA. As part of such a program, and upon written request by EPA, such laboratories shall perform analyses of samples provided by EPA to demonstrate the quality of the analytical data; and

e. Use EPA guidance to evaluate all data to be collected during the RFI. This evaluation shall be provided to EPA as part of the sampling plan contained in the Work Plan and shall be updated as necessary or appropriate.

f. Existing data shall be evaluated by EPA for its adequacy as a basis (partial or whole) for CC/RA and RFI Report analyses and conclusions, and development and evaluation of the corrective measures alternatives. Guidance documents on data quality analysis and data collection methods shall be used as guidelines to assess the quality of existing data, with EPA's best scientific and engineering judgments used as the determining factor on data quality.

Financial Assurance

95. During the period that this Part of the Decree is being implemented, ASARCO shall establish and maintain financial security as necessary and appropriate to assure completion of its corrective action obligations as they are identified through the interim

measures, RFI, CMS, additional work, and CMI processes.

96. Initially and through December 31, 1999, except as allowed or required pursuant to Paragraphs 97 through 107 below, ASARCO shall establish and maintain financial security in an amount equal to the amount it is currently required to demonstrate under Section XII of the December 1990 CERCLA Consent Decree.

97. By December 31, 1999, and annually thereafter, ASARCO shall develop and maintain a single cost estimate for the remaining work to be performed pursuant to this Part of the Decree. Annual cost estimates after 1999, shall include an adjustment for inflation in accordance with 40 C.F.R. § 264.142(b). Annual cost estimates shall be transmitted with the following January monthly report.

98. Beginning on January 1, 2000, and annually thereafter (except as otherwise allowed or required pursuant to Paragraph 99 immediately below), at ASARCO's election, the company shall use one or more of the following forms to establish and maintain the required financial security:

a. A surety bond or fund guaranteeing performance of the work;

b. One or more irrevocable letters of credit equaling the total estimated cost of the necessary assurance;

c. A trust fund;

d. A demonstration that ASARCO satisfies the requirements of 40 C.F.R. § 264.143(f);

e. A guarantee to perform the work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with ASARCO, provided that such guarantor establishes its ability to provide such security through or more of the mechanisms provided in subsections a., b., c., or d., of this paragraph, on the same schedule as otherwise required herein of ASARCO; or

f. A demonstration by ASARCO that:

(1) It has assets located in the United States amounting to at least ninety percent (90%) of total assets or at least six (6) times the sum of the current cost estimate for work to be performed under this Decree and any other environmental obligation and liabilities for which ASARCO is providing assurance by means of a financial test; and

(2) It can satisfy any two of the following three criteria:

(i) A ratio of current assets to current liabilities that equals 1.25 or greater.

(ii) Tangible net worth (as defined in 40 C.F.R. § 264.141) greater than the sum of the cost estimate for work to be performed under this Decree and any other environmental obligations and liabilities for which ASARCO is providing assurance

by means of a financial test plus $10 million.

(iii) Either of the following alternative (A) or (B):

(A) (1) Total assets less total liabilities (as these terms are defined in 40 C.F.R. § 264.141) shall be no less than $500 million, with "total liabilities" including the sum of the current cost estimate for all work to be performed under this Decree and any other obligations and liabilities for which ASARCO is providing assurance by means of a financial test; or

(2) The ratio of ASARCO's net income, plus depreciation, depletion, and amortization, minus $10 million to total liabilities (as defined in 40 C.F.R. § 264.141 and subparagraph (A) (1) above is greater than 0.10.

(B) A current bond rating for the Company's most recent bond issuance of AAA, AA, A or BBB as issued by Standard and Poor's or Aaa, Aa or Baa as issued by Moody's. This bond must be issued by ASARCO and not a corporate parent or other affiliate.

Financial calculations for purposes of this subparagraph f. shall be in accordance with generally accepted accounting principles on a consolidated basis, except that LIFO inventories

shall be included in "current assets" at their replacement cost.

99. In any calendar year, if ASARCO can show that the estimated cost to complete the remaining work has diminished below the amount calculated at the end of the prior calendar year (or as previously recalculated during that calendar year), ASARCO may submit a proposal for reduction to EPA, and may reduce the amount of the security upon approval by EPA.

100. In any calendar year, if ASARCO becomes aware, or should become aware, that the estimated cost to complete the remaining Work has increased by ten percent (10%) or more above the amount calculated by the end of the prior calendar year, such increase shall be reported in the next monthly report and documentation of financial security for that increase shall be provided sixty (60) days following the increase in the cost estimate with the next due monthly report.

101. Should any change(s) in circumstances occur which causes, or ASARCO anticipates might reasonably cause in the short term, the financial security mechanism then in place to fail to meet the requirements herein, ASARCO shall immediately either begin use of a different means for financial assurance, or upgrade its existing affected mechanism(s) to bring it into compliance. ASARCO shall not have more than sixty (60) days from the date on which ASARCO became aware, or should have become aware of such change(s), to come into compliance with this subsection.

