**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF TEXAS**
**(Corpus Christi Division)**

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| **In re** | § | **May 15, 2009Case No. 05-21207** |
| | § | |
| **ASARCO, LLC, et al.** | § | **Chapter 11** |
| | § | |
| **Debtors** | § | **Jointly Administered** |
| | § | |
| | § | |

UNITED STATES' BRIEF IN SUPPORT OF DEBTORS' MOTION UNDER BANKRUPTCY RULE 9019 FOR ORDER APPROVING SETTLEMENT OF ENVIRONMENTAL CLAIMS AND NOTICE OF RESPONSE TO PUBLIC COMMENTS RECEIVED

The United States on behalf of the U.S. Environmental Protection Agency ("EPA"), the United States Department of the Interior ("DOI"), the United States Department of Agriculture ("USDA"), and the United States International Boundary Water Commission ("USIBWC"), hereby files this Brief in support of Debtors' Motion Under Bankruptcy Rule 9019 for Order Approving Settlement of Environmental Claims (Dkt. No. 10534) (the "Environmental Settlements"), and notifies the Court of the filing of public comments and its response thereto. The five Environmental Settlement were lodged with this Court on March 12, 2009.

The Environmental Settlements are under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq., and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and involve more than fifty sites throughout the country. The parties to the settlements are the Debtors, the United States, and the States of Alabama, Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Texas, Utah and Washington.

The proposed Environmental Settlements require the Court's approval under two different sets of laws. First, pursuant to Federal Bankruptcy Rule of Procedure 9019, the Court must approve them as in the best interest of the bankruptcy estate and as being consistent with applicable bankruptcy law. On March 12, 2009, Debtors filed a motion for approval of the Environmental Settlements pursuant to Bankruptcy Rule 9019 (Dkt. Nos. 10534, 10539, 10540, 10541, 10542, 10551, 10567). ASARCO Inc. (the "Parent"), the Official Committee of Unsecured Creditors of the Debtor (the "Committee"), Union Pacific, and certain other parties filed oppositions to the Debtor's motion. (Dkt. Nos. 10741, 10734, 10742, 10733, 10737, 10738, 10740).

Second, the Court must approve the Environmental Settlements under applicable environmental law. Approvals of settlements under the environmental laws include a procedure for obtaining public comment, and are based on a record consisting of those comments, the

United States' responses thereto, and the information in the record before the Court. See 28 C.F.R. § 50.7.

As explained below, the primary opposition to the settlements is from the Parent and the Committee. However, both the Parent and the Committee appear to approach these settlements as if the Sites were being estimated, and focus exclusively on their and the Debtor's litigation positions. In reality, the proposed Environmental Settlements represent compromises between the Debtor's litigation views and those of the governments, which the Parent and Committee prefer to pretend do not exist.

## I. BACKGROUND

### A. History of The Environmental Claims in This Bankruptcy

The Debtors' mining and operational activities spanning the last century or more, have resulted in extensive liabilities of the Debtors at over 100 Sites in sixteen States across the country. See Debtors' Disclosure Statement In Support of Fifth Amended Joint Plan at 50-55. Dkt. No. 11220. On or about February 16, 2006 and August 1, 2006, the United States filed several proofs of claim asserting environmental liabilities for at least 38 Sites. Sixteen States have filed numerous proofs of claim asserting environmental liabilities against the Debtors. The Debtors own at least 26 contaminated properties. In accordance with 28 U.S.C. § 959(b), the Debtors are responsible to comply with applicable nonbankruptcy law to clean up these properties, and the United States and/or the States have administrative expense claims for such cleanups for which they were not required to file proofs of claim.

On March 23, 2007, this Court entered its Order providing for the estimation of certain of the environmental claims. Dkt. No. 4238. Over the next ten months, settlements were reached for allowed claims or payment for all or part of 20 of these sites for a total of approximately $530 million without the need for estimation. In the summer and fall of 2007, the Court conducted approximately 13 days of estimation hearings for three large Sites (the Coeur d' Alene

Site, Omaha Site, and certain State liabilities for the Tacoma Site) but did not issue rulings when an agreement in principle through mediation was announced.

Beginning in early the fall of 2007, and continuing for the next eight months, the parties negotiated to achieve a consensus plan of reorganization under the supervision of Judge Magner. That process included an effort to resolve the outstanding claims of the environmental creditors and to create a process by which the assets of debtor could be sold and a consensual plan achieved. This process included four different mediation sessions personally overseen by Judge Magner and numerous additional meetings and conferences between the parties to that effort. The mediation resulted in five environmental settlements that were filed as part of the Sterlite-sponsored Plan of Reorganization. On July 31, 2008, Debtors filed a proposed Plan of Reorganization and Disclosure Statement, including the five environmental settlements, which were amended on September 12, 2008. Docket Nos. 9101, 9098. The Environmental Settlements proposed to resolve federal and state environmental liabilities at more than fifty sites in sixteen states (in addition to the approximately twenty previously approved settlements in this case). Id.

On October 13, 2008, the Debtor announced that Sterlite had informed it that Sterlite could not and would not complete the purchase transaction contemplated by the original Sterlite Plan. The Court suspended all proceedings on that plan, necessarily including the environmental settlements that were part of it. Over the next five months, Debtor and the governments worked to recast the settlements such that they would not be dependent on the approval of any particular plan of reorganization. The basic economic terms of the settlements, including the allowed claims for each site, remained substantially consistent with the prior agreements. On March 12, 2009, the Debtors filed a motion for approval of the five amended Environmental Settlements. See Docket Nos. 10534, 10539, 10540, 10541, 10542, 10551, 10567.

The United States has also conducted a public comment process under environmental law on the Environmental Settlements. The United States published notice of the settlements in the

Federal Register on March 24 and 26, 2009. See 74 Fed. Reg. 12378, 12379, 12380, 13227. Written comments were received through April 24 and 26, 2009,[1] and additional oral comments regarding the Texas Custodial Trust Settlement were received at a public meeting in El Paso, Texas on May 11, 2009. The public comment period has ended, and the United States now provides the Court with copies of the public comments and its response thereto.

As set forth below, the United States has received approximately 1750 written comments. However, the bulk of these, approximately 1730, relate to the Texas Custodial Trust Settlement. The remainder of the comments generally focus on the settlements for two sites, the Omaha Lead Site and the Coeur d'Alene Site. No comments at all were received for the Multi-State Custodial Trust Settlement or for all but one of the sites covered by the Miscellaneous Federal and State Sites Settlement.

| Settlement | Site | # Comments |
|---|---|---|
| Texas Custodial Trust | El Paso Smelter | 1770 written (Of which approximately 1,700 were non-unique form comments)<br>25 transcribed during public meeting |
| Residual Sites Settlement | Coeur d'Alene | 4 |
| Residual Sites Settlement | Omaha Lead | 2 |
| Miscellaneous Federal and State Sites | IBWC | 1 |
| Montana Custodial Trust | All sites | 3 |

[1]Some commenters, including the Parent, submitted written comments after this date. Notwithstanding that they came in after the close of the public comment period, the United States considered these comments in reaching its conclusion that the Environmental Settlements are fair, reasonable, and consistent with environmental law, and provides responses to them in this Notice.

After careful consideration of the public comments that were received, the United States has concluded that the proposed Environmental Settlements are fair, reasonable and lawful compromises, and provides this Notice indicating its belief that they should be approved.

**B. Statutory Background**

The environmental liabilities of the Debtor that are resolved by the proposed Environmental Settlements derive primarily from two federal statutes and their state counterparts. The first of these, CERCLA, is generally directed at cleaning up sites contaminated with hazardous substances due to releases of such substances at abandoned or non-operating facilities. The second, RCRA, generally addresses clean up of hazardous constituents at operating facilities, and any migration of hazardous constituents from such facilities, resulting from the generation, treatment, storage, disposal, or transport of hazardous wastes.

**CERCLA**

The United States refers the Court to the general background briefing on CERCLA and its relation to bankruptcy law submitted in the early stages of this case, Dkt. No. 4657 and 4745, a brief summary of which follows. Congress enacted CERCLA in response to widespread concern over the severe environmental and public health effects resulting from improper disposal of hazardous wastes and other hazardous substances. See generally United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1500 (6th Cir. 1989), cert. denied, 494 U.S. 105 (1990); United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1416-18 (6th Cir. 1991); Eagle-Picher v. EPA, 759 F.2d 922, 925 (D.C. Cir. 1985); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983). CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986)(SARA), grants broad authority to the United States in connection with the cleanup of waste sites.

CERCLA provides EPA with several options when EPA determines that response action is needed at a particular hazardous waste site. For example, EPA may undertake the response action on its own, utilizing funds from the Superfund, and then sue the responsible parties for

reimbursement of the Superfund. 42 U.S.C. §§ 9604, 9607. Responsible parties under CERCLA are liable for both responses costs and injuries to the natural resources affected by the release of hazardous substances. 42 U.S.C. § 9607(a)(4)(c). EPA may also issue administrative orders under CERCLA Section 106 directing responsible parties to implement response actions. 42 U.S.C. § 9606. Responsible parties include the owners and operators of hazardous substance facilities as well as those who arranged for the disposal, treatment, or transport of the hazardous substances. 42 U.S.C. § 9607.

At the time the United States and Debtor provided the initial CERCLA background briefing to the Court, there had been no Supreme Court ruling regarding the applicability of joint and several liability to CERCLA cases.[2] Nevertheless, all Circuits, including the 5th, generally agreed that parties sued by the United States under CERCLA are subject to strict, and joint and several liability unless a responsible party can demonstrate divisibility of harm. See, e.g., In re: Bell Petroleum Services, Inc., 3 F.3d 889, 895-96 (5th Cir. 1993). The Supreme Court's recent decision in Burlington Northern v. United States, 129 S.Ct. 1870 (2009), No. 07-1601 (May 4, 2009), has confirmed these fundamental principles regarding joint and several liability in government claims under CERCLA Section 107(a)(4).

The Supreme Court noted with approval the seminal opinion in United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983),[3] and noted that, "[f]ollowing Chem-Dyne, the courts of appeals have acknowledged that '[t]he universal starting point for divisibility of harm analysis in CERCLA cases' is §433A of the Restatement (Second) of Torts." 129 S.Ct. 1870, No. 07-1601 at 13. The Burlington Court confirmed that not all harms are capable of being divided, and that the party seeking to avoid joint and several liability bears the burden of proving

[2] United States v. Atlantic Research Corporation, 551 U.S. 128, 127 S.Ct. 2331, 2339 n. 7 ("We assume without deciding that § 107(a) provides for joint and several liability.").

[3]The Chem Dyne court found CERCLA's legislative history clear that references to joint and several liability were deleted from CERCLA to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases; not as a rejection of joint and several liability. 572 F.Supp. at 808.

that a reasonable basis for apportionment exists. Id. at 14. When two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm. Id. at 14. Equitable considerations play no part in such a determination. Id. at 15 n. 9. Thus, both before and after Burlington, defendants face significant risk that they will be found jointly and severally liable for all of the government's response costs and Natural Resource Damages. The fact that the Burlington Court upheld the district court's apportionment in that case does not mean that an apportionment would be available in most or even many other cases involving a single harm. The Burlington Court held only that the district court made detailed findings of fact in that case concerning divisibility and that the facts in the record reasonably supported the apportionment of liability. Id. at 17. Indeed, the Burlington Court noted the Restatement's comment that when two or more causes produce a single, indivisible harm, "courts have refused to make an arbitrary apportionment for its own sake." Id. at 14.

Having created the liability system and enforcement tools to allow EPA to pursue responsible parties for Superfund cleanups, Congress expressed a strong preference that the United States settle with responsible parties in order to avoid spending resources on litigation rather than on cleanup. See United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991) ("presumption in favor of voluntary settlement"); In re Cuyahoga Equipment Corporation, 980 F.2d 110 (2d Cir. 1992) (citing City of New York v. Exxon Corp., 697 F. Supp. 677, 693 (S.D.N.Y. 1988)); United States v. Cannons Engineering Corp., 899 F.2d 79, 92 (1st Cir. 1990); United States v. DiBiase, 45 F.3d 541, 545-46 (1st Cir. 1995); Kelley v. Thomas Solvent Company, 717 F. Supp. 507 (W.D. Mich. 1989); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S. Code Cong. & Ad. News 2862. CERCLA encourages settlements by providing protection from contribution claims for matters addressed to parties who settle with the United States. Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2). This provision provides settling parties with a measure of finality in return for their willingness to settle. United States v. Pretty Products, Inc., 780 F. Supp. 1488 (S.D. Ohio 1991);

see Cannons Engineering, 899 F.2d at 92; O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990); United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96 (1st Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S. Code Cong. & Ad. News 2862. In addition, a party that has settled its CERCLA liability may bring actions for contribution against other non-settling responsible parties. 42 U.S.C. § 9613(f)(1). See United States v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991); Chem-Dyne, 572 F. Supp. 802.

**RCRA**

The Resource Conservation and Recovery Act ("RCRA"), also known as the Solid Waste Disposal Act, 42 U.S.C. §§ 6901 et seq., regulates generators and transporters of hazardous waste and owners and operators of facilities that manage, treat, store, or dispose of hazardous wastes. Pursuant to 42 U.S.C. § 6926(b)(1), EPA has authorized certain states to administer portions of the RCRA hazardous waste management programs. The United States retains the authority to enforce an authorized State's regulations as well as the federal portion of the program still being administered by the United States. 42 U.S.C. § 6928. RCRA regulations impose on owners and operators of hazardous waste generation, treatment, storage, disposal, and transportation facilities obligations about the manner in which solid and hazardous wastes are dealt with. See 42 U.S.C. §§ 6921-6925; 40 C.F.R. Subchapter I. In addition, owners and operators of hazardous waste treatment, storage, or disposal facilities must obtain either a permit or “interim status” in order to operate legally. 42 U.S.C. § 6925. Under RCRA, the United States and authorized states have authority to order the owner or operator of a permitted or interim status facility to conduct closure, corrective action, or other response measures as necessary to protect human health. 42 U.S.C. §§ 6925(c)(3), (u), (v) and 6298(h). Where EPA determines that handling of solid waste may present an imminent and substantial endangerment to health or the environment, it can also issue a cleanup order or seek injunctive relief against

any person who has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid waste anywhere that solid waste is located. 42 U.S.C. § 7003.

### C. The Proposed Settlements

The Miscellaneous Federal and State Sites Settlement resolves federal and state environmental claims at twenty-three sites that are not currently owned by the Debtor in twelve states, providing allowed general unsecured claims totaling approximately $94.6 million. While the settlement resolves claims at a number of sites, it is in most respects a fairly standard cash-out agreement, under which Debtor has agreed to grant certain allowed claims in exchange for a covenant not to sue from the relevant government at each Site and protection from contribution actions by non-settling PRPs.

The three custodial trust settlements,[4] provide a mechanism by which Debtor can fulfill its responsibility to comply with applicable nonbankruptcy law, see 28 U.S.C. § 959(b), to cleanup twenty-six non-operating properties it presently owns in fourteen states, and satisfy its liability to the Government for administrative expense claims or injunctive relief. Under these settlements, three custodial trusts will be created to own and clean up certain properties to be transferred to it by the Debtor on the effective date of any plan of reorganization. Debtor will also fund the trust on the effective date of any plan of reorganization with cash in the amount of the allowed administrative priority claims as set forth in each settlement, which totals approximately $261.3 million, including $27.5 million for the administrative costs of the trusts.[5]

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[4]The Amended Consent Decree and Settlement Agreement Establishing a Custodial Trust for Certain Owned Sites in Alabama, Arizona, Arkansas, Colorado, Illinois, Indiana, New Mexico, Ohio, Oklahoma, Utah, and Washington; the Consent Decree and Settlement Agreement Establishing a Custodial Trust for the Owned Smelter Site in El Paso, Texas and the Owned Zinc Smelter Site in Amarillo, Texas; and the Consent Decree and Settlement Regarding the Montana Sites.

[5]The Montana Custodial Trust Settlement Agreement also provides the State of Montana with an allowed general unsecured claim of $5 million for compensatory natural resource damages. The Multi-State Custodial Trust Agreement also provides for allowed general unsecured claims for past costs for the Murray Site and Sand Springs Site.

Finally, the Amended Settlement Agreement and Consent Decree Regarding Residual Environmental Claims for the Coeur d'Alene, Idaho, Omaha, Nebraska, and Tacoma, Washington Environmental Sites resolves three of the largest remaining liabilities in the bankruptcy, all of which were subject to estimation hearings in 2007. The settlement provides for the creation of the Successor Coeur d'Alene Custodial and Work Trust to own and cleanup certain properties to be transferred to it by the Debtor on the effective date of any plan of reorganization and to cleanup areas of the site not currently owned by the Debtor. In all, the settlement provides allowed general unsecured claims totaling $736 million and allowed administrative claims totaling $14 million.

## II. STANDARD OF REVIEW

The well settled standard applied to review of the United States' proposed settlements under CERCLA is whether a settlement is fair, reasonable and consistent with CERCLA. United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1424, 1426 (6th Cir. 1991); United States v. Cannons Engineering, 899 F.2d 79, 84 (1st Cir. 1990); United States v. Hercules, Inc., 961 F.2d 796, 800 (8th Cir. 1992). Review of such settlements is committed to the discretion of the reviewing court, see United States v. Hooker Chemical & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985), which is to exercise this discretion in a limited and deferential manner, Akzo Coatings, 949 F.2d at 1424; Cannons Engineering, 776 F.2d at 84; In re Cuyahoga Equipment Corp., 980 F.2d 110, 118 (2d Cir. 1992).

The judicial deference to settlements reached by the parties to litigation is "particularly strong" when that settlement "has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field." Akzo Coatings, 949 F.2d at 1436. The balance of competing interests affected by a settlement with the federal government '"must be left in the first instance to the discretion of the Attorney General,'" Kelley v. Thomas Solvent Company, 717 F. Supp. 507, 515 (W.D. Mich. 1989) (citation omitted), since the Attorney General retains "considerable discretion in

controlling government litigation and in determining what is in the public interest." United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.), cert. denied, 429 U.S. 940 (1976). "Indeed, where a settlement is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental laws, in conjunction with the Department of Justice, one court has indicated that a presumption of validity attaches to that agreement." United States v. Rohm & Haas Co., 721 F. Supp. 666, 681 (D.N.J. 1989) (citing City of New York, 697 F. Supp. at 692) (emphasis added).

Fairness in the CERCLA settlement context has both procedural and substantive components. Cannons, 899 F.2d at 86. To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance. Cannons, 899 F.2d at 86. A determination that a settlement is procedurally fair "may also be an acceptable proxy for substantive fairness, when other circumstantial indicia of fairness are present." United States v. Davis, 261 F.3d 1, 23 (1st Cir. 2001).

In reviewing substantive fairness, the court need only determine whether a proposed settlement reflects a reasonable compromise of the litigation. U.S. v. Rohm & Haas Co., 721 F.Supp. 666, 685 (D.N.J. 1989). In order to be fair to other non-settling responsible parties, a settlement should recover at least an amount "roughly correlated with some acceptable measure of comparative fault," apportioning liability "according to rational (if necessarily imprecise) estimates" of fair shares of liability for a given Facility. Cannons Engineering, 899 F.2d at 87.[6] Factors considered by courts reviewing CERCLA settlements for fairness include "'the strength of the plaintiffs' case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in the litigation if the settlement is not approved.'" Kelley v. Thomas Solvent Co., 717 F.Supp. 507, 517 (W.D.Mich.1989) (citing United States v. Hooker Chemical & Plastic Corp., 607 F. Supp. 1052, 1057 (W.D.N.Y.), affirmed, 776 F.2d 410 (2d Cir. 1985)).

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[6] Accord, In re Energy Cooperative, Inc., 173 B.R. 363, 367 (N.D. Ill. 1994); In re Eagle-Picher Industries, Inc., 197 B.R. 260 (Bankr. S.D. Ohio 1996), aff'd, 1997 U.S. Dist. LEXIS 15436 (July 14, 1997 S.D. Ohio).

Whether a settlement is "reasonable" for purposes of judicial review of CERCLA settlements sometimes involves review of the technical effectiveness of cleanup requirements in settlements obligating settling parties to perform remediation. None of the proposed settlements require Debtor to perform remediation. Rather, they generally provide money either to a special account or a trustee for use in cleanup of the Site pursuant to response or corrective action measures that are or have been selected separately. Courts typically find such monetary settlements reasonable. See, e.g., Kelley, 717 F. Supp. at 518 (settlement providing monetary recovery was reasonable because it "functions exactly as the CERCLA cost recovery action was intended").

Finally, a CERCLA settlement must be consistent with the statutory goals of CERCLA:

> (1) Congress' desire to equip the federal government with tools necessary for prompt and effective responses to hazardous waste disposal problems of national magnitude and (2) Congress' desire that those responsible for causing the problems thus identified bear the costs and responsibility for remedying the harmful conditions they created.

United States v. Wallace, 893 F. Supp. 627, 636 (N.D. Tex.1995). CERCLA authorizes the cleanup of hazardous waste sites using money from the Superfund, but the Superfund is limited and cannot finance cleanup of all of the many hazardous waste sites across the nation. Congress knew when it enacted CERCLA that the costs of response activities would greatly exceed the Superfund. Kelley, 717 F. Supp. at 518. Thus, settlements of CERCLA cases in which the defendants agree to reimburse the Superfund for past expenditures are in the public interest. Cost-effective settlement practices also preserve resources of the Government in its efforts to clean up hazardous waste sites as quickly as possible. See Kelley, 717 F. Supp. at 518; See, e.g., In re Bell Petroleum, 3 F.3d at 897.

## III. THE PROPOSED SETTLEMENTS ARE FAIR, REASONABLE AND CONSISTENT WITH ENVIRONMENTAL LAW AND THE PUBLIC COMMENTS RECEIVED DO NOT PROVIDE A BASIS NOT TO APPROVE THE SETTLEMENTS

For the reasons set forth below as to each site, the United States, having considered the public comments received, believes that the proposed Environmental Settlements are fair, reasonable, and lawful, notwithstanding the public comments submitted.

**A. The Proposed Settlements are Fair, Reasonable, and Consistent with Environmental Law**

The mediation, settlement negotiation, and public comment processes have ensured that the procedural fairness requirement is satisfied. Cf. Davis, 261 F.3d at 23 (noting lodging and publication as factors bearing on procedural fairness). The proposed Environmental Settlements are the result of arduous arm's length negotiations by experienced bankruptcy and environmental counsel on both sides. They originated in the court-ordered mediation before Judge Magner and proceeded, for the first several months until an agreement in principle was reached. Debtor and the United States and the interested States then negotiated these settlements to conclusion over a period of more than a year beyond the mediation.

The substantive fairness of the proposed Settlements necessarily includes consideration of the litigation risks and possible outcomes of proceeding to estimation hearings or other litigation. See Akzo, 949 F.2d at 1436 (among the factors determinative of substantive fairness are "the possible risks involved in the litigation if the settlement is not approved."). Among the litigation risks faced by the government of proceeding to estimation at any of the Sites proceeding under CERCLA authorities is the difficulty of establishing the future costs of environmental cleanups at Sites that have been the subject of greatly varying degrees of investigation and/or administrative decisionmaking with regard to response actions, especially in light of the incomplete environmental information about many sites and the differing expert reports of other parties in interest, as well as the potential for divisibility defenses. These risks justify compromise and were taken into account in the settlements. See United States v. DiBiase, 45 F.3d 541, 546 (1st Cir. 1995) ("Settlement requires compromise. It makes sense for

the government, when negotiating, to give a PRP a discount on its maximum potential liability as an incentive to settle.").

The substantive fairness of a CERCLA settlement does not require a rigid adherence to any mathematical formula. See Cannons, 899 F.2d at 87-88 ("the agency must also be accorded flexibility to diverge from an apportionment formula in order to consider special factors not conducive to regimented treatment."). See also id. at 85 (noting that two settlements that the court ultimately approved required payments of 160% and 260%, respectively, of a given PRP's volumetric share of waste.).[7]

The settlement amounts therefore fairly account for the fact that the governments have incomplete information and/or have not concluded the administrative process to decide on a cleanup approach at the majority of Sites and the fact that Debtor is the only viable PRP at many Sites. See id. at 88 (noting that among the "frequently encountered reasons for departing from strict formulaic comparability are the uncertainty of future events and the timing of particular settlement decisions); cf. Sun Co., Inc. (R&M) v. Browning-Ferris, Inc., 124 F.3d 1187, 1193 (10th Cir. 1997) (Noting that in performing equitable allocation in the context of a contribution action between PRPs, "the total cleanup costs – including responsibility for "orphan shares" – will be equitably apportioned among all the PRPs, with the court being able to consider any factors it deems relevant."); Morrison Enterprises v. McShares, Inc., 302 F.3d 1127, 1135 (10th Cir. 2002); Pinal Creek v. Newmont Mining Corp. 118 F.3d 1298, 1303 (9th Cir. 1997) *overruled on other grounds by* United States v. Atlantic Research Corp., 551 U.S. 128 (2007); Centerior Service Co. v. ACME Scrap Iron & Metal Corp., 153 F.3d 344, 354 n.12 (6th Cir. 1998), *overruled on other grounds by* Atlantic Research Corp., 551 U.S. 128; Vine Street LLC v. Keeling, 460 F.Supp.2d 728, 761 n,129 (E.D. Tex. 2006).

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[7]Indeed, even in the context of divisibility and apportionment of harm, where equitable factors "play no role," Burlington Northern, 129 S.Ct. 1870, No. 07-1601 at 15 n.9, the Supreme Court affirmed the assignment of a plus 50% "margin of error" to the appellant's calculated share of liability, id. at 18.

For many of the custodial trust sites, substantive fairness is measured by a slightly different yardstick. At the majority of these sites, there is no question that the Debtor is the sole responsible party because the cleanup is being or will be conducted under RCRA or analogous state law, not CERCLA. See, e.g., 42 U.S.C. § 6928 (authorizing EPA to issue corrective action orders to current owners). Moreover, at many of these sites, the Debtor is subject to pre-bankruptcy consent decree obligations to perform and/or fund the cleanup work. See, e.g., the RCRA Consent Decree in United States v. ASARCO, No. 98-3-H-CCL (D.MT) (pertaining to the East Helena Site); and the Consent Decree United States and Texas v. Encycle/Texas and ASARCO, No. H-99-1136 (S.D. Tex) (pertaining to the El Paso Site). The compromise at any given site, therefore, generally reflects the litigation risk associated with the inherent difficulty of proving future cleanup costs on the basis of incomplete site investigation and cleanup action selection.

Thus, as set forth in the tables below, the proposed settlement amounts reflect significant compromises by the United States that are substantively fair because they are roughly correlated with the Debtor's comparable fault, taking into account the litigation risks and additional factors described above.

The proposed CERCLA settlements are reasonable because they provide substantial funding to perform future cleanup work at the Sites and/or replenish the Superfund by recovering significant past costs. See, e.g., Kelley, 717 F. Supp. at 518.

Moreover, the proposed CERCLA settlements are consistent with CERCLA because they conserve resources for cleanup rather than for litigation and appropriately place the fair burden of the cleanup costs on the party that contributed to the hazardous waste problem rather than on the tax-paying public. See Wallace, 893 F. Supp. at 636; Kelley, 717 F. Supp. at 518; Bell Petroleum, 3 F.3d at 897.

The custodial trust settlement amounts are reasonable compromises and consistent with environmental law because they provide certainty that the governments' future decisions as to

necessary environmental cleanups will be implemented by a custodial trustee without the need for further litigation. In addition, the trust structure ensures that funding will be available for required cleanup actions and administrative costs. Finally, to the extent that costs turn out to be greater than expected at a given site, the trust structure provides for the possibility that funding will be available from the value of the cleaned up properties.

**Miscellaneous Federal and State Sites (Federal Lead Only)[8]**

| Site (and whether comment was received) | Total Past and Estimated Future Costs and NRD | Proposed Allowed Claim | Fairness of Settlement Under Environmental Law |
|---|---|---|---|
| Beckemeyer (none) | $9,257,656.04 | $6.08 million | No dispute over liability based on Asarco's status as former owner/operator of zinc smelter. Claim amount reflects costs already incurred. Settlement reflects compromises over any possible challenges to EPA's actions. |
| Black Pine (none) | $190,000 | $190,000 | Asarco paying in full because it is responsible to remediate release of hazardous substances from its owned property. |
| Combination Mill (none) | $542,000 | $542,000 | Asarco paying in full because it is responsible to remediate release of hazardous substances from its owned property. |
| Coy Mine (none) | $200,000* *The Coy Mine claim consists of stipulated penalties pursuant to a consent decree | $200,000 | No dispute about either Debtor's liability for the claim or the proper claim amount |

[8]The United States refers the Court to the material filed by individual states and Debtor for information regarding Sites over which a State has primary regulatory authority.