102. ASARCO may change the form of financial security provided under this section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this section.

103. ASARCO's inability to maintain financial security hereunder at any time during the pendency of this Decree shall not excuse or be a defense to allegations of failure to perform any requirements of this Decree.

104. Unused

105. Unused

106. In the event of a dispute regarding financial security, ASARCO may only lower the amount of and/or alter the form of the financial security after, and in accordance with an effective informal resolution, or final administrative or judicial decision resolving the dispute.

107. ASARCO shall be released from financial assurance requirements under this Part at the time the Final CMC Report is approved by EPA.

Public Comment

108. Upon receipt by EPA of interim measures workplans, the Draft CMS Report or Draft CMC Report from ASARCO, if EPA determines that such Report is acceptable, EPA shall review that Report and EPA shall provide any comments regarding its content and conclusions to ASARCO, in writing.

109. Following ASARCO's receipt of EPA's comments, ASARCO shall respond to EPA's comments and suggestions.

110. If and when approved, EPA shall make that approved Draft Report available to the public (the RFI Final Report will be made available together with the CMS Final Report) for review and comment for a period of at least thirty (30) days, but not to exceed sixty (60) days.

111. The public may, and should be encouraged to, comment on all aspects of the work to be performed pursuant to this Part of the Decree at any time during the implementation hereof. EPA and ASARCO will endeavor to make all documents available for review by interested members of the public in a timely manner, and to be responsive to public interest in this matter. (The administrative record will be located at the address noted below.)

112. EPA will endeavor to consider all timely comments from the public during each phase of activity under this Part of the Decree. EPA reserves the right, however, to not respond to comments which are made after the closure of the comment periods specified herein, or to comments on matters outside the scope of this Part of the Decree.

113. Following the public review and comment periods, EPA shall notify ASARCO in writing of any additional work to be performed, and/or of any modifications to the draft documents which are found to be necessary or appropriate.

114. If the corrective measures recommended in the Draft CMS Final Report are not the corrective measures selected by EPA, EPA shall inform ASARCO in writing of the reasons for such decision, and ASARCO shall modify the CMS for EPA approval and implement such changes.

115. If, after review of public comments, EPA disagrees with ASARCO's conclusions in the Draft CMC Report, EPA shall inform ASARCO in writing of the reasons for such decision, and ASARCO shall either modify the CMC Report for EPA approval or conduct such work as is necessary to complete the corrective measures (including the development and implementation of work plans, if appropriate), as appropriate.

116. The Administrative Record supporting the selection of the Corrective Measures shall be available for public review at EPA Region VIII, Montana Office, 301 South Park, Helena, Montana 59626-0096, from 8 a.m. to 5 p.m., every Business Day.

Off-Site Access

117. To the extent that work required by this Part of the Decree; or by any approved Work Plan prepared pursuant hereto, must be done on property not owned or controlled by ASARCO, ASARCO shall use its best efforts to obtain site access agreements from the present owner(s) of such property within thirty (30) days following transmittal of the Work Plan to EPA.

118. "Best efforts" as used in this Section shall include, at a minimum, a certified letter (showing actual receipt) from ASARCO to the present owner(s)

of such property requesting the execution of reasonable access agreements to permit ASARCO, and EPA and their authorized representatives to obtain access to such property.

119. Any such access agreement shall be incorporated by reference into this Decree upon execution by ASARCO and copies of fully executed access agreements shall be submitted to EPA with the next following monthly report.

120. In the event that agreements for access are not obtained within thirty (30) days of the date of receipt of ASARCO's certified letter to the property owner, ASARCO shall notify EPA in writing within seven (7) days thereafter regarding both the efforts undertaken to obtain access and its failure to obtain such agreements. EPA may, at its discretion, assist ASARCO in obtaining access.

121. Nothing in this section limits or otherwise affects EPA's right to access and entry pursuant to applicable law, including RCRA and CERCLA.

122. Nothing in this section shall be construed to limit or otherwise affect ASARCO's liability and obligation to perform corrective measures including corrective measures beyond the facility boundary, notwithstanding the lack of access.

Sampling and Data/Document Availability

123. Unless notified by EPA in writing, ASARCO shall submit to EPA the results of sampling and/or tests or other data generated by, or on behalf of ASARCO, in the Monthly Reports. In addition,

ASARCO shall submit to EPA the results of all validated and confirmed sampling and/or tests or other data generated by, or on behalf of ASARCO performed pursuant to this Part of the Decree, with the RFI Report, if not before.

124. ASARCO shall notify EPA in writing at least three (3) Business Days before conducting any well drilling, equipment installation , or sampling, except, in the event ASARCO is unable to reach the EPA Project Manager, or EPA requests a postponement of the work a longer notice period shall be provided. ASARCO shall provide a reasonable amount of, or allow EPA or its authorized representatives to take, split samples of all samples collected by ASARCO pursuant to this Part of the Decree.