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| Flux Mine (none) | $666,906 | $487,000 | Debtor has primary responsibility for Flux Mine-specific future costs, since Debtor is the only surviving PRP connected to mining there, but settlement reflects Debtor's limited responsibility for mining district-wide past costs and fact that environmental investigation is incomplete and no removal action has formally been selected. |
| Jack Waite (none) | $11.54 million (net of revisions to EE/CA cost estimate and 2006-2008 ASARCO Prepetition Environmental Trust fund expenditures at this Site) | $11.3 million | No dispute about Debtor's liability. Debtor, whose period of operation accounts for about 70% of the mine's total historical production, is the only surviving operator of the mine. |
| Monte Cristo (none) | $24.95 million | $11 million | Debtor has primary responsibility for the Site, since it is the last viable PRP connected to mining there. Settlement also takes into account the existence of a large orphan share. Settlement nevertheless leaves unreimbursed $1.6 million orphan share of response costs and $12 million orphan share of NRD, which reflects litigation risk associated with Debtor's limited role at the Site. Settlement also takes into account litigation risks associated with asserting a $12 million NRD claim that was not specifically identified in the governments' proofs of claim, and the inherent uncertainty of projecting future removal costs when the governments have not completed all necessary studies or selected a removal action. |

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|---|---|---|---|
| Richardson Flat/Lower Silver Creek (none) | $46,278,320 | $7.4 million | This settlement reflects Asarco's fair share based on its involvement at both the tailings impoundment and downstream, but discounts for some uncertainty regarding the nature of Asarco's operations on its leaseholds and the uncertainty of estimating costs when a remedy has not been formally selected. Settlement also reflects the litigation risk associated with the timing of the claim amendment for this Site. |
| Stephenson Bennett (none) | $9.1 million | $550,000 | Settlement reflects Asarco's volumetric-based fair share, largely negotiated pre-bankruptcy, with some discount for uncertainties in Asarco's precise period of ownership and/or operations and production at the Site. |
| Tacoma Smelter (none) | $71.45 million (net of amounts already available and future amounts expected under other agreements) | $27 million | The settlement reflects the fact that another party has assumed responsibility for some of the work and litigation risks associated with the inherent uncertainty of projecting needs and costs well into the future. |
| Terrible Mine (none) | $2,145,215 | $1.4 million | Debtor has primary responsibility for the Site as it is the sole surviving and viable PRP connected to the mining operations at the Site. However, the settlement reflects litigation risks associated with establishing that the late filing of the claim was due to "excusable neglect" under the standard set forth in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 395 (1993). The settlement also takes into account the uncertainty of estimating costs when a remedy has not been formally selected. |

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|---|---|---|---|
| USIBWC (1 comment) | $27.5 million | $19 million | Debtors have primary responsibility for the USIBWC costs incurred in addressing the migration of contaminants from the adjacent El Paso Smelter Site, and debtor does not dispute that the origin of the contaminants on the USIBWC Site was the El Paso Smelter. The settlement reflects the inherent uncertainty with the future cost projections addressing the groundwater and soils contamination since the USIBWC has not completed all necessary studies or selected a final remedy. |
| Vasquez Blvd/I-70 (none) | $2,011,011 | $1.5 million | No dispute over liability based on Asarco's status as former owner/operator of adjacent smelter. Settlement reflects Asarco's fair-share as well as uncertainties associated with the nature and cost of future work at the Site. |

**Custodial Trust Sites (Federal Lead Only)**[9]

| Site (and whether comment was received) | Total Past and Estimated Future Costs and NRD (2008 dollars) | Proposed Allowed Claim | Fairness of Settlement Under Environmental Law Fairness of Settlement |
|---|---|---|---|
| East Helena Smelter (2 comments) | $161 million to $224 million | $100 million | No dispute over liability based on Debtor's current ownership and consent decree obligations, but settlement reflects litigation risk associated with the nature and cost of future work at the Site. |
| Taylor Springs (no comments) | $18,855,092 | $4,200,000 | Debtor is current owner but settlement reflects Asarco's fair-share and existing contractual agreement between Debtor and a viable previous owner/operator. |
| Whiting (no comments) | $1,293,235 | $1,200,000 | Reflects fair estimate of future costs of obligations in light of uncertainty of final closure activities. |

[9]The United States refers the Court to the materials filed by individual states and Debtor for information regarding Sites over which a State has primary regulatory authority.

**Residual Sites (Federal Lead Only)**[10]

| Site (and whether comment was received) | Total Past and Estimated Future Costs and NRD (2008 dollars) | Proposed Allowed Claim | Fairness of Settlement Under Environmental Law |
|---|---|---|---|
| **Coeur d'Alene** | $2,569,199,968 | $482 million | No dispute over the Debtor's liability. The settlement reflects litigation risks associated with Judge Lodge's divisibility ruling as well as challenges to EPA's future costs and natural resource damages. |
| **Omaha Lead** | $405 million | $187.5 million | No dispute over the Debtor's liability as former owner/operator. The settlement reflects litigation risks associated with extent of Debtor's contribution to contamination at the Site and challenges to EPA's future costs. |

## D. The Settlements Should be Approved Under Environmental Law Notwithstanding the Public Comments Received

### 1. Parent's Public Comments

While the Parent submitted public comments limited to the Omaha Lead Site and the Coeur d'Alene Basin Site, PUB_COM002028, they contend only that the Debtors are paying too much under the proposed Environmental Settlements, and do not identify any issue under environmental law that any of the settlements are not recovering enough to meet the public interest in cleanup of environmental sites, which is the purpose of CERCLA. Cf. Report and Recommendation on Motion to Withdraw Reference, Dkt. 10992 at 12 (noting same in finding Parent failed to meet its burden of identifying any unsettled or difficult issue of environmental law (or conflict with bankruptcy law) justifying withdrawal of reference). Indeed, the Parent's public comments regarding these two sites are identical to the arguments in the Parent's

[10]The United States refers the Court to the materials filed by individual states and Debtor for information regarding Sites over which a State has primary regulatory authority.

objection to the Debtor's Motion under Rule 9019. Therefore, the United States refers the Court to its response to the Parent's objection, see infra at Section IV, for detailed discussion of those issues.

To the extent Parent's objection asserts that a CERCLA settlement can only be substantively fair under Cannons if each party bears *no more* than "the cost of the harm for which it is legally responsible," Dkt. No. 10741 at 6-7, Parent misconstrues Cannons. First, a settlement need only be "roughly correlated with some acceptable measure of comparative fault," to ensure that non-settling parties are not treated unfairly by having to assume too disproportionate a share of liability. See Cannons Engineering, 899 F.2d at 87; United States v. Charles George Trucking Co., 34 F.3d 1081, 1088 (1st Cir. 1994) (discussing the court's Cannons decision and explaining that the substantive fairness inquiry is usually confined to "the proposed allocation of responsibility as between settling and non-settling PRPs."). Second, the Cannons court counseled significant deference to both the government's chosen measure of comparative fault and the government's view of factors justifying divergence from that measure. Id. at 87-88.

Indeed, the court explicitly identified additional factors at play in the substantive fairness analysis, some of which justify premiums above comparative fault. Id. at 88. In Cannons, cash-out settlors were required to pay a premium to account for the risk of cost overruns on planned response actions. The Court approved as fair the escalation of those premiums for PRPs that did not settle at the earliest opportunity. Thus, while the governments do not believe they are receiving a premium under these settlements, nothing in Cannons suggests that a settlement is unfair if a settling PRP pays more than an amount equivalent to its comparative fault. Id. ("Because we are confident that Congress intended EPA to have considerable flexibility in negotiating and structuring settlements, we think reviewing courts should permit the agency to depart from rigid adherence to formulae wherever the agency proffers a reasonable good-faith justification for departure"). Indeed, even Parent has conceded that liable parties must pay their

share of orphan shares. Dkt. No. 4743 at 7; see also Restatement §433A comment h (existence of orphan share can defeat apportionment of single harm).

Furthermore, the Parent's over-emphasis of the "efficacy, cost-effectiveness, and adequacy of remedial measures" as the metric for the reasonableness of these proposed Settlements is misplaced. See Dkt. 10741 at 7-9. None of the settlements select a particular remedial, response, or corrective action at any site, as did the settlements in the cases cited by Parent. See Dkt. 10741 at 7-8, citing Akzo, 949 F.2d at 1426 and Cannons, 899 F.2d at 89-90.[11] Therefore, far from being of "cardinal importance," Dkt 10741 at 6, any agency decisions about such actions are simply not before the Court.

**2. Montana Custodial Trust Settlement – Montana Sites**

The Montana Custodial Trust Settlement covers four sites presently owned by Debtor in Montana: The East Helena Smelter Site, the Black Pine Mine Site, the Mike Horse Mine Site, and the Iron Mountain Site. Three comments were received regarding this Settlement, two of which are applicable to all four sites.

One public commenter, PUB_COM stated his view that "old mines almost always are not as bad as the no-growthers say" and that the government should "look at the four clean-up sites in Montana closely." Notwithstanding this comment, the United States and State of Montana have investigated all four Sites covered by this Settlement and have ascertained that each one has significant contamination that poses a risk to human health and the environment and will require significant cleanup actions. See, e.g., the proffers, declarations, and expert reports of Patrick Plantenberg, Denise Martin, Ann Maest, Ph.D., William H. Bucher, P.E., contained in the site files for the respective sites; see also Proffer of Gregory Brusseau, Dkt. 11270, Ex. 2.

The second commenter states:

> I think polluters in this country have one sweet deal. they pollute like mad and never clean up and then declare bankruptcy. it is

[11]Parent's reliance on Bell Petroleum for this proposition, Dkt. 10741 at 8, is misplaced, since that case did not involve a settlement at all.

> clear the american taxpayers need up front payments from anyone who uses toxic pollutants, up front millions and billions should be paid if any company wants to use toxic chemicals. these selfish, greedy corporations are harming and hurting american citizens. this needs to be stopped by a fair government that takes care of its citizens instead of selling them out to the wolves.

The United States notes that the Sites covered by this Settlement are no longer operating. To the extent the commenter urges that Debtor should have been made to pay "up front" prior to commencing operations, the time for that has long passed. To the extent this commenter contends that the governments should be recovering more than they are for the Montana Sites, the United States respectfully notes that the Settlement provides substantial amounts to fund future cleanup at all four sites as well as the value of the remediated properties should more resources ultimately be required. Furthermore, it is important to note that the proposed Settlement is the product of compromise in which, "in exchange for the saving of cost and the elimination of risk, the parties each g[a]ve up something they might have won had they proceeded with the litigation." U.S. v. Armour & Co., 402 U.S. 673, 681 (1971). See also United States v. State of Oregon, 913 F.2d 576, 580 (9th Cir. 1990) (A consent decree is not "the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise") (citation omitted).

Finally, the Board of County Commissioners of Granite County, Montana commented that it "supports the cleanup of the Black Pine Mine Site" but would like to be consulted so as to avoid the cleanup negatively affecting the county's roads and traffic issues. The United States notes that the Settlement does not select any particular reclamation or response action but, rather, merely provides funding for the reclamation and/or response actions once they are selected. During the process of selecting cleanup actions at the Montana Sites, Montana and the United States will comply with applicable community relations provisions of RCRA, CERCLA, or applicable state laws. The Montana Department of Environmental Quality, which will have lead agency responsibility for determining the final mine reclamation and response actions for the ASARCO-owned portions of the Black Pine Mine in Granite County, which is the focus of the

Commissioners' comments, has acknowledged this comment and has indicated that it will consider the concerns the Commissioners identify and that it will provide additional opportunity for public involvement and community input as it proceeds to make determinations regarding the cleanup of the site. The United States has consulted with the State of Montana, which concurs in this response to the comments regarding the four Montana sites.

3. **USIBWC**

Two comments (one dated April 6, 2009, and one dated April 24, 2009) were received that referenced the USIBWC Site, both from the same commenter. The two identical comments were focused on the El Paso Smelter Site and the migration of contamination to the surrounding area, including to the USIBWC Site. In both comments, the Commenter requests a public meeting in the affected area, in accordance with section 7003(d) of RCRA, 42 U.S.C. 6973(d). Both comments include news articles discussing the El Paso Smelter Site. The April 24, 2009 comment is different from the April 6, 2009 comment in that it has an additional attachment, a draft mineral process waste management study, that discusses the El Paso Smelter.

The United States, EPA and the Texas Commission on Environmental Quality ("TCEQ") held a public meeting under Section 7003(d) of RCRA, 42 U.S.C. 6973(d) on May 11, 2009 in El Paso, TX. The commenter's concerns as related to the El Paso Smelter Site are addressed below in the United States' response to comments received regarding the El Paso Smelter Site.

Focusing on references to the USIBWC Site, the commenter states that "water is delivered from the IWBC (sic) controlled American Dam to the Rio Grande Canalization Project and then to Franklin Canal," recognizing that the USIBWC controls the Rio Grande water flow through the American Canal. Both comments show concern that the El Paso Smelter contamination, and contamination in the American Canal will affect the commenter's rights to obtain surface water from the Franklin Canal for irrigation purposes.

The commenter's concerns regarding contamination of the American Canal are adequately addressed in the USIBWC Settlement. The USIBWC identified the need to renovate

the outdated and decaying American Canal in 2001, to prevent contaminated water and fines from migrating through weepholes and joints in the canal concrete lining. The USIBWC settlement includes: the costs for disposing of large volumes of contaminated soil; costs for dewatering the canal and surrounding groundwater; and costs for treating the contaminated water safely before discharge. See Proffer of Gayle S. Koch and Proffer Allen J. Medine.

Further, the United States points out that the $19 million settlement for the USIBWC Site is a substantial amount of funding which will allow the Agency to address soils contamination and contamination in the American Canal in the near future. The United States notes that the El Paso Smelter settlement includes costs associated with environmental remediation at the El Paso Smelter Site which will prevent migration of contaminants to the USIBWC Site and American Canal. There is also potential for coordination between the groundwater remediation efforts at the USIBWC Site and the El Paso Smelter Site.

4. **COEUR D'ALENE**

The public comments received separately from the Coeur d'Alene Chamber of Commerce and the Boards of Benewah and Shoshone counties raise concerns that all settlement monies must be spent in the Basin and used in an efficient and prioritized manner. See PUB_COM001544, 001549, and 001568. First, these concerns are not a challenge to the fairness or reasonableness of the proposed Basin settlement. Second, as illustrated in Ms. Grandinetti's Declaration at ¶¶ 24-27, EPA has involved every affected state and local government, and the public, in the development and implementation of cleanup work in the Basin to ensure that these stakeholders are kept well-informed and involved in the manner in which monies are spent and used for cleanup of the Basin. And, EPA will continue to do so until EPA completes its work in the Basin. Specifically, the Basin Commission was created by the Idaho legislature and is made up of representatives of the State of Idaho, the three Idaho counties in the Basin, including the ones who filed these public comments, the Coeur d'Alene Tribe, the State of Washington, and the United States. The Basin Commission was established to help

implement, direct, and/or coordinate cleanup work in the Basin. One of its primary functions is to approve annually one- and five-year work plans for cleanup, including annual priorities and budget. A Technical Leadership Group (TLG) was developed to advise the Basin Commission. It also consists of federal, state, local entities, including Benewah and Shoshone County, and tribal representatives serving the governmental entities with regulatory or land management responsibilities in the Basin that may be affected by cleanup actions. Specific duties of the TLG include providing advice on the development of work plans and funding plans, technology development, monitoring, demonstration/pilot projects, establishing cleanup priorities, and coordinating with related activities in the Basin. In sum, the role and active participation of these counties in the Basin Commission and its TLG ensure that the counties have a voice in the manner in which any settlement monies are spent to cleanup the Basin.

5. **OMAHA LEAD**

Since the facts are essentially the same as they were at the time of the estimation hearing on the Omaha Lead Site (OLS), it is striking that Union Pacific's position has changed so starkly. Union Pacific initially sought to disallow the United States' claim, Dkt. No. 4218, and now argues that a $187.5 million recovery for the OLS "inadequately reflects Asarco's actual contamination to the OLS." UP Comments, PUB_COM001295, at 11.[12] Union Pacific specifically argues that the settlement cannot be approved without a formal allocation of liability between the responsible parties. Id. at 13-14. The United States responds that no preliminary

[12]To the extent UP believes the proposed Residual Environmental Sites Settlement prioritizes claim payment as between the three sites covered by the Settlement, UP Comments, PUB_COM001295, at 11, or permits subordination of the allowed general unsecured claims granted by the Settlement, UP Comments, PUB_COM001295, at 15, that reflects a misunderstanding of the Settlement. Each of the Sites will receive allowed general unsecured claims. Nothing in the settlement subordinates any of those allowed general unsecured claims to any other claims – indeed, the Settlement explicitly forbids such subordination. Residual Sites Settlement at 15, ¶ 10. While the Coeur d'Alene Site also receives $14 million in administrative priority funding, that funding covers the Debtor's liabilities at owned, non-operating property to be transferred to the Coeur d'Alene Successor and Work Trust pursuant to the settlement, which liabilities give rise to administrative priority funding. See Dkt 4657 at 17-19. There are no such Debtor-owned, non-operating properties in the OLS.

allocation of responsibility is necessary or required in this context. CERCLA § 122(e)(3), 42 U.S.C. § 6922(e)(3).

Moreover, contrary to Union Pacific's comment that the Court lacks sufficient information to determine whether the Settlement represents a fair and reasonable compromise, UP Comments, PUB_COM001295 at 12-14, the Court has plenty of information before it to determine if an allowed claim of $187.5 million is a fair and reasonable recovery for the OLS. The Court heard four days of evidentiary hearing that included over fifteen witnesses and over 200 exhibits, and that information is before the Court. On this record, the Court is well aware of the United States' views as to the Debtor's share of liability at the Site as well as the precise litigation risks faced by the United States.

As set forth at length before, during, and after the estimation hearing, the United States believes that the Debtor is jointly and severally liable for all response costs at OLS and contributed at least 90% of the lead contamination at the Site, and that past and future response costs at the Site total $405 million. The Parent, Debtor, and UP itself did their level best to convince the Court that Debtor's share of responsibility was less than 90% and the past and future response costs total far less than the United States argues.[13] While UP now comments that the proposed Settlement is a mistake that leaves the United States undercompensated and UP exposed to disproportionate liability in the future, the reality is that the United States faced the risk of receiving even less had it proceeded to an estimation decision. In that event, UP would be left with even greater potential future liability than it asserts it now faces.[14]

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[13]Indeed, UP persists in trying to have it both ways by arguing on the one hand that Debtor is not paying enough because the United States' costs will leave UP with significant liability in the future and on the other that the United States' remedy is inconsistent with CERCLA because it proposes to do too much, resulting in higher costs. UP comments, PUB_COM001295 at 17.

[14]There is also nothing improper about not having a precise mathematical allocation of liability among all PRPs prior to entering a settlement, UP Comments, PUB_COM001295 at 16. In this settlement, issues of litigation risk predominate over allocation issues.

UP comments that the Settlement is not reasonable because, by not recovering more, the United States will be forced to "reduce its scope of remedy, obtain more of its reimbursement from taxpayers through the use of Superfund money, or unconscionably burden other interested parties and/or PRPs." There is nothing inherently unreasonable about accepting less in settlement than full payment of the equivalent to a party's comparable fault on account of litigation risk. Cannons 899 F.2d at 90. Furthermore, CERCLA's preference for early settlement necessarily means that there is nothing inappropriate in a settlement with one PRP that leaves "the possibility that late settlers and non-settlers bear the risk that they might ultimately be left responsible for an enhanced share of the total claim." United States v. Fort James Operating Co., 313 F. Supp. 2d 902, 909.

UP objects to paragraph 13 of the Amended Settlement Agreement and Consent Decree Regarding Residual Environmental Claims, UP Comment, PUB_COM001295 at 15, which provides that only the amount or value EPA receives from Debtors pursuant to its Plan of Reorganization, and not the total amount of the allowed claim, shall be credited by EPA to its account for a particular site, which credit will reduce the liability of non-settling potentially responsible parties like UP for the particular site by the amount of the credit. The significance of this language relates to whether UP will continue to be liable for the full amount of the United States' remaining unreimbursed cleanup costs under CERCLA. UP contends that its potential joint and several liability should be reduced by the amount of the allowed claim, even though, under the settlement, the United States may receive less than the allowed claim amount on account of Debtors' bankruptcy and any reduced payout for unsecured claims under its plan of reorganization.

UP's objection is misplaced because the language of paragraph 13 is consistent with the express language of CERCLA and with Congress' intent that responsible parties rather than the public should bear the burden of cleanup costs. Paragraph 13 is consistent with Section 113(f)(2), (3) of CERCLA, 42 U.S.C. § 9613(f)(2), (3). Section 113(f)(2) provides: "[A]

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." 42 U.S.C. § 9613(f)(2) (emphasis added). In a bankruptcy settlement such as this, the terms of the settlement include a payout amount or value that will be determined in accordance with a plan of reorganization. The "amount of the settlement" therefore under the Amended Settlement Agreement is the amount or value that is received under the Plan, which is consistent with paragraph 13.

Paragraph 13's consistency with CERCLA is further confirmed by the fact that section 113(f)(3) of CERCLA plainly contemplates that the United States can pursue non-settlors whenever it obtains "less than complete relief" from settlors.[15] Congress thus made clear that the United States could pursue non-settlors if settling parties have not made the United States whole, as will frequently be the case where, for example, PRPs file for bankruptcy or have an inability to pay. As the legislative history indicates, nonsettling persons "remain potentially liable for the amounts not received by the government through the settlement." (Emphasis added.).[16] This is in accord with one of the fundamental Congressional purposes in enacting CERCLA: responsible persons bear the costs for remedying the harmful conditions they created.[17] If a settling party does not pay the United States all of its response costs, Congress wanted the other responsible parties to provide the United States with complete relief.[18]

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[15] "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." 42 U.S.C. § 9613(f)(3).

[16] See 131 Cong. Rec. 34,646 (Dec. 5, 1985) (remarks of Rep. Glickman incorporating House Judiciary Committee explanations of amendments to CERCLA); H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 3, at 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3042.

[17] Cannons, 899 F.2d at 90-91; Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

[18] See Rohm & Haas, 721 F. Supp. at 676 & n.10; In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1027 (D. Mass. 1989).

Both Sections 113(f)(2) and (3) thus support paragraph 13's provision for crediting EPA's site account for only amounts actually received by the United States. UP remains liable for any outstanding amounts. This interpretation is consistent with Congress' intent that the United States retain the ability to obtain "complete relief" from the responsible parties whenever possible.

Nor is this result in any way unfair to UP. UP is potentially jointly and severally liable under CERCLA. Thus, it already is liable for and could be required to pay all of the United States' response costs. UP is thus benefited by the Amended Settlement Agreement and Consent Decree through a reduction in its liability to the United States in the amount of EPA's credit to its site account.

UP's position is also contrary to the public interest and to the interest of most PRPs, because it would provide a severe disincentive against the United States' pursuing debtors for CERCLA liabilities where there are other non-bankrupt PRPs. See In re Eagle-Picher Industries, Inc., 197 B.R. 260, 271-72 (Bankr. S.D. Ohio 1996), aff'd, 1997 U.S. Dist. LEXIS 15436 (July 14, 1997 S.D. Ohio). If whenever the United States entered into a bankruptcy settlement, the United States' claims against other jointly and severally liable parties were reduced by more than the United States actually receives, it may not be in the United States' interest to pursue debtors. The United States would recover significantly more by pursuing fully viable non-debtors that are jointly and severally liable with debtors so that the United States could maximize its recovery without any reduction on account of the bankruptcy. The PRPs like UP would then have the burden of pursuing debtors and would themselves face a significant risk that their claims (if timely filed) would be disallowed as contingent claims for contribution. See 11 U.S.C. § 502(e)(1)(B). It is for this reason, inter alia, that the Bankruptcy Court and District Court approved similar language to paragraph 13 in the Eagle-Picher bankruptcy settlement. See In re Eagle-Picher Industries, Inc., 197 B.R. 260, 271-72 (Bankr. S.D. Ohio 1996), aff'd, 1997 U.S. Dist. LEXIS 15436 (July 14, 1997 S.D. Ohio).

The fact that the United States retains the ability to obtain further relief from UP does not mean that the United States could not decide in the future to enter into a settlement with UP that forgives some of the response costs for which it would otherwise be liable. Consideration of such discretionary partial forgiveness by the United States sometimes follows when PRPs enter into settlements with the United States. When EPA enters into negotiations with UP, UP will have an opportunity to request a partial reduction of its liability on account of any "orphan share". For the United States to decide in advance that UP would be automatically entitled to a full credit that is higher than the amount or value the United States actually receives would preclude the United States from the ability to seek complete relief as permitted by CERCLA.

And, notwithstanding UP's comment regarding the resolution of the Debtor's civil penalties at OLS, UP Comment, PUB_COM001295 at 15, the United States has reasonably prioritized recovering funds for cleanup actions over its civil penalty claims.

The Settlement is fair notwithstanding that the covenants not to sue and contribution protection become effective "as of the Closing Date," rather than upon receipt of distributions based on the claims allowed by the Settlements. See UP Comment, PUB_COM001295 at 16. Upon the closing date, ASARCO will have resolved its liability under 42 U.S.C. § 9613(f)(2) and is therefore entitled to contribution protection at that point. In the event that ASARCO fails to pay the United States in accordance with a plan of reorganization or this settlement, then the United States or any other party is free to explore whether it is still the case that ASARCO has resolved its liability.

UP's contention that a premium is "required" whenever a party settles its CERCLA liability, UP Comments, PUB_COM001295 at 12, is without foundation in the case law. If anything, "CERCLA's statutory framework contemplates that [responsible parties] who do not join in a first-round settlement will be left with the risk of bearing a disproportionate share of liability." United States v. Charter Int'l Oil Co., 83 F.3d 510, 515 (1st Cir. 1996). The Cannons court noted that it may be appropriate for a premium to be paid as part of a compromise,

Cannons, 899 F.2d at 88, also noted that litigation considerations form a significant part of the fairness, id., and reasonableness analysis, id at 90. Here, the United States agrees that Asarco's contribution to the Site contamination is significant, but it entered into the settlement based on its analysis of litigation risk to its claim, not based solely on Asarco's contribution to lead contamination at the Site.

Union Pacific also comments that the settlement should not be approved because in the time since the settlement was reached, Asarco's estate has been awarded stock by the District Court. Union Pacific insists that the United States should garner more in settlement than it has agreed, because Asarco is now worth more. UP Comments, PUB_COM001295 at 6, 12, 14. First of all, the United States does stand to benefit by a larger payout from a larger estate, if those are the circumstances at the time of payment. The United States will be paid a higher percentage of its claim if the estate has more to give to its creditors. The United States primarily responds, though, that it agreed to the Amended Settlement for the Residual Sites mainly based on litigation risk. In light of the risks, the United States has agreed to a fair and reasonable settlement that is consistent with CERCLA.[19]

**6. EL PASO SMELTER**

[19]UP makes reference to Section 122 of CERCLA, 42 U.S.C. § 9622. UP Comments, PUB_COM001295 at 16. However, many of the requirements of CERCLA Section 122 apply only to work settlements or administrative cash-out settlements. Bankruptcy cash-out settlements are entered into pursuant to the general inherent authority of the Attorney General to conduct and settle litigation. The Attorney General's authority to conduct, and therefore, settle cases involving the United States is well-established. See, e.g., United States v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992); Tosco Corp. v. Hodel, 804 F.2d 590, 591 (10th Cir. 1986). Courts have upheld the United States' entry into numerous environmental bankruptcy settlements under the Attorney General's inherent authority that have obtained important benefits for the public and have also benefitted other potentially responsible parties by reducing their liability. See, e.g., In re Cuyahoga Equipment Corporation, 980 F.2d 110, 112-13, 119-20 (2d Cir. 1992); In re Eagle-Picher Industries, Inc., 197 B.R. 260 (Bankr. S.D. Ohio 1996), aff'd, 1997 U.S. Dist. LEXIS 15436 (July 14, 1997 S.D. Ohio); In re Energy Cooperative, Inc., 173 B.R. 363, 372 (N.D. Ill. 1994). Furthermore, the District Court, in line with this Court's Report and Recommendation, has already rejected the Parent's motion for withdrawal of reference based on the same argument UP asserts in its comments. UP Comment, PUB_COM001295 at 16, n. 60. In re ASARCO, LLC, Civ. No. 09-cv-91 (S.D. Tex. May 1, 2009). In any event, UP has not filed a timely motion to withdraw the reference.

The United States received 1,738 timely written comments and 25 transcribed comments taken during a public meeting, held on May 11, 2009, in El Paso, Texas, regarding the proposed Custodial Site settlement. The vast majority of written comments were duplicates or versions of the same letter. In addition to the written comments, 11 of 25 individuals who provided oral comments at the public meeting also previously provided similar written comments.

The following table describes the duplicate letters. The table also summarizes 3 letters that represent and encompass the comments not included in the 1,695 duplicate letters as well as the 25 transcribed comments from the public meeting.

| **Letter** | **Number of Letters** | **Summary** |
|---|---|---|
| Sierra Club Membership Letter, PUB_Com 000018 | 1,679 | • Requests public hearing<br>• Requests $250M allocated for comprehensive cleanup |
| PUB_Com 00001 | 16 | • Requests public hearing<br>• Requests at least $250M allocated for cleanup<br>• Compares settlement to other cities with ASARCO smelters<br>• Requests funds be set aside for surveys and testing of health effects for workers and residents<br>• Requests all smokestacks be taken down<br>• Requests smokestacks be tested for hazardous waste prior to demolition |
| Sierra Club – Lone Star Chapter, PUB_Com 001114-21 | | • Objects to TCEQ's use of the Texas Risk Reduction Rules (TRRR) due to industrial cleanup standards<br>• Objects to the use of an asphalt cap over the 100 acre site<br>• Suggests that cleanup costs may exceed $200-300B<br>• Alleges settlement ignores the significant volume (250 acres) of contaminated property adjacent to the Site<br>• Proposes that cleanups at ASARCO's El Paso and Amarillo smelter sites should be kept under separate accounts<br>• Alleges that under the Bush Administration, the DOJ did not negotiate with ASARCO properly<br>• Alleges the proposed settlement does not account for the historic use of "Ionate" (fertilizer mixture)<br>• Questions whether the proposed cleanup plan addresses groundwater remediation<br>• Requests comprehensive Dona Ana, New Mexico multi-media sampling and analysis be conducted<br>• Suggests performing El Paso County Metals Survey Site's hazardous waste dump site multi-media sampling and assessment |

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| | | • Raises concerns over care to be used during demolition activities at the Site Requests public hearing<br>• Requests funds set aside for surveys and testing on health effects on former ASARCO employees and surrounding citizens |
| United States Congressman Silvestre Reyes, PUB_Com 002096-7 | | • Requests public meeting in El Paso<br>• Suggests $52M for remediation will fall short of actual resources necessary to address severe contamination at Site and greater amount may be necessary<br>• Suggests figure wrongly devised from "simple division of limited resources, ignoring the fact that the smelter operation is unique in its location directly within an urban community."<br>• Alleges that proposed remediation targets only a limited portion of the polluted area, "possibly rendering the overall site as undevelopable for appropriate future use"<br>• Worries that lack of funding will compromise groundwater protection efforts<br>• Alleges settlement fails to address ASARCO's illegal disposal of hazardous waste from the Dept. of Defense Rocky Mountain Arsenal |
| Texas State Senator Eliot Shapleigh, PUB_Com 002137-41 | | • Requests public meeting in El Paso<br>• Requests $250M allocated for comprehensive cleanup<br>• Alleges that under the Bush Administration, the DOJ did not negotiate with ASARCO properly<br>• Alleges that proposed remediation fails to address the entire Site<br>• Alleges the proposed settlement does not account for the historic use of "Ionate" in residential properties |

The State of Texas, as the lead agency in the El Paso Smelter Site matter, has also provided responses ("State Response") to the comments it received. See Texas Commission on Environmental Quality's Response to Public Comments Regarding the Consent Decree and Settlement Agreement Establishing a Custodial Trust for the Owned Smelter Site in El Paso, Texas and the Owned Zinc Smelter Site in Amarillo, Texas, Dkt. 11290. The State comments are summarized and cited in our response below when appropriate.