125. Except as noted below, ASARCO may assert a business confidentiality claim covering all or part of any information provided to EPA or its representatives pursuant to this Part of the Decree. Except under exigent circumstances, any assertion of confidentiality shall be substantiated by ASARCO when the assertion is made, or the right to assert the claim shall be waived. Information determined to be confidential shall be disclosed only to the extent permitted by 40 C.F.R. Part 2. If no confidentiality claim (including substantiation) accompanies the information when it is provided, it may be made available to the public without further notice to ASARCO. Physical or analytical data either generated and/or submitted pursuant to this Part of the Decree cannot be claimed confidential and/or privileged.

Record Preservation

126. During the pendency of this Decree and for a minimum of three (3) years from EPA approval of the Final CMC Report, ASARCO shall preserve all submittals and data generated and/or submitted in its possession or in the possession of its divisions, officers, directors, employees, agents, contractors, attorneys, successors and assigns which relate to performance under this Part of the Decree or to hazardous waste management and/or disposal at the Facility. For a period of three (3) years from EPA approval of the Final CMC Report, ASARCO shall make such records available to EPA for inspection or copying or shall provide copies of any such records to EPA. ASARCO shall notify EPA twenty (20) days prior to the destruction of any such records, and shall provide EPA with the opportunity to take possession of any such records.

Project Managers

127. On or before the effective date of this Decree, EPA, and ASARCO shall designate Project Managers. Each Project Manager shall be responsible for overseeing the implementation of this Part of the Decree. The EPA Project Manager shall be EPA's designated representative at the Facility. To the maximum extent possible, all communications between ASARCO and EPA, and all documents, reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Part of the Decree, shall be directed to the Project Managers.

128. The EPA project manager is:

Susan Zazzali, RCRA Project Manager
Montana Office
U.S. EPA Region VIII
301 South Park, Drawer 10096
Helena, Montana 59626

129. The ASARCO project manager is:

Jon Nickel
ASARCO Incorporated
100 Smelter Road, Highway 12
East Helena, MT 59635

130. The parties agree to provide at least seven (7) days notice prior to changing Project Managers.

131. The absence of the EPA Project Manager from the site shall not be cause for the stoppage of work.

Notification and Document Certification

132. Unless otherwise specified, reports, notices, approvals, disapprovals, or other submittals relating to or required under this Part of the Decree shall be in writing, shall be certified in accordance with Paragraph 228 and shall be sent to the EPA Project Manager.

Reservation of Rights

133. EPA expressly reserves all rights and defenses that it may have, including the right both to disapprove of work performed by ASARCO that is not in compliance with this Decree and to require that ASARCO perform tasks in addition to those stated in the Work Plans required by this Part of the Decree.

134. In the event ASARCO fails to adequately perform work pursuant to this Part of the Decree, including the submittal of acceptable documents, EPA reserves the right to perform any portion of the work required hereunder or any additional site characterization, or other corrective actions as EPA deems necessary or appropriate to protect human health and the environment, including drafting final work plans and other documents, which become binding on ASARCO upon execution by EPA.

135. EPA may exercise its authority under CERCLA to undertake removal actions or remedial actions at any time.

136. EPA reserves its right to seek reimbursement from ASARCO under all applicable statutes for such additional costs incurred by the United States.

137. Notwithstanding compliance with the terms of this Decree, ASARCO is not released from liability, if any, for the costs of any response actions taken or authorized by EPA under any applicable statute, including CERCLA.

138. EPA reserves the right to initiate any appropriate action pursuant to section 7003 of RCRA, 42 U.S.C. § 6973, at the East Helena Facility at any time during the pendency of this Decree.

139. If EPA determines that activities in compliance or noncompliance with this Part of the Decree have caused or may cause a release of hazardous waste or hazardous constituents both within and outside of the Facility; or have caused or may cause a threat to human health or the environment; or if EPA

determines that ASARCO is not capable of undertaking any studies or corrective measures required hereunder, EPA may order ASARCO to stop further implementation of this Part of the Decree for such period of time as EPA determines may be needed to abate any such release or threat and/or to undertake any action which EPA determines is necessary to abate such release or threat.

140. No informal advice, guidance, suggestions, or comments by EPA regarding reports, plans, specifications, schedules, and any other writings submitted by ASARCO will be construed as relieving ASARCO of its obligations to obtain written approval, if and when required by this Part of the Decree.

Termination and Satisfaction

141. Except for the record preservation provisions, the requirements of this Part of the Decree shall be deemed satisfied upon ASARCO's receipt of written notice from EPA that the EPA has approved the Final CMC Report.

Survivability/Permit Integration

142. Subsequent to the entry of this Decree, a RCRA permit may be issued to the East Helena Facility incorporating any or all of the requirements of this Part of the Decree into the permit.