**a. The $52 Million Allocated for Cleanup is Sufficient**

Virtually all of the comments, both written and oral, state that the $52 million allocated for the El Paso Smelter Site cleanup is insufficient.[20] The State, as the lead agency in charge of the remediation, notes that the $52 million cost estimate for remediation of the Site is supported by both independent and internal expert reports. The Response further notes, as a contingency on the cost estimate, any sale proceeds from the disposition of the El Paso property may be used for the remediation of the facility in the event that the $52 million is insufficient. The USEPA has reviewed the cost estimate and expert reports and agrees the proposed settlement amount is reasonable.

**b. The TCEQ Standards are Appropriate**

Many letters, including the Sierra Club LSC letter, object to the use of the selected industrial cleanup standards. The State Response explains that the land use for the remediation of a site is determined by looking at the current land use for the property, under Texas Administrative Code Rules. Since the El Paso Smelter Site is currently being used in a commercial/industrial manner, the future land use for the remediation is also commercial/industrial. EPA's policy is that the current and reasonable expected future land use and corresponding exposure scenarios should be considered in both the selection and timing of remedial actions. 61 Fed. Reg. 19432 (May 1, 1996). EPA reviewed the State's determination and agrees with the decision.

**c. The Cost Estimate Includes the Majority of the Site**

Many letters, including the letters submitted by Representative Reyes and State Senator Shapleigh, question whether the entire site is included in the cost estimate. The State Response clarifies that the entire Site is considered, with the exception of approximately 55 acres on the southern portion of the property. The state recognizes that the 55-acre portion may have elevated levels of lead and arsenic and has estimated remediation to be under $1 million. The State

[20]Several comments erroneously stated that EPA officials estimated the site cleanup costs to be $250 million. EPA has found no evidence that any official made such statements.

proposes that proceeds from the sale or lease of other portions of the property will fund this portion of the cleanup. The USEPA will review any cleanup measures proposed for the 55-acre portion.

**d. Separating of Amarillo and El Paso Funds**

Many letters, including the Sierra Club LSC letter, request that the funds for El Paso Smelter Site and the Amarillo property be listed separately and maintained in separate accounts. The Consent Decree designates $52 million to address the El Paso Smelter Site and $80,000 to maintain the Amarillo property. The United States will ask the Court to provide appropriate clarification for separate accounting.

**e. Potential Coordination Regarding Groundwater Remediation**

Many letters, including the letters submitted by the Sierra Club LSC and Congressman Reyes, question whether the cost estimate covering groundwater is adequate to fully remediate the groundwater. The State Response indicates the intent is to restore the aquifer so that groundwater meets state and federal drinking water standards and also will require that groundwater and surface water will be monitored to ensure that drinking water sources are protected while restoration of the aquifer is ongoing. The United States further notes that the settlement provides for the potential coordination between the United States International Boundary and Water Commission and the State to address groundwater concerns.

**f. Appropriateness of the DOJ Review**

The letters submitted by the Sierra Club LSC and State Senator Shapleigh allege that USDOJ, under the previous administration, did not properly negotiate with ASARCO. No specific allegations were made, and no evidence was provided to support that anything occurred other than arms-length negotiations. The currently delegated official has also carefully considered the received comments. The United States continues to believe that this settlement is consistent with the goals of CERCLA and RCRA, and is in the public interest.

**g. The Use of Ionate Fertilizer is Beyond the Scope of the Settlement**

Many letters, including the letters submitted by the Sierra Club LSC and State Senator Shapleigh, question whether the use of a fertilizer that was produced using slag obtained from ASARCO may have contaminated El Paso yards when applied by the homeowners. The State Response concludes it would be difficult to prove ASARCO's liability for the application of this useful product, and the United States is aware of no evidence that it was applied except as intended. USEPA concurs with the state's assessment of the difficulty of proving CERCLA liability for these releases. See 42 U.S.C. § 9601(22)(D).

**h. The Dona Ana Cleanup has been Addressed**

The Sierra Club LSC letter requests that a comprehensive Dona Ana, New Mexico multi-media sampling and analysis be conducted. The United States has entered into an agreement regarding the cleanup of the Dona Ana Site and no additional work is needed.

**i. El Paso County Metals Survey Site's Hazardous Waste Dump**

The Sierra Club LSC letter requests sampling of the El Paso County Metals Site's Hazardous Waste Dump. The State Response assumes this reference relates to the area surrounding the Site where contamination was discovered and addressed as part of the residential cleanup or the area of the Site east of I-10 (across the highway from the facility) where ASARCO did store waste. If the latter, ASARCO has already removed a large portion of the waste from this area and deposited it in repository cell #3. The State's cost estimate contemplates that another 20,000 cubic yards of material will be removed from this area and placed in the not-yet-constructed repository cell #4. The $52 million cost estimate also includes confirmation sampling to ensure that all the waste of concern in this area has been removed.

**j. Demolition and Testing of the Smokestacks**

The Sierra Club LSC letter requests that the smokestacks on the ASARCO property be taken down as soon as possible and that care be taken during demolition activities to ensure that contaminants do not migrate beyond the ASARCO property. The State Response notes that the demolition of buildings on the site will be one of the first activities in implementing the

remediation. Further, the State will implement dust control measures to address high wind conditions and perimeter air monitoring may also be considered. The USEPA believes these measures are adequate.

**k. Health Assessments are Beyond the Scope of this Settlement**

Several comments received at the public hearing, and the letters submitted by Congressman Reyes and the Sierra Club LSC, request funds be made available for former employees of ASARCO and citizens to undergo continuing health assessments. The United States did not file a claim in the bankruptcy proceedings related to funds for health assessments, however the United States will forward these requests and applicable information to the ATSDR for their consideration.

**l. The El Paso Settlement is Not Less Favorable than Other ASARCO Settlements**

Several of the comments received at the public hearing question whether the El Paso Smelter settlement compares favorably with other ASARCO site settlements by citing two Sites where allowed claims are higher. The United States believes each settlement is unique because site specific conditions must be considered. Moreover, notwithstanding the many commenters who focused the $52 million devoted to the El Paso Smelter Site under the Custodial Trust Settlement, the United States notes the City of El Paso-related costs actually total $100 million, consisting of $29 million for the residential cleanup efforts, $19 million for the USIBWC site, and $52 million for El Paso Smelter Site. Regarding the residential cleanup standards, the standards for arsenic and lead used to clean the El Paso residential properties compare favorably with the standards used at the larger ASARCO sites in Washington, Nebraska, Colorado and Montana. For example, the level of 500 parts per million (ppm) for lead used in the El Paso area is within the range 400 ppm to 1200 ppm used in the other state sites.

**m. Possible Mexico Contamination is Beyond the Scope of this Settlement**

Several comments received at the public meeting request that possible contamination in Mexico be considered in the settlement. The releases into the environment in Mexico are beyond

the scope of the Custodial Trust Consent Decree and the claims of the United States under this settlement. See 42 U.S.C. § 9601(8).

**n. Rocky Mountain Arsenal/Encycle Waste**

The letter submitted by Congressman Reyes questioned whether the settlement covers ASARCO's illegal disposal of the hazardous wastes from the Encycle facility. Pursuant to the 1999 RCRA El Paso Smelter Consent Decree, ASARCO paid a penalty for the illegal treatment, storage, and disposal of wastes. The current remediation addresses the waste that remains at the Site. The State Response properly notes that a thorough discussion of the Encycle waste issue as it relates to waste from Rocky Mountain Arsenal is contained in Appendices I and II of the November 2007 GAO Report on Hazardous Waste. The report states that Encycle would test waste coming into the facility to ensure that it met acceptance criteria, which did not allow radioactive material, explosive material, or dioxins. Specifically in regard to Rocky Mountain Arsenal, the report states that the waste received by Encycle from this facility had a low hazard level and was a liquid residue containing dissolved salts and residual metals. The USEPA also stated at the public meeting that ASARCO did not accept dioxin or radioactive materials, consistent with the 2007 GAO Report findings.

## IV. THE PROPOSED SETTLEMENTS ARE FAIR AND REASONABLE UNDER BANKRUPTCY LAW

The proposed settlements represent significant compromises by the United States and sixteen States, each of whom represent the interests of the public in cleaning up contaminated sites that endanger public health and the environment.[21] Through more than a dozen separate mediations on the already-settled sites, three multi-day estimation hearings for three large sites, and more than a year of mediation on the remaining sites, the governments have steadfastly

[21] In addition to the substantial compromises on a site-by-site basis as set forth in the tables below (see supra Section III), the United States did not seek the reimbursement of DOJ's more than $7.9 million in enforcement costs for this case, See USMISC086131, which are recoverable under CERCLA. See United States v. Northeastern Pharmaceutical and Chemical Co., 579 F.Supp. 823, 850 (W.D. Mo. 1984), aff'd in part and rev'd on other grounds, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

avoided unnecessary litigation, litigated where appropriate, and sought to achieve reasonable settlements that ultimately benefit all creditors by allowing the Debtor a chance to exit bankruptcy without becoming mired in dozens of lengthy, time-consuming environmental estimation hearings. Notwithstanding the objections of the Parent, the Creditors Committee, and Union Pacific, who focus almost exclusively on the settlements for the Omaha Lead and the Coeur d'Alene Site,[22] the compromises reflected in the five proposed Environmental Settlements are fair, reasonable, and in the best interests of the estate.

To approve the Settlements under bankruptcy law, the Court must determine that they are fair and reasonable and in the best interests of creditors. See Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968). Such a determination is left to the sound discretion of the bankruptcy court. United States v. AWECO, Inc. (In re AWECO, Inc.), 725 F.2d 293, 297 (5th Cir. 1984). The factors relevant to that determination are the probability of success in litigation, the complexity and likely duration of the litigation, and other factors relevant to the wisdom of the compromise, Rivercity v. Herpel (In re Jackson Brewing Co.), 624 F.2d 599, 602 (5th Cir. 1980), which include "the paramount interests of the creditors with proper deference to their reasonable views" and "the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion," Connecticut Gen. Life Ins. Co. v. United Cos. Fin Corp. (In re Foster Mortgage Corp.), 68 F.3d 914, 917, 918 (5th Cir. 1995) (citations omitted). Where these factors call for an evaluation of the strengths and risks associated with the underlying claims, the Court must apply non-bankruptcy law to evaluate such strengths and risks, unless the Bankruptcy Code provides otherwise. See Travelers Cas. & Surety Co. v. Pacific Gas & Elec. Co., 549 U.S. 443, 448-52 (2007); In re Brints Cotton Marketing, Inc., 737 F.2d 1338, 1341 (5th Cir. 1984).

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[22]Because the Parent's site-specific public comments are substantively identical to their objections and argue that the governments are recovering too much, they are discussed together in this section of the brief. Conversely, because UP's site-specific public comments are substantively identical to their objections but argue that the governments are recovering too little, they are discussed together above. See supra Section III.

The proposed settlements reflect the litigation risks for both sides in proceeding to estimation for each site.[23] See, e.g., Debtor's Motion at 13-16. Both Parent and the Committee steadfastly ignore these litigation risks and refer only to their and Debtor's experts' positions in the case, as if the were not another side to the settlements that were reached. Moreover, Debtors avoid the risk of joint and several liability. The objectors' general complaints that the Settlements provide too great a recovery to the governments ignore these significant risks. Their settlement- and site-specific objections are equally flawed.[24]

**1. The Custodial Trust Settlements are Fair and Reasonable**

**a. The Funding for Cleanup Is Fair and Reasonable**

The Parent's and Committee's objection that the three custodial trust settlements improperly provide more money to the governments than the Debtor's expert, Mr. Perazzo, opined would be necessary, Dkt. 10741 at 2, n.3 and Dkt. 10734 at 6, cannot be taken seriously. In their focus on how much they agree with Mr. Perazzo, the Parent, Committee, and Committee's expert Johns act as if there were only one side to the negotiation. The United States and States have their own views of how much it will cost to clean up these sites, and those views are supported not only by the experience and expertise of the environmental agencies involved, but by numerous expert witness reports that the Parent and Committee pretend do not exist. Of course, the essence of any settlement is compromise, and the ultimate settlement amount is

[23]The Committee and the Parent both criticize the Debtor for allegedly having failed to individually consider each Site. See Dkt. 10741 at 2 and Dkt. 10734 at 9-10 (with respect to Miscellaneous Federal and State Sites). However, as Mr. Lapinsky testified in his deposition, the Debtor considered the settlements site by site and found that they were reasonable. See e.g., Lapinsky Tr. at 16:12-17:1, 17:8-16, 49:1-14, 49:18-24; 53:8-16; 62:15-18; 67:6-20.

[24]Both the Committee and the Parent also criticize the Debtor for failing to provide sufficient information to the Court to enable it to consider the settlements. See Dkt. 10741 at 2-7 and 10734 at 2-3, 5, 9. By the time the two-day hearing on the settlements concludes, the Court will have before it the testimony of multiple expert witnesses and dozens of fact witnesses, hundreds of exhibits, and argument and briefing by counsel on all sides, not to mention the record compiled during 13 days of estimation hearings on three of the large sites. That is a sufficient record on which to consider these settlements under bankruptcy law.

naturally going to be somewhere between the two sides' positions. To pretend otherwise is unrealistic.

The Parent and Committee also unrealistically ignore the risk Debtor faced that Mr. Perazzo's opinions as to the costs of future work would be rejected in favor of those of the governments'. Aside from this general and obvious litigation risk, even the Creditor Committee's expert has admitted that whether a particular response action would be accepted by the government agency with decisionmaking authority for a particular site is important in projecting future costs at a Site. Johns Tr. at 141:22-142:2. The United States believes that Mr. Perazzo did not adequately consider this factor, among many others (including, e.g., the incurrence of government oversight costs).

Moreover, because environmental investigations are not complete at many of these sites, the governments are assuming significant risks of unknown events and cost overruns.[25] For example, when the parties negotiated the settlement for the Ragland Site, they believed essentially all cleanup work was complete. Since that time, it has come to light that significant cleanup work remains to be done. The property is in deep disrepair, and poses significant potential costs to address, at least, environmental and public safety concerns. See Ragland Photos Exhibit.

To the extent that the governments' estimates include demolition costs at some sites, the Committee's expert's view that such costs are not usually recoverable under CERCLA, Johns Proffer, Dkt. 11268 at ¶ 28, is inaccurate. In cases where demolition is part of the response action, Courts have generally found demolition costs to be recoverable. See Bancamerica Commercial Corp. v. Trinity Industries, Inc., 900 F. Supp. 1427, 1468 (D. Kan. 1995) ("While the building demolition undoubtedly resulted in some enhancement of the property's value, this was

[25]While the governments do not believe they are in fact obtaining a premium, the Committee's own expert conceded that there is value associated with securing a complete liability transfer associated with known and unknown environmental liabilities at a site, Johns Tr. at 112:18-22, which is what the Custodial Trust Settlements accomplish from the Debtor's perspectiv. See Cannons, 899 F.2d at 88 ("obtaining a complete release from uncertain future liability may call for a premium.").

not the sole reason for taking the action. EPA had valid concerns regarding possible contamination of the soils underneath the buildings. The evidence suggests that in order to properly complete the cleanup ASARCO was required to remove the buildings and address the underlying soils. This work was performed in a reasonable manner, and under the circumstances it constitutes a necessary cost of response. The court concludes that the cost of building demolition is a reasonable and necessary cost of response, and that the total costs incurred by ASARCO related to lead remediation are recoverable under CERCLA.").

The Committee's vague criticism that the settlement improperly provides the governments with whatever value the properties have once they are remediated, Dkt. 10734 at 6, fails to recognize that the governments have in many cases agreed to funding significantly less than what they project cleanup costs may be (as well as having assumed the risk of unknown conditions and cost overruns). The availability of the value of the remediated sites mitigates the risks the governments have thereby assumed and represents a fair compromise for the Debtor since it avoids an additional upfront cash payment that would otherwise have been necessary.[26] In reality, the value of these properties may be limited, especially in comparison to the expected cleanup and restoration costs. See e.g. Jacobson Decl. at ¶¶ 16-21.

For example, with respect to the East Helena, the United States has submitted the expert report and proffer of Gregory A. Brusseau, Dkt. 11269, Ex 1, and fact witness proffers of Linda Jacobson, the RCRA Project Manager for the site, Dkt. 11275, Ex. 9, and Randall Breeden, an EPA hydrogeoloist, Dkt. 11275, Ex. 2. Using EPA's RCRA Proposed Remedy to project future cleanup work and costs at the Site, Mr. Brusseau conservatively estimates future costs to be $120,867,832, or approximately ***$20 million*** more than what the United States and Montana are settling for. Brusseau Proffer Dkt. 11269, Ex. 1 at 6, ¶ 9. Brusseau also opines, however, that his

[26] Moreover, by transferring the property and cleanup obligations to a custodial trust, the Debtor is able to provide funding to the trusts that is less than what be needed if given directly to the governments because the governments will incur only oversight costs, and not indirect costs, in supervising the implementation of the work performed by the custodial trusts.

estimate "aggressively assumes that limited soil excavation and capping will capture all of the sources [of groundwater contamination], and that a relatively short water treatment period will flush metals from the groundwater." Id at ¶ 10. If any or all of these assumptions turn out to be incorrect, the costs for response would increase to as much as $219,931,812, or approximately **$120 million** more than what the United States and Montana are settling for. These costs exclude EPA and Montana oversight and indirect costs (32.27% for EPA Region 8 in 2007), which would be incurred if this Site were to be regulated as a Superfund site rather than a RCRA site, and the risk that additional soils cleanup on ASARCO-owned undeveloped land would be required, at a cost of $3.9 million or more. Id. at ¶ 10. Thus, notwithstanding that the Debtor's range from expected value to 95% confidence level is roughly $49 million to $56 million, the United States estimate of the range from the base case to the worst case is roughly $120 million to $224 million. Id. at Figure 4. The settlement value of $100 million, with the additional potential for value from portions of the remediated property, is a reasonable compromise between these two ranges.

Moreover, the settlement is not limited to the Debtor's liability under RCRA. It also resolves the State of Montana's restoration-based claim for damages to natural resources at the Site.[27] This brings Debtor's potential liability at this Site to at least $161 million. See Proffer of William Bucher, Dkt. No. 11262 at ¶ 35.

**b. The Administrative Cost Amount Is Fair and Reasonable**

Equally unfounded is the Committee's objection to the administrative funding for the custodial trusts. The Debtor's original proposal to fund the trusts with $17.5 million unrealistically projected costs out only six years into the future, Lapinsky Tr. at 47:14-15, when even Mr. Perazzo's expert report predicts that many sites will take far longer to clean up. In fact, the $27.5 million allowed claim represents a reasonable sum given the near certainty that many of these properties will remain in trust for a long period. For example, the United States believes

[27]The Settlement also includes funding for DOI's costs, as co-trustee for certain resources, of coordinating NRD work with the State.

that active treatment of the groundwater and long-term monitoring at East Helena will take at least 30 years, Brusseau Proffer at ¶ 9, and possibly in perpetuity, id. at 10. The Committee's own expert completely agrees with the Debtor's expert's underlying assumptions and analysis, Johns proffer at ¶¶ 6-11, and Mr. Perazzo himself assumed that cleanup of the selenium contaminated groundwater at East Helena would take fifteen years, with long-term O&M continuing for another thirty years. Exp. Report of James Perazzo, Supporting Documentation at 8. Indeed, several sites, including the East Helena Smelter property, are essentially permanent waste repositories that are unlikely ever to be sold. Moreover, Debtor's proposal of $17.5 million applied an unrealistically aggressive discount rate of 8%, Lapinsky Tr. at 16-7, given the fact that custodial trustees' investments are typically required to be extremely risk averse. See, e.g. Multi-State Custodial Trust Agreement Attachment D at § 2.6.1.

**c. Custodial Trust Treatment with Cash Funding is Fair and Reasonable**

The Parent and Committee also fail to take into account the fact that the estate is getting substantial value from the settlements in the form of a complete resolution of the Debtor's civil liability for these owned sites. Ordinarily, EPA settlements have a reopener for unknown conditions. Cf. 42 U.S.C. § 9622(f)(6) (requiring CERCLA work consent decrees to contain reopeners for unknown conditions absent "extraordinary circumstances"). In particular, the Parent's argument that the custodial trust treatment of these liabilities is somehow improper, Dkt. 10741 at 37, is baseless. Absent these settlements, the Debtor would remain obligated to comply with non-bankruptcy law at these owned properties, including the performance of corrective action, reclamation, and the like. See 28 U.S.C. § 959(b). In addition, in order to get any plan confirmed, the Debtor would have to provide for compliance with law at these properties. Otherwise the Plan would be "forbidden by law" and unconfirmable. See 11 U.S.C. § 1129(a)(3); In re: Eagle Picher Holdings, Inc., 345 B.R. 860 (Bankr. S.D. Ohio 2006) (considering whether environmental custodial trusts proposed by Debtor in a plan of reorganization were sufficiently funded to demonstrate that the plan was not forbidden by law under 11 U.S.C. §1129(a)(3)).

Indeed, the formation of, transfer of contaminated property to, and funding of, custodial trusts is a common bankruptcy mechanism for dealing with environmental liabilities at owned properties.[28] See, e.g., In re Fruit of the Loom Inc., No. 99-4497 (Bankr. D. Del.); In re Philip Servs. Corp., No. 03-37718 (Bankr. S.D. Tex); In re Eagle-Picher Holdings, Inc., No. 05-12601 (Bankr. S.D. Ohio).

The Committee appears to propose that all of the properties covered by the Custodial Trust Settlements should have been placed in a single trust, funded at Mr. Perazzo's expected value for the "combined portfolio," because cost overruns at any one site would be cancelled by cost underruns at some other site. See Johns Proffer at ¶ 21. This approach unrealistically ignores the fact that thirteen states plus the federal government are involved in the proposed Custodial Trust Settlements. Any structure that does not designate particular amounts to each Site would never be acceptable to these diverse interests and would, in fact, encourage a race to the finish at each Site to ensure that funding would be available there, potentially leaving sites not as far along in the investigation and decisionmaking process high and dry. Furthermore, a custodial trust structure that failed to allocate as between individual sites would be unfair to other PRPs at CERCLA sites since they would not know how much funding was being set aside for a site at which they were liable.

**d. Provision Relating to Leftover Funds Is Fair and Reasonable**

Notwithstanding the Parent's assertion to the contrary, Parent Public Comment at 28-29, allowing whatever funds remain after cleanup at a given site is complete to be transferred to the Superfund is not improper. This provision was required by Debtor for tax reasons and actually serves as a benefit to the estate. In any event, the vast majority of the cleanups call for long-term operations and maintenance, often in perpetuity, meaning that as a practical matter there never will be any surplus to transfer to the Superfund.

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[28]Contrary to the Parent's assertions, Dkt. 10741 at 37, environmental liabilities for owned properties give rise to administrative expense priority. See Dkt 4657 at 17-19.

**2. Debtor's Agreement to Guarantee the Parent's Remaining Payments to the Prepetition ASARCO Environmental Trust is Fair and Reasonable**

The Committee criticizes the Debtor's agreement as part of the Environmental Settlements to place in escrow an amount equal to the Parent's remaining payments to the Prepetition ASARCO Environmental Trust as "without consideration." The Committee ignores the fact that the proposed Settlements in return provide the Debtors with protection against all future civil environmental liability for acts, omissions, or conduct of the Debtors that created liability under environmental laws prior to February 1, 2009, at any site not owned by the Debtors as of that date, "even if the governments are presently unaware of such liability." See e.g., Miscellaneous Federal and State Sites Settlement at 32 ,¶ 30(B). Such liabilities would otherwise not be discharged through this bankruptcy. See In re: Crystal Oil Co., 158 F.3d 291, 296 (5th Cir. 1998) (holding that claims for environmental liabilities arise on the date "a potential . . . claimant can tie the bankruptcy debtor to a known release of a hazardous substance."). The governments are willing to look to the Prepetition ASARCO Environmental Trust to fund cleanups at as-yet-unknown sites for which ASARCO may in the future be determined to be liable as long as there is assurance that that Trust will be funded.[29] These two provisions – the governments' agreement to forego environmental claims that have not yet arisen and the Debtor's guarantee of AMC's future payments to the prepetition trust – are sufficient consideration for one another in the Settlements.

**3. The Proposed Settlements Do Not Constitute a Sub Rosa Plan**

The Committee's objection that the proposed Environmental Settlements somehow constitute a sub rosa plan, Dkt. 10734 at 10-12, is baseless. The proposed Environmental Settlements do not dispose of all claims against the Debtor, do not restrict creditors' right to vote as they deem fit on a proposed reorganization plan, and do not "dispose of virtually all of

[29]In addition, the governments accepted less funding from the estate on the understanding Debtor would perform work until the Effective Date at some sites using funds from the Prepetition ASARCO Environmental Trust.

[Debtor's] assets, leaving 'little prospect or occasion for further reorganization." See Official Committee of Unsecured Creditors v. Cajun Electric Power Cooperative, 119 F.3d 349, 355 (5th Cir. 1997) (citing Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways), 700 F.2d 935, 940 (5th Cir. 1983) (setting forth and applying legal standard for determination of whether a compromise is a sub rosa plan). Indeed, if anything, the custodial trust mechanism in particular paves the way to a confirmable plan, avoiding future litigation over plan proposals that might be "forbidden by law" due to the treatment of environmental liabilities on owned property. See Eagle Picher, 345 B.R. 860. In this sense, the owned non-operating contaminated properties to be transferred to custodial trusts pursuant to the Custodial Trust Settlements are "not so much the crown jewel of [Debtor's] estate, but its white elephant." See Cajun Electric, 119 F.3d at 355.

**4. The Proposed Settlement Amount for the Monte Cristo Site Appropriately Takes Into Account Debtor's Period of Operations at the Site**

The proposed settlement amount for the Monte Cristo Site, contained in the Miscellaneous Federal and State Sites Settlement, provides an allowed claim of $11,000,000 to be split evenly between the United States and the State of Washington. This settlement is a significant compromise from the governments' claims for future responses costs, NRD, and past costs, which total approximately $25,000,000. This amount was reduced due to litigation risks and in light of ASARCO's limited period of operations. However, the fact remains that ASARCO is the last viable PRP connected to mining in the Monte Cristo Mining Area (MCMA).

The Committee's vague reference to the possibility that other PRPs may be found for this Site, Dkt. 10734 at 9, is belied by the results of the Forest Services' PRP Search and related investigations. ASARCO and/or its corporate ancestors and affiliates owned and operated mines and mining facilities in the MCMA from 1903 (and potentially as early as 1902) through 1907. Lentz Decl. at ¶ 9. All other companies that once owned or operated mines or mining-related facilities in the MCMA are either dissolved or cannot be located (and the two entities for which corporate records cannot be located were involved with mines not presently targeted for cleanup),

leaving ASARCO as the last viable PRP connected in any way to mining operations for the portions of the MCMA covered by the Settlement.[30] Lentz Decl. at ¶ 13.

Furthermore, the Committee's assertion that the proposed settlement amount for the Monte Cristo Site "improperly ignores Debtor's limited ownership" ignores the fact that Debtors are, if not jointly and severally liable outright, at least liable for their share of the orphan shares at the site. See Restatement (Second) of Torts § 433A, comment h; cf. Sun Co., Inc. (R&M), 124 F.3d at 1193; Morrison Enterprises, 302 F.3d at 1135; Pinal Creek, 118 F.3d at 1303; Centerior Service Co., 153 F.3d at 354 n.12; Vine Street, 460 F.Supp.2d at 761 n,129.

**5. The Proposed Settlement Amount for the Tacoma Smelter Site Takes Into Account the Assumption of Certain Work Obligations by Another Party**

Asarco's operation of a copper and lead smelter on the western shore of Commencement Bay in Washington State for 80 years led to its liability for cleanup of three Operable Units of the Commencement Bay Nearshore/Tideflats Superfund Site. A 1995 consent decree requires Asarco to remove arsenic- and lead-contaminated soils from residential yards and public properties in Tacoma and Ruston, Washington (Operable Unit 04). A 1997 consent decree requires Asarco to clean up the smelter property itself (Operable Unit 02), by removing buildings and contaminated soils and placing a cap on the smelter site and a hard surface along the property's Commencement Bay shoreline. A 2002 Unilateral Administrative Order requires Asarco to clean up parts of the Bay (Operable Unit 06) by dredging contaminated sediments and placing a cap on off-shore areas.

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[30]There are an additional five private landowners who are technically PRPs due to their current ownership of small portions of land within the MCMA from which hazardous waste is being released by virtue of passive migration. However, the Forest Service would face significant hurdles if it pursued a cost recovery action against these individuals and trusts. For example, these private landowners may have a divisibility defense based on their ownership of relatively small portions of the total site and their lack of a connection to mining activity. In any event, even if these private landowners were ultimately held liable for some or all of the response costs at the Site, the Forest Service does not believe these individuals and trusts have significant financial resources in comparison to the likely future response costs. Lentz. Decl. at ¶ 13.

In 2006, this Court approved the sale of the smelter property to Point Ruston, LLC, a private land developer. Point Ruston agreed to conduct most of the cleanup of the smelter property and some of the cleanup of the off-shore sediments. However, Asarco remains liable for the work in the event of default by Point Ruston.

The Committee asserts that the settlement amount for the unowned portions of the Tacoma Smelter Site, contained in the Miscellaneous Federal and State Sites Settlement, ignores "the transfer of the Tacoma property to a brownfield developer who assumed liability for a significant portion of the remediation at the site." Dkt. 10734 at 9.

Contrary to the Creditors' Committee's assertion, the settlement did take into account Point Ruston's assumption of these obligations. The United States' $73 million future cost expected value includes a 20% chance that Point Ruston will default and the United States will have to take on Point Ruston's cleanup obligations. Koch supp. Report at 1. This is a reasonable assumption. However, even assuming full performance by Point Ruston, the United States' future cost expected value for the portions of the cleanups that Point Ruston did not take on is $55.4 million. Koch supp. report at 1. Clearly, the proposed Settlement providing the United States an allowed claim of $27 million reflects Point Ruston's assumption of some cleanup obligations, and represents a significant compromise of the United States' claim.