143. No requirements of this Part of the Decree shall terminate upon the issuance of a RCRA permit unless the requirements are expressly replaced by equivalent or more stringent requirements in the permit.

* * *

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XII. PENALTY FOR PAST VIOLATIONS

179. Within 30 days after the date of entry of this Decree, ASARCO shall pay to the United States a civil penalty in the amount of Three Million three Hundred and Eighty-Six thousand and One Hundred Dollars ($3,386,100), plus interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, calculated from the date of lodging of this Decree until the date of payment.

* * *

[pp. 95]

XVIII. EFFECT OF DECREE

209. ASARCO's payment of all civil penalties due, and ASARCO's commitments to pay all stipulated penalties due and owing under this Decree, and ASARCO's commitment to fully and successfully complete the requirements of this Decree, shall constitute full satisfaction of the claims for civil penalties for civil violations alleged in the complaint of the United States that occurred prior to the date of lodging of this Decree, except as provided in this Paragraph. This release includes any alleged civil violations relating to the management of materials generated by the smelting of Encycle Materials, but does not include alleged civil violations relating to receipt, storage or smelting of the Encycle Materials themselves. This release also does not include any civil violations relating to discharges from the Facility to the East Helena Publicly Owned Treatment Works. This

release is conditioned upon the complete and satisfactory performance by ASARCO of its obligations under this Decree.

210. a. ASARCO agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the East Helena Facility or this Decree, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 111, 112, 113 or any other provision of law; any claim against the United States, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113 related to the East Helena Facility, or this Decree. Nothing in this Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

b. ASARCO reserves and this Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damage

caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of activities to be performed pursuant to this Decree, or the oversight or approval of ASARCO's plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than the CWA, RCRA, or CERCLA and for which the waiver of sovereign immunity is found in a statute other than the CWA, RCRA, or CERCLA.

211. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, penalties, recovery of response costs, or other appropriate relief relating to any ASARCO facility, ASARCO shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of Paragraph 209. This includes any claims through which the United States seeks additional relief related to ASARCO's environmental management system.

212. This Decree does not limit the United States' right to obtain penalties or injunctive relief under RCRA, the CWA, or other federal or State statutes or regulations except as expressly specified in Paragraph 209 of this Part.

213. EPA reserves all of its statutory and regulatory powers, authorities, rights, remedies, both legal and equitable, which pertain to ASARCO's failure to comply with any of the requirements of this Decree, including the assessment of penalties under RCRA or the CWA.

214. This Decree shall not be construed as a covenant not to sue, release, waiver or limitation of any rights, remedies, powers and/or authorities, civil or criminal, which EPA has under RCRA, CERCLA, or any other statutory, regulatory, or common law authority, except as provided in Paragraph 209 above, however, EPA agrees that, so long as ASARCO remains in compliance with Part VII of this Decree, EPA shall not initiate a separate action under Sections 3008(h) and 3013 of RCRA, 42 U.S.C. §§ 6928(h) and 6933, for work to be performed at the Facility.

215. Except as expressly provided in this Decree, compliance by ASARCO with the terms of this Decree shall not relieve ASARCO of its obligations to comply with RCRA or any other applicable local, state or federal laws and regulations, including, but not limited to, the CWA and SDWA.

216. By consenting to the entry of this Decree, the United States does not warrant or aver that ASARCO's compliance with this Decree will constitute or result in compliance with the RCRA, the CWA, ASARCO's NPDES permits, or any other federal, State, or local permit, law, rule or regulation. Notwithstanding EPA's review and approval of any plans formulated pursuant to this Decree, ASARCO shall remain solely responsible for compliance with RCRA and the CWA, this Decree, ASARCO's NPDES permits, and any other

applicable federal, State, or local permit, law, rule, or regulation. Compliance with this Decree shall be no defense to any action commenced pursuant to said laws, regulations, or permits, except as specifically provided in Paragraph 209 of this Part.

Other Claims and Parties

217. Except as expressly provided herein, nothing in this Decree shall constitute or be construed as a release from any claim, cause of action or demand in law or equity, against any person, firm, partnership, or corporation for any liability it may have arising out of, or relating in any way to, the generation, storage, treatment, handling, transportation, release, management or disposal of any hazardous wastes, hazardous constituents, hazardous substances, hazardous materials, pollutants, or contaminants found at, on, or under, taken to or from, or migrating to, from or through the Facility.

Other Applicable Law

218. This Decree is not intended to be nor shall it be construed as a permit. This Decree does not relieve ASARCO of any obligation to obtain and comply with any local, state, or Federal permits. ASARCO, therefor, shall obtain or cause its representatives to obtain all permits and approvals necessary under applicable local, state, and Federal laws and regulations and shall otherwise comply with all applicable local, state, and Federal requirements. The pendency or outcome of any proceeding concerning the issuance, reissuance, or modification of any permit shall neither affect nor

postpone ASARCO's duties and liabilities as set forth in this Decree.

Indemnification of the United States

219. Neither the United States Government, nor its agencies, departments, agents, and employees (the "Government"), shall be held out or construed to be a party to any contract entered into by ASARCO in carrying out activities pursuant to this Decree.

220. The Government shall not be liable for any injury or damages to persons or property resulting from acts or omissions of ASARCO or its contractor(s) in implementing the requirements of this Decree, or any EPA-approved work plans or planning documents submitted and/or approved pursuant to this Decree.

221. The Government shall not be considered agent, independent contractor, receiver, trustee and assign, in carrying out activities required by this Decree.

* * *

APPENDIX I

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Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Civil Action No. :

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
ASARCO, Incorporated,	)
	)
Defendant.	)

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the United States Environmental Protection Agency ("EPA"), files this complaint and alleges as follows:

NATURE OF THE CASE

1. This is a civil action against ASARCO, Incorporated ("ASARCO" or "Defendant") for injunctive relief and civil penalties pursuant to Sections 3008(a), (g) and (h) of the Resource Conservation and Recovery Act of 1976, as amended by the Solid Waste Disposal Act Amendments of 1980 and the Hazardous and Solid Waste Amendments of 1984 ("RCRA"), 42 U.S.C. §§ 6928(a), (g) and (h), for violations of RCRA at ASARCO's East Helena, Montana facility ("the Facility"), and for injunctive relief and civil penalties pursuant to Section 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d), for violations of the CWA at the Facility. The violations which are the subject of this complaint relate to ASARCO's receipt, generation, management, treatment, storage, and disposal of hazardous wastes at the Facility, and the discharge of pollutants from a point source at the Facility to a navigable water of the United States without authorization under the National Pollutant Discharge Elimination System ("NPDES") established pursuant to Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, Sections 3008(a) and (h) and 3006(g) of RCRA, 42 U. S.C. §§ 6928 (a) and (h) and 6926(g), and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

3. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and (c), and 1395(a); Sections

3008(a) and (h) of RCRA, 42 U.S.C. §§ 6928(a) and (h); and Section 309(b) of the CWA, 33 U.S.C. § 1319(b). Defendant ASARCO was and is, at all material times, doing business in this district. The events giving rise to the claims alleged herein occurred in this district.

4. Notice of the commencement of this action has been given to the State of Montana as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

DEFENDANT

5. ASARCO is a corporation organized under the laws of the State of New Jersey doing business in the State of Montana.

6. ASARCO is a "person" within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), 40 C.F.R. § 260.10, Mont. Code Ann. § 75-10-403(12) and Mont. Admin. R. 17.54.201.

7. ASARCO is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

8. At all material times herein, ASARCO was the owner and operator of the Facility, a primary lead smelter and associated sulfuric acid manufacturing plant located just south of the City of East Helena, Montana. The Facility is a "source" within the meaning of Section 307(d) of the CWA, 33 U.S.C. § 1317(d), that recovers base metals from various ores and other materials, and in an ancillary operation, produces sulfuric acid.

9. At all relevant times, ASARCO controlled the day to day business operations of the Facility.

STATUTORY AND REGULATORY FRAMEWORK

10. RCRA was enacted on October 21, 1976, and amended thereafter by, among other acts, the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). 42 U.S.C. §§ 6901 et seq. The statute established a program for the management of hazardous wastes to be administered by the Administrator of EPA. 42 U.S.C. §§ 6921 et seq. The regulations promulgated by the Administrator are codified at 40 C.F.R. Parts 260 through 271.

11. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when he or she deems the state program to be substantially equivalent to the federal program.

12. The Administrator granted authorization to the State of Montana to administer its hazardous waste program in lieu of the federal program on July 25, 1984, and has authorized revisions to that program since that date.

13. Pursuant to Sections 3008(a), (g) and (h), and 3006(g) of RCRA, 42 U.S.C. §§ 6928(a), (g) and (h), and 6926(g), the United States may enforce the federally approved Montana hazardous waste program, as well as the federal regulations promulgated pursuant to HSWA, by filing a civil action in United States District Court for injunctive relief, including, corrective action and civil penalties.

14. Section 3005 of RCRA, 42 U.S.C. § 6925, and Mont. Code Ann. § 75-10-406, generally prohibit the operation of any hazardous waste treatment, storage, or disposal facility ("TSD facility") except in accordance with a permit. Section 3005(e) of RCRA, 42 U.S.C. § 6925(e) and Mont. Code Ann. § 75-10-406, further provide that certain hazardous waste facilities may obtain "interim status" to continue operating until final action is taken by EPA or Montana with respect to the facility's permit application so long as the facility satisfies certain conditions. Therefore, a person may not own or operate a TSD facility unless the person has obtained a permit for the facility or has interim status for the facility.