**6. The CdA Settlement Is Appropriate Because It Is Well Below What Debtor Would Owe Even If The 22% Divisibility Ruling Was Completely Upheld, And Parent Presents No New Evidence To Challenge The Vast Majority Of The United States' Claims.**

Despite broadly deriding the United States' CdA Basin claims as "highly exaggerated" and "wildly inflated," Parent's Objections (Docket #10741) at 33, the Parent's objections are actually limited to a relatively small portion of those claims. The United States' claims at the CdA Basin Site have three components: (1) $180 million in past costs, which neither Parent nor Debtor has disputed; (2) $2.05 billion in future EPA response costs, including oversight costs; and (3) $333 million in natural resource damage claims on behalf of the Departments of the

Interior (DOI) and Agriculture. Debtor's 9019 Motion (Docket #10534) at 13. The total claim is approximately $2.56 billion. Parent's Objections (Docket #10741) at 33.

Parent presents no new evidence or analysis challenging the amounts of past costs or EPA's future response costs, which together comprise approximately $2.23 billion of the total $2.56 billion claim. Those costs are primarily for EPA's Comprehensive Remedy. EPA presented the detailed technical and legal bases for the Comprehensive Remedy at the 2007 estimation hearing, and Parent raises no additional challenge to that demonstration. See United States' Post-Hearing Brief (Docket #6219) at 1-18.

Instead, Parent's Objection focuses on the NRD claims, which constitute approximately $333 million. Parent's Objections (Docket #10741) at 33-35; Debtor's 9019 Motion (Docket #10534) at 13. Parent mistakenly terms these "EPA" damages, but in fact they pertain only to the NRD claims of DOI and Agriculture and have nothing to do with claims for either past costs or future EPA cleanup costs. As discussed below, even these limited challenges are without merit.

Parent argues that the proposed settlement is improper because of the district court's divisibility ruling. Parent's Objections (Docket #10741) at 27-32. Parent's argument, which relies on the assumption that there is no possibility the decision will be reversed on appeal, overlooks two points. First, even if Parent was correct that the divisibility ruling was absolutely certain to be affirmed in all respects, the settlement is nonetheless appropriate: Parent does little if anything to challenge the value of the United States' claims, and the settlement amount of $482 million is well below 22% of the United States' total claims. Second, every divisibility inquiry is inherently fact-specific, but Parent makes no effort to address the facts underlying the district court's divisibility analysis, nor how that analysis would withstand scrutiny under controlling law.

**a. Parent Produces No New Evidence To Question EPA's Comprehensive Remedy, And Recent Developments Further Support Using The Comprehensive Remedy To Value EPA's Claims.**

The Comprehensive Remedy represents EPA's long-term cleanup plan for the Basin. This plan is necessary for protection of human health and the environment, and thus provides the basis for the United States' claim regarding future response costs in this bankruptcy proceeding. EPA has estimated the future Basin response actions set forth in this plan will be approximately $2.05 billion, which constitutes the vast majority of the United States' total cost claim. The technical and legal bases for EPA's Comprehensive Remedy for the Coeur d'Alene Basin were presented in detail at the October 2007 estimation hearing and are summarized in the United States' Post-Hearing Brief. (Docket #6219) at 1-18. At that hearing, Debtor did not contest the fact that the Coeur d'Alene Basin is highly contaminated with mine-related wastes or that the wastes released by mining operations have been carried downstream and deposited in the sediments and on banks and flood plains or used as fill throughout the Basin. Neither Debtor nor Parent deny that these mine wastes are now distributed throughout the river and creek corridors, in the wetlands and lateral lakes that adjoin the main stem of the River, and in Lake Coeur d'Alene, where they come into contact with fish, birds, and other wildlife, as well as with people who use these areas. Instead, Debtor presented testimony and argued that political considerations would prevent EPA from implementing any of the Comprehensive Remedy beyond EPA's Interim Record of Decision. In effect, Debtor suggested that the court nullify EPA's long-term remedial approach without a technical or legal basis for doing so. See id. at 5-13.

To the extent that Debtor's arguments had any merit at that time, events since October 2007 have shown those arguments to be in error. The supplemental testimony of Cami Grandinetti, EPA's manager for the Coeur d'Alene Basin, demonstrates that the Comprehensive Remedy can and is being implemented. See Grandinetti's May 2009 Declaration. EPA is currently pursuing an amendment to the 2002 Interim Record of Decision as Ms. Grandinetti testified during the October 2007 estimation hearing. The range of alternatives being considered includes all of the Comprehensive Remedy for the Upper Basin, which represents approximately half of the Comprehensive Remedy for the entire Basin. Grandinetti's May 2009 Declaration

¶ 6. The Amended ROD will also describe EPA's strategy for implementing the Comprehensive Remedy in the Lower Basin. Id. ¶ 17. Implementation of cleanup will come later in the Lower Basin than the Upper Basin due to the general sequencing of the Basin cleanup schedule. Id. EPA anticipates issuing the ROD Amendment in the middle of 2010. Id. ¶ 10. The State of Idaho is working closely with EPA on the ROD Amendment, and EPA is engaged with all other interested stakeholders and the public in the Basin. Id. ¶¶ 24-26.

Perhaps owing to EPA's further work on the Comprehensive Remedy, Parent does not even repeat Debtor's earlier argument that it could not be done (though the Parent did echo it during the estimation proceedings). In fact, other than criticizing aspects of the NRD claim, which is not part of EPA's claim at all, Parent offers no new basis for its generalized assertion that EPA's claim is inflated. In addition, since filing its objection, Parent has identified no witness to testify about EPA's CdA claims at the upcoming hearing on Debtor's motion to approve the environmental settlements. In short, Parent appears to have no new evidence to present regarding the valuation of the past cost claims or EPA's future cost claims for the CdA site.[31] That being the case, Parent's rhetoric cannot overcome the specific demonstrations of the technical and legal merits of EPA's remedy, EPA's willingness to implement that remedy, and EPA's public commitments to do so.

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[31] In addition to filing its objections to the CdA settlement in this Court, Parent also sent "Public Comment" on the CdA settlement to the Department of Justice. Parent's public comments on the CdA settlement are generally a verbatim restatement of its bankruptcy court objections. However, Parent's public comments also challenged the placement of $41 million of the settlement proceeds into a trust account for oversight of EPA's remedial work in the Basin, based on Parent's belief that this would potentially result in an overpayment of EPA's claim against Debtor. PUB_COM002054-56. First, Parent incorrectly assumes the $41 million applies only to EPA's oversight costs when, in fact, this amount reflects both EPA's past costs and EPA's future oversight costs. This $41 million represents 10% of Debtor's payment for the Basin that corresponds to EPA's combined past and oversight costs approximating 10% of EPA's total claim. Moreover, the Parent's comment errs by making a judgment about overpayment based on EPA's internal decision about what to do with the settlement proceeds. EPA's decision to use the $41 million from this settlement to fund oversight work at the CdA site is entirely within EPA's discretion. More generally, judging whether an overpayment by a debtor to a creditor has been made requires comparing the amount paid to the amount of the claim; how the creditor spends the money is of no import.

**b. Parent's Additional Testimony Does Not Diminish The United States' Natural Resource Damages Claims.**

The issues raised by Parent in its brief to the Court and its public comments on the Coeur d'Alene settlement are identical. See Parent's Objections (Docket #10741) at 34-36; PUB_COM002052-54. In both instances, the Parent focuses on neither the sweeping injuries to resources throughout the Basin nor on the methods used by the United States to calculate its damages. Nor does the Parent provide any legal basis for challenging the United States' selection of restoration options. Rather, Parent makes four points which are supported by neither the record nor the law. First, despite the revised damages calculations which would result in significantly more damages than originally thought, the amount of damages sought in this settlement has not changed at all. Second, whether the number of tundra swans living in North America is increasing or decreasing, this should not affect the recovery of damages for the extraordinary contamination of the Coeur d'Alene River Basin. Third, the Court has heard no evidence – nor will it – that any additional tundra swan nesting grounds are available to compensate for damaged and destroyed wetland habitat. Finally, all evidence before the Court regarding conservation easements in the Basin directly contradicts Parent's argument that such easements should be the restoration option chosen to compensate the public for the large-scale pollution of public lands.[32] These arguments are further discussed in turn.

The United States has not increased the damages demand made in the original Proof of Claim. To be sure, the "more fish, more damages" argument presented by Parent is wholly inaccurate. The United States told this Court that, despite the revised damages calculations, the amount of damages sought in this settlement has not changed. Tr. (Day 4 p91). This is so even though new sampling quite plainly demonstrates that the baseline used in the original damages calculations significantly underestimated the populations of cutthroat trout which would inhabit Canyon Creek were it not for mine pollution. Moreover, regardless of whether damages have

[32] Each of these points is also fully addressed in the United States' Post-Hearing Brief (Docket No. 6219) at 30-35.

increased, decreased, or stayed the same, this calculation effects only *one* small portion of *one* tributary in the Coeur d'Alene Basin. Thus, even if the United States were to seek no damages for that stretch of Canyon Creek, it would be insignificant when compared to the damages sought for injury to surface waters in the Basin.

Second, the population of tundra swans in North America – whether increasing or decreasing – provides no basis for rejecting the United States' decision to restore the metals-contaminated wetlands in the Coeur d'Alene River Basin. Parent suggests that, because tundra swan populations are increasing in the Pacific Flyway, the Trustees should not be allowed to recover damages based on the mining companies' extraordinary contamination of the Basin. To be sure, Parent offers no reason not to redress this valuable wetland habitat. Nonetheless, the United States is entitled under the law to restore the wetlands on which migratory birds rely. The Court's inquiry can end there.

Moreover, the Court has heard no evidence – nor will it – that any additional nesting grounds are available to compensate for damaged and destroyed wetland habitat. To the contrary, the testimony elicited at the first hearing from Dr. Robert Trost, the Chief Waterfowl Biologist for the U.S. Fish & Wildlife Service in the Pacific Flyway, was that Parent's suggested alternative is "not possible." (Tr. Day 2, p205). "There is no more land in private hands there that we can obtain that would address the problem. And so it's not a feasible alternative to expand the nesting easement." (Tr. Day 2, Pp207). Debtor's expert witness knew of no additional easements that could be obtained in the nesting grounds of the tundra swan. Tr. III:232:21-25; Ex.USCdA 120 at 155:3-8. In the absence of a factual basis for selecting a different alternative, the Trustees' selection cannot be rejected. U.S. v. Great Lakes Dredge & Dock, 259 F.3d 1300, 1307-09 (11th Cir. 2001).

Finally, all evidence before the Court regarding conservation easements in the Basin directly contradicts Parent's argument. Parent suggests that the Court value the injuries to federal lands based on the costs of acquiring conservation easements elsewhere in the Coeur d'Alene

Basin. To be sure, the economist hired by Asarco chose this restoration option, even though the "people that know this area, that are familiar with these resources, that are responsible for these resources and the management thereof concluded that [conservation easements] are not feasible." Tr. (Day 4 at 23). And when asked about how to treat restoration options that are not feasible, even the Parent's expert agreed that "if it's not going to work, it's not a viable option." Tr. (Day 1 at 46). To now suggest that the United States should be forced to value its claims based on restoration options that will not work – according to the testimony and affidavits in front of the Court – is nonsensical.

Perhaps most importantly, Parent has provided to the Court no legal basis for rejecting the United States' selection of restoration options. As discussed at length in the United States' Post-Hearing Brief, the selection by a court of a restoration plan different than that chosen by the Trustees and that does not restore injured natural resources is contrary to controlling law. See United States Post-Hearing Brief (Docket No. 6219) at 29-30. The D.C. Circuit Court of Appeals has rejected that approach as "directly contrary to the expressed intent of Congress." State of Ohio v. DOI, 880 F.2d 432, 442 (1989).

**c. Even If the District Court's 22% Divisibility Ruling Were Certain To Be Upheld In All Respects, The Settlement Agreement Already Substantially Discounts The United States' Claims Below 22%.**

The settlement of claims for the CdA site is roughly proportionate to the amounts of those claims. The total settlement is $482,143,000, consisting of $41,464,000 for past costs, $373,179,000 for EPA's future response costs, and $67,500,000 for DOI's and Agriculture's natural resource damage (NRD) claims. See Parent's Objection (Docket # 10741) at 33 n.61. Despite agreement among the parties on the amounts sought by the United States for its claims and on the amounts to be paid under the settlement agreement, Parent incorrectly claims that the settlement represents "approximately 22% of the EPA's ***full claim amount***." Id. at 28 (emphasis in original).

Parent's rhetoric in its objections is disproven by the percentage calculations in its own footnotes. As Parent observes in a footnote, the CdA settlement represents approximately 18.8% of the United States' total claim amount.[33] Parent Objection at 33 n.62. Parent is correct: 18.8% of $2.56 billion is approximately $482 million. By contrast, 22% of the United States' claim would be $564 million, or $82 million more than the United States is recovering in the CdA settlement. Even if 22% of the United States' claim had the talismanic value that Parent ascribes to it, the CdA settlement here would be 85.5% of this amount ($482 million / $564 million), not the "full claim amount" that Parent characterizes it to be. Whether viewed in dollar or percentage terms, the difference between the United States' recovery in the settlement negotiated with Debtor versus 22% of the United States' claim is not negligible.

Moreover, even putting aside any consideration of joint and several liability, recovering 85% of the United States' claim (after reduction for the 22%) would be appropriate here, for several reasons. First, as demonstrated supra in Sections 1 and 2, Parent presents evidence to dispute the value of only a small portion of the United States' claims, and even that evidence is ultimately not persuasive. Second, Parent notes that the applicable standards for reviewing this settlement derive both from bankruptcy law and from CERCLA. Parent's Objections (Docket No. 10741) at 5-6. But under CERCLA, it is common for the United States to recover the large majority of its costs in settlement. And unlike this case, those settlements typically occur in instances where the settling parties' liability has not been established. Here, the same district court decision that Parent urges be adopted on divisibility also conclusively establishes that the Debtor is liable for both EPA's response costs and natural resource damages. In the typical CERCLA context, settling for 85% of costs after establishing a party's liability for those costs would be generous to the liable party. Finally, as our prior filings have emphasized, the United

[33] Parent's footnote actually says "EPA's" claim amount rather than the "United States" claim amount. As explained above, this is because parent mistakenly identifies the NRD claims as EPA claims rather than as claims of the Departments of the Interior and Agriculture.

States' valuation of its claims is conservative.[34] The very large costs reflect the immense size of the Coeur d'Alene Basin site, the extent and severity of the contamination, and the correspondingly substantial costs for cleanup and NRDs.

**d. The Viability of the District Court's September 3, 2003, Divisibility Ruling in the Coeur d'Alene Basin Litigation is Critical to Parent's Argument, and Does Not Withstand Scrutiny**

As discussed above, the Basin settlement is a reasonable compromise for the Debtor's management to strike with the United States even under the divisibility ruling of the District Court in Idaho. Nevertheless, Parent contends that the Idaho District Court's divisibility holding renders the Basin settlement unreasonable. Parent has it backwards. If that ruling is incorrect, the Debtor is at risk for up to the full amount of the United States' claims for the basin, $2.6 billion. Since Debtor has already been held liable for the Basin, accepting a $482 million settlement to resolve that very large claim is a reasonable decision for Debtor's board. This is especially so when the divisibility ruling is examined more closely.