15. The owner or operator of a facility with "interim status" must comply with 40 C.F.R. Part 265, or the equivalent State regulations codified at Mont. Admin. R. Title 17, Chapter 54, Subchapter 6.

16. Under Mont. Admin. R. 17.54.303, a "waste" within the meaning of Montana Admin. R. 17.54.302 is a "hazardous waste" if it is either listed as a hazardous waste in Mont. Admin. R. 17.54.330-333 or if it exhibits one of the characteristics set forth in Mont. Admin. R. 17.54.320-324.

17. Section 3004(d) through (g) of RCRA, 42 U.S.C. § 6924(d) through (g), generally prohibits certain hazardous wastes from being disposed on land unless the Administrator determines that the methods used for land disposal are protective of human health and the environment for as long as the waste remains hazardous. Pursuant to Section 3004(d) through (g) of RCRA, 42 U.S.C. § 6924(d) through (g), the

Administrator has promulgated regulations prohibiting land disposal of certain hazardous wastes unless the wastes meet certain treatment standards set forth in the regulations. The regulations are referred to as "land disposal restrictions," and are codified at 40 C.F.R. Part 268 and Mont. Admin. R. 17.54.150.

18. Pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), whenever the Administrator of EPA determines that there has been a release of a hazardous waste into the environment from a facility subject to interim status requirements, the Administrator may commence a civil action for appropriate relief, including, an injunction requiring the defendant to take corrective action necessary to protect human health or the environment.

19. Pursuant to Section 3008(a) and (g) of RCRA, 42 U.S.C. 3008(a) and (g), and Public Law 104-134, a person is subject to civil penalties not to exceed $25,000 per day of noncompliance for each violation of RCRA which occurred prior to January 30, 1997 and $27,500 per day for each violation which occurred after January 30, 1997.

20. Section 402 of the CWA, 33 U.S.C. § 1342, established the NPDES permit program, and authorizes the Administrator of EPA to issue permits for the discharge of pollutants from a point source into navigable water upon condition that such discharge meet all applicable requirements of, inter alia, Section 301(b) of the CWA, 33 U.S.C. § 1311(b), and any other conditions EPA determines are necessary to carry out the CWA.

21. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except in compliance with, inter alia, the terms and conditions of a National Pollutant Discharge Elimination System permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

22. Pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), and Public Law 104-134, any person who violates Sections 301, 302, 306, 307, 308, 318, or 405 of the CWA, 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1328, or 1345, or violates any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to injunctive relief, and a civil penalty not to exceed $25,000 for each day of each such violation occurring before January 30, 1997 and a civil penalty of $27,500 for each day of each such violation occurring after January 30, 1997.

GENERAL ALLEGATIONS

23. From at least May 1991 to the present, ASARCO has been an owner and operator, as defined at 40 C.F.R. § 260.10 and Mont. Admin. R. 17.54.201, of a facility where ASARCO received, generated, stored, treated and disposed of hazardous waste as defined in 40 C.F.R. § 261.3 and Mont. Admin. R. 17.54.303.

24. Because ASARCO is and has been an owner and operator of a facility at which ASARCO received, generated, stored, treated and disposed of hazardous

waste, ASARCO is and was subject to the RCRA hazardous waste program and the Montana authorized hazardous waste program, codified at Mont. Code Ann. § 75-10-401 et seq.

25. From at least May 1991 to November 1996, ASARCO generated and mixed wastewater from various processes in the Facility process wastewater system and disposed of the process wastewater onto the ground at the Facility. The process wastewater was a hazardous waste under Mont. Admin. R. 17.54.303.

26. In at least January, 1995, ASARCO generated filter cake at its acid plant and water treatment plant and disposed of the filter cake onto the ground at the Facility. The filter cake was a hazardous waste under Mont. Admin. R. 17.54.303.

27. From at least January 1992 to June 1997 ASARCO has received spent refractory brick from other mineral processing facilities, and has generated spent refractory brick, at the Facility. ASARCO stored, smelted and disposed of spent refractory brick at the Facility during this period. Some of the spent refractory brick was a hazardous waste under Mont. Admin. R. 17.54.303.

28. From at least January 1992 to present, ASARCO has received, stored, treated and disposed of at the Facility spent carbon from heap leaching processes. Some of the spent carbon received by ASARCO at the Facility was and is a hazardous waste under Mont. Admin. R. 17.54.303.

29. From at least February 1996 to April 1996, ASARCO received, stored, treated and/or disposed of

spent caustic slag at the Facility. The spent caustic slag was a hazardous waste under Mont. Admin. R. 17.54.303.

30. From at least June 1996 to present, ASARCO has received, generated, stored, treated and disposed of plant soils at the Facility. Some of these plant soils were and are hazardous waste under Mont. Admin. R. 17.54.303.

31. From at least May, 1991 to present, ASARCO has received, stored, treated and disposed of various materials from the Encycle/Texas facility in Corpus Christi, Texas, including, materials described by ASARCO as "flux substitutes", "metal bearing secondary materials", and "product" ("Encycle Materials"). Some of the Encycle Materials were and are hazardous waste under Mont. Admin. R. 17.54.303.

32. There has been a release of hazardous waste into the environment from the Facility.

33. From at least May, 1991 to October, 1994, ASARCO discharged process wastewaters containing pollutants from the Facility process wastewater system to Lower Lake. From October, 1994 to present, ASARCO discharged process wastewater containing pollutants from its High Density Sludge Treatment Facility to Lower Lake. None of these discharges to Lower Lake were authorized by a permit issued pursuant to the National Pollutant Discharge Elimination System.

34. Lower Lake is hydrologically connected to Prickly Pear Creek, a water of the United States. Pollutants discharged by ASARCO into Lower Lake are

subsequently discharged from Lower Lake into Prickly Pear Creek. None of the discharges from Lower Lake to Prickly Pear Creek were authorized by a permit issued pursuant to the National Pollutant Discharge Elimination System.

FIRST CLAIM FOR RELIEF
(Failure to Notify)

35. Paragraphs 1 through 34, inclusive, are realleged and incorporated herein by reference.

36. Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), requires that any person generating or transporting a hazardous waste or owning or operating a facility for treatment, storage, or disposal of a hazardous waste, file a notification with EPA and the authorized State stating the location and general description of such activity and the identified hazardous waste handled by such person.

37. ASARCO generated, stored and/or disposed of hazardous waste, including, process wastewater, filter cake, spent refractory brick, spent carbon, spent caustic slag, plant soils and Encycle Materials at the Facility.

38. ASARCO never provided notification to EPA or Montana for these activities as required by Section 3010(a) of RCRA, 42 U.S.C. § 6930(a).

39. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed $25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997 and $27,500 per day

of each violation which occurred after January 30, 1997.

SECOND CLAIM FOR RELIEF
(Failure To Make A Hazardous Waste Determination)

40. Plaintiff realleges paragraphs 1 through 34, inclusive, which are incorporated herein by reference.

41. A generator of "solid waste" is required to determine whether the waste is hazardous in accordance with 40 C.F.R. § 262.11.

42. A generator of " waste" is required to determine whether the waste is hazardous in accordance with Mont. Admin. R. 17.54.402.

43. The process wastewater, filter cake, spent refractory brick, and plant soils are "solid wastes" as that term is defined in Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), and are "wastes" as that term is defined in Mont. Code Ann. § 75.10.203(11).

44. ASARCO, as the generator of solid waste and waste, including, process wastewater, filter cake, spent refractory brick, and plant soils, is required to characterize the waste prior to making any management decisions concerning the waste pursuant to 40 C.F.R. § 262.11 and Mont. Admin. R. 17.54.402.

45. ASARCO failed to accurately characterize these wastes.

46. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed $25,000 per day of noncompliance for each such violation which

occurred prior to January 30, 1997 and $27,500 per day for each such violation which occurred after January 30, 1997.

THIRD CLAIM FOR RELIEF
(Treatment, Storage, Disposal Without a Permit)

47. Paragraphs 1 through 34, inclusive, are realleged and incorporated herein by reference.

48. Sections 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and Mont. Code Ann. § 75-10-406 provide that a facility shall not treat, store, or dispose of hazardous waste without a permit.

49. ASARCO has treated and/or stored, and/or disposed of hazardous waste, including process wastewater, filter cake, spent refractory brick, spent carbon, spent caustic slag, plant soils, and Encycle Materials at the Facility.

50. ASARCO has not received a permit or obtained interim status for any treatment, storage, or disposal activity at the Facility.

51. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed $25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997 and $27,500 per day for each such violation which occurred after January 30, 1997.

FOURTH CLAIM FOR RELIEF
(Land Disposal Restriction Requirements)

52. Plaintiff realleges paragraphs 1 through 34, inclusive, which are incorporated herein by reference.

53. 40 C.F.R. § 268.7(a) and Mont. Admin. R. 17.54.150(1) requires that, among other things, generators must test their hazardous waste to determine if the waste is restricted from land disposal.

54. ASARCO violated these provisions by failing to perform the requisite waste analysis, tracking and record keeping for hazardous waste, including, but not limited to, process wastewater, filter cake, spent refractory brick and plant soils.

55. Storage and "land disposal" of restricted hazardous waste is prohibited unless all applicable storage and treatment standards have been met pursuant to Section 3004(d)-(g) of RCRA, 42 U.S.C. § 6924(d)-(g), 40 C.F.R. §§ 268.50 and 268.40, and Mont. Admin. R. 17.54.150(1).

56. ASARCO violated the land disposal restrictions by storing and disposing of restricted hazardous waste, including, process wastewater, filter cake, spent refractory brick, spent carbon, plant soils, and Encycle Materials without meeting storage and treatment standards as required by 40 C.F.R. §§ 268.50 and 268.40 and Mont. Admin. R. 17.54.150(1).

57. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed $25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997 and $27,500 per day for each such violation which occurred after January 30, 1997.

FIFTH CLAIM FOR RELIEF
(Accumulation of Hazardous Wastes)

58. Plaintiff realleges paragraphs 1 through 34 inclusive, which are incorporated herein by reference.

59. 40 C.F.R. §262.34(a) and Mont. Admin. R. 17.54.421 provide that generators of hazardous waste may accumulate hazardous waste on site without a permit or interim status provided that the waste is accumulated for no more than 90 days and that the containers in which the waste is being accumulated are marked with the words "Hazardous Waste."

60. ASARCO has generated and accumulated hazardous waste, including spent refractory brick, at the Facility for more than 90 days without a permit or interim status and has failed to mark any containers in which hazardous waste, including spent refractory brick, was being accumulated with the words "Hazardous Waste."

61. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed $25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997 and $27,500 per day for each such violation which occurred after January 30, 1997.

SIXTH CLAIM FOR RELIEF
(Failure To Characterize Waste-Derived Residue)

62. Plaintiff realleges paragraphs 1 through 34, inclusive, which are incorporated herein by reference.

63. 40 C.F.R. §266.112 and Mont. Admin. R. 17.54.1114 requires owners or operators of industrial furnaces to determine whether the co-combustion of hazardous waste has significantly affected the character of the residues.

64. ASARCO failed to characterize the slag and other materials derived from the treatment and/or disposal of hazardous waste, including spent refractory brick, spent carbon, spent caustic slag, plant soils and Encycle Materials, in the smelter in violation of 40 C.F.R. § 266.112 and Mont. Admin. R. 17.54.1114.

65. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed $25,000 per day of noncompliance for each violation which occurred prior to January 30, 1997 and $27,500 per day for each such violation which occurred after January 30, 1997.

SEVENTH CLAIM FOR RELIEF
(Precious Metals Recovery Regulations)

66. Plaintiff realleges paragraph 1 through 34 inclusive, which are incorporated herein by reference.

67. 40 C.F.R. § 266.70 and Mont. Admin. R. 17.54.1101(6) require persons who generate, transport and store, hazardous waste that is reclaimed for precious metals recovery to comply with certain recordkeeping, notice and management regulations.

68. To the extent ASARCO was reclaiming precious metals from hazardous waste, including, spent refractory brick and spent carbon, ASARCO failed to comply with the recordkeeping, notice and management regulations for precious metals recovery

in violation of 40 C.F.R. § 266.70 and Mont. Admin. R. 17.54.1101(6).

69. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed $25,000 per day of noncompliance for each violation which occurred prior to January 30, 1997 and $27,500 per day for each violation which occurred after January 30, 1997.

EIGHTH CLAIM FOR RELIEF
(Unauthorized Discharges)

70. Paragraphs realleges paragraphs 1 through 34 inclusive, which are incorporated herein by reference.

71. Prickly Pear Creek is a "navigable water" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

72. ASARCO discharged pollutants, as those terms are defined in Sections 502(6) and 502(12) of the CWA, 33 U.S.C. §§ 1362(6) and 1362(12), into Lower Lake at the Facility. Via a hydrological connection between Lower Lake and Prickly Pear Creek, pollutants discharged by ASARCO from the Facility into Lower Lake entered Prickly Pear Creek. Lower Lake is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

73. On several occasions beginning in May 1991 through the present, ASARCO discharged quantities of wastewater containing "pollutants," within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6), at the Facility from its process wastewater

system and the High Density Sludge Facility to Lower Lake and from there to Prickly Pear Creek.

74. Because ASARCO did not have a permit authorizing its discharge of pollutants to Prickly Pear Creek, the discharges from Lower Lake to Prickly Pear Creek occurred in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

75. ASARCO is subject to injunctive relief, and is subject to the assessment of civil penalties not to exceed $25,000 for each day of each such violation which occurred prior to January 20, 1997 and civil penalties not to exceed, $27,500 per day for each such violation which occurred after January 30, 1997.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, respectfully prays that this Court:

a. Assess civil penalties not to exceed Twenty Five Thousand Dollars ($25,000) for each day of each violation prior to January 30, 1997 and not to exceed Twenty Seven Thousand and Five Hundred Dollars ($27,500) for each day of each violation after January 30, 1997 of RCRA and the CWA as alleged in this complaint;

b. Grant injunctive relief to bring ASARCO into compliance with RCRA and the CWA at the Facility, to require ASARCO to conduct corrective action pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), at the Facility, and to bring ASARCO into compliance with all applicable environmental laws; and

c. Grant such other and further relief as this Court may deem just and proper.

DATED this ____ day of January, 1998.

Respectfully submitted,

/s/ Lois J. Schiffer
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