The Basin divisibility ruling suffers from two fatal flaws. It does not define the harm, and its rationale for the volumetric apportionment is not supported by the record. Further, Burlington Northern made no change in the law that would remedy these flaws. Finally, the ruling cannot be applied by simply assigning Asarco a 22% share of the United States' total claim.

i. The Idaho District Court Did Not Define the Harm in the Basin, Making it Impossible to Apportion the Harm Among the Many Causes.

First, the Coeur d'Alene Basin site encompasses hundreds of square miles and many polluting facilities. The Idaho Court found and enumerated many injuries. Coeur D'Alene Tribe v. Asarco, Inc., 280 F. Supp. 2d 1094, 1106-07 & 1122-24 (D. Idaho 2003). In addition to high lead levels found in children, id. at 1107, the Idaho Court found injuries to surface waters, soils

[34] For example: the settlement allows $14 million for cleanup of Debtor-owned properties that will actually cost $40 million, all of which could be charged to Debtor as administrative expenses (Grandinetti Declaration ¶ 23); the alternatives that EPA is considering in the ROD Amendment include all of the Comprehensive Remedy for the Upper Basin and in some cases exceed it (Grandinetti Declaration ¶ 6).

and sediments, riparian resources, fish, certain birds, ground water, and benthic organisms. Id. at 1123-24. Nevertheless, the Idaho Court's divisibility ruling proceeded from its conclusion that there is a single "broad injury" or "common harm" in the Basin, but did not define the broad injury or common harm. See id. at 1120. Rather than defining the harm, the court skipped that step and went on to conclude that tailings volume would be the apportionment measure. Since the court did not define the harm, it did not provide an adequate explanation of why volume – exclusive of all the other influences on the injuries that the court enumerated – was a reasonable way to apportion the harm. Instead, the Court simply declared it to be so. Id. ("Clearly, there is a reasonable relationship between the waste volume, the release of hazardous substances and the harm at the site.").

To be sure, the court attempted to distinguish this case from United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988), which rejected a volumetric apportionment (and was cited favorably in Burlington Northern (slip op. at 13)). Distinguishing another case cannot take the place of defining the harm in this case. Moreover, the Basin ruling's discussion of Monsanto is incomplete. The Idaho Court simply noted that Monsanto involved defendants that did not all contribute the "same type and quantity of hazardous substances," and then attempted to contrast that with the Basin. 280 F. Supp. 2d at 1120. But the Idaho Court did not address the underlying principle at work in Monsanto. The Monsanto defendants had the burden of proof and failed to establish a relationship between the waste volume, the release of hazardous substances, and the harm at the site. 858 F.2d at 172. The Basin divisibility ruling suffers from the same infirmity. Because the Basin ruling does not define the harm, there can be no basis for concluding that the apportionment forges a reasonable linkage between the waste volume, the release of hazardous substances, and the harm in the Basin.

In addition, the failure to identify the harm makes it impossible to assess whether the harm is one that is even capable of apportionment. As the Supreme Court stated, not all singular harms are capable of being apportioned. When two or more causes produce a "single, indivisible harm,

'courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with the responsibility for the entire harm.'" Burlington Northern, slip op. at 14 (quoting Restatement (Second) of Torts § 433A, Comment I). The comment quoted by the Supreme Court states that certain harms, "by their very nature, are normally incapable of any logical, reasonable, or practical division." Restatement (Second) of Torts § 433A, Comment I. Because the harm is not defined, it is not possible to conclude that the defendant has met the burden of showing that the harm is capable of apportionment. An illustration from the Restatement puts this problem into high relief: Two companies spill oil into a stream. The plaintiff's cattle drink water from the stream, are poisoned, and die. Id. Illustration 15. Under those facts, which bear striking similarities to the Basin case, both companies are jointly and several liable for the full amount of damages. Id. Because the Idaho Court did not define the harm, there is no basis for concluding that the Basin harm is capable of a rational apportionment.

ii. The Idaho District Court's Stated Rationale for its Volumetric Apportionment is Not Supported by the Record.

Second, the Court found that hazardous substances were released, and in many cases re-released, over a period of more than 100 years in many places throughout the Basin. Id. at 1101, 1104-06. The court found that the tailings varied in the amount of lead, cadmium and zinc they contained, and over time become finer in size. Id. at 1105-06. The various releases met with varied fates: Dams built early in the 20th century impounded some of the hazardous substances, a flood redistributed some of the pre-1917 releases, including impounded releases; the Coeur d'Alene River was a dredged from time to time from 1932 to 1968; and the various mills eventually put tailings impoundments in place. Id. at 1104-05. The court found that hazardous substances continue to be released from soil, ground water, mining adits, tailings impoundments, and waste rock piles. Id. at 1106. The experts agreed that numerous factors surrounding the releases, and the fate and transport of the hazardous substances, affected the environmental injuries. Nevertheless, the District Court concluded that allocation based solely on volume of tailings was reasonable. The Court based this conclusion on its finding that expert witnesses "on

both sides" agreed that "'a reasonable basis' for apportioning is to consider the amount of mining waste discharged into waterways." Id. at 1121. However, neither of the witnesses referred to by the Court offered any such opinion. To the contrary, the United States' witness testified that there is no reasonable basis for predicting the amount of metals in tailings and Asarco's witness refused to offer any opinion on the amount of metals discharged into the basin. Ex. USCdA105 at 2961; Ex. USCdA112 at 11590. Thus, the court's conclusion is without support in the record.

Parent contends that this Court should adopt the Idaho District Court's holding because the Court relied on "the testimony of more than 100 witnesses . . . [and] 8,695 exhibits" to find a "similarity of milling methodologies used in the CDA Basin and the clear relationship among the waste volume, the release of hazardous substances, and the harm at the Site." Dkt. No. 10741, at 29-30. Each of these arguments has been addressed in the United States's Post-Hearing Brief at 18-26. Parent's arguments are incorrect for the reasons stated there.

The parent also argues that the recent Burlington Northern Supreme Court opinion supports the Basin divisibility ruling. It does not.

iii. The *Burlington Northern* Decision Does Not Remedy the Flaws in the Divisibility Ruling.

The Burlington Northern case involved a 5-acre site with one polluting enterprise. By contrast, the Basin Site stretches over hundreds of square miles and involves more than twenty polluting enterprises. The Parent's reliance on the Supreme Court's recently issued Burlington Northern opinion suffers from two flaws: (1) Burlington Northern did not change the applicable law: nothing in that opinion remedies the errors in the Idaho District Court's divisibility ruling, and (2) the two cases are completely different.

As discussed above, Burlington Northern does not change the basic law in this area, and, in fact, supports the settlement. The Supreme Court reaffirmed the longstanding principle that, once a defendant has been held to be liable to the United States under CERCLA, that defendant's liability is joint and several unless the defendant carries its burden of demonstrating that "there is a reasonable basis for determining the contribution of each [defendant] to a single harm." This

was the law that the Idaho District Court applied. 280 F. Supp. 2d at 1119-20. Thus, there was no change in the law that will reinvigorate the fatally flawed divisibility ruling.

In addition to restating the law, the Supreme Court applied the law to the particular facts of that case. In accordance with the Restatement (Second) of Torts, § 433A, the Supreme Court reviewed the evidentiary record and concluded that the particular facts in that case supported the district court's holding that an apportionment of liability was appropriate. Slip op. at 14, 17. The facts in Burlington Northern differ in two important respects from the facts in the Basin case.

First, Burlington Northern involved a 5-acre site. See id. at 2. There, the Supreme Court stated that the district court and the court of appeals agreed that the harm, though singular, was theoretically capable of apportionment. Id. at 14-15. The Basin Site covers a large part of northern Idaho and encompasses a major river and its extensive system of tributaries. The Idaho District Court identified numerous environmental injuries, yet never identified the singular harm that it found to be capable of apportionment. As noted above, Burlington Northern did not change the law, and so did not remove the necessity of defining the harm before determining whether the harm could be rationally apportioned among the causes of the harm. Thus, the Supreme Court's ruling does not obviate the Basin divisibility ruling's first flaw – its failure to define the harm it was apportioning.

Second, Burlington Northern involved a site with only one polluting enterprise, and the releases and injuries occurred at a relatively small industrial site. In contrast, the Basin involved more than twenty mills, and a number of other polluting enterprises. The site contains hundreds of properties used for numerous purposes including residential and recreational. The Basin injuries are occurring on and under the land, as well as in and alongside hundreds of miles of river and tributaries. No witness before the District Court acknowledged that there was any reasonable basis on which to apportion harm in the Basin based simply on the amount of tailings released. To be sure, only two witnesses addressed the issue of divisibility. As discussed in detail in the United States' brief following the estimation hearing for the Basin, the district court's key finding

– that expert witnesses "on both sides" agreed that the amount of tailings disposed in the Basin provide a reasonable basis for apportionment – is directly contrary to the only testimony in the record. See, e.g., Ex. USCdA105 at 2961, 3081; Ex. USCdA112 at 11590.

Further, while Parent suggests that this Court does not have "the robust evidentiary record" on which the district court relied, the full trial testimonies of both divisibility witnesses, as well as several trial exhibits, are in the record. *See*, USCdA104, USCdA111. Other than suggesting that Judge Lodge's opinion is "well-reasoned and carefully considered," Parent offers no evidence to suggest that it is, in fact, supported by the record.

Thus, the Supreme Court's ruling does not save the Basin divisibility ruling from its two fatal flaws. Even if it did, the divisibility ruling cannot be mechanically applied in this bankruptcy for two additional reasons.

iv. The Basin Divisibility Ruling Does Not Cover the Continuing Releases.

Judge Lodge's apportionment percentages explicitly exclude leaching, runoff from waste piles, and mine adits. See 280 F. Supp. 2d at 1106. Accounting for the contributions of those continuing releases was left to be adjudicated in the next phase of the stayed Idaho litigation. Id. Thus, it would be inappropriate to simply apply a 22% share to Asarco. Asarco had the burden of proving that those releases could be apportioned, but failed to offer any proof during the estimation hearing.

The district court in Burlington Northern applied a "50% margin of error" to its calculation of the amount of contamination for which the railroads were responsible. The Supreme Court noted that the district court's conclusion that the two chemicals the district court in that case attributed to the Railroads accounted for two-thirds of the contamination requiring remediation, "finds less support in the record," (slip op. at 18). However, it found that any error in this regard was harmless because the district court reached the same result it would have without the 3% reduction, in light of its inclusion of this margin of error. If such a margin of error were applied to this case, Asarco's liability could be as high as 33%. If a margin of error

was appropriate in Burlington Northern, it is even more appropriate in assessing the reasonableness of the Basin settlement.

v. The Basin Divisibility Ruling, Contrary to Fundamental Principles Governing Apportionment of Singular Harms, Does Not Account for Orphan Shares

Finally, the divisibility holding cannot survive because it would unjustly require the innocent taxpayers bear the burden of the substantial share of costs that would be allocated to defunct or bankrupt parties. See Restatement (Second) of Torts § 433A, comment h (inappropriate to apportion single harm if injustice may result to plaintiff because of, for example, orphan share). See also United States v. Monsanto Co., 858 F. 2d at 173 (making government whole is the "primary consideration;" more appropriate place for allocating costs among the polluters is a contribution action).

**7. The Settlement for the Omaha Lead Site is Fair and Reasonable**

**a. New Developments at the Omaha Lead Site - Including the Issuance of a Final ROD - Support Settlement**.

While none of the information generated since the time of the hearing has created a genuinely new issue at the OLS, the Committee, Union Pacific, and Parent have each argued that the new information further supports their objections.[35] However, in fact, the record reflects that significant events since the hearing of August 2007 substantially strengthen the United States' claim at this site. The following events have occurred since the OLS estimation hearing[36]:

* EPA has now cleaned up contaminated soils at more 4,600 residential properties, Feild Dec. at ¶ 7;

[35] Union Pacific's comments are addressed in the public comment section, see supra at Section III.

[36] The recent Supplemental Declaration of Robert Feild provides an overview of the events at the OLS since the estimation hearing and should provide the Court helpful information and context to the extent it wishes to understand the relevant events. See Dkt. 11276 Ex. 6.

* EPA has performed lead paint assessments at more than 3,100 Omaha properties to assess the severity of deteriorating lead based paint to determine eligibility for paint stabilization Feild Dec. at ¶ 7;

* Since the 2007 estimation hearing, EPA has completed stabilization of deteriorated lead-based paint at 1,187 of the 1,482 properties that have been determined to be eligible for this action Feild Dec. at ¶ 7;

* EPA continued its thorough investigations and analysis at the OLS and a Final Remedial Investigation was completed. These investigations included a Final Baseline Risk Assessment. In October, 2008, a final focus area was proposed for the OLS. According to 2000 U.S. Census data, the population of the final focus area is 125,650, including 14,117 children under the age of 7.

* Separate Remedial Investigation and Feasibility Study reports were released for public comment in October, 2008.

* On October 28, 2008, EPA released the Omaha Lead Site Proposed Plan for public comment period. The Proposed Plan described the Agency's preferred alternative for cleanup at the Site. The comment period for the Proposed Plan closed on January 15, 2009. All comments received by EPA were considered in finalizing the selected remedy.

Most significantly, on May 13, 2009, EPA issued the Final Record of Decision for the OLS. The final remedy selected by EPA continues the soil cleanup program conducted under the interim remedy and is fully consistent with the preferred remedy identified in the Proposed Plan which, in turn, is fully consistent with the remedy the United States' predicted would be selected at the time of the estimation hearing. The properties eligible for soil remediation under the selected final remedy include all those with mid-yard lead concentrations exceeding 400 parts per million (ppm). In addition, the Proposed Plan includes stabilization of deteriorating exterior lead-based paint that threatens the continued effectiveness of the soil cleanup at eligible properties, and provides interior dust response consisting of a HEPA vacuum program and health education at

eligible properties where lead levels in interior dust exceed health-based criteria established by the U.S. Department of Housing and Urban Development (HUD). Feild Dec. at ¶ 12.

The ROD includes a Responsiveness Summary addressing all comments received on the proposed plan. See Joint Exhibit List. It is notable that virtually every comment that Parent and UP assert in objecting to the present settlement were submitted by UP as part of its comments on the Proposed Plan. The Responsiveness Summary is 170 pages in length and represents the formal and fully considered decision of EPA on these matters. Any party wanting to challenge this EPA decision bears the burden of proving that specific EPA response action was arbitrary and capricious or inconsistent with the NCP. A court's review of an NCP challenge is limited to the administrative record compiled in support of the challenged action. See Dkt. 4657 at 7-8; Dkt. 4745 at 3-4. EPA's response action choices are entitled to some deference, and a court must not substitute its own judgment for that of the Agency. See 42 U.S.C. § 9613(j)(2); United States v. Chromalloy, 158 F.3d 345, 352-53 (5th Cir. 1998); Bell Petroleum, 3 F.3d at 905 ("we will not substitute our judgment for that of the agency . . . . Our determination of whether the EPA's decision was arbitrary and capricious must be made on the basis of the rationale relied on by the EPA as contained in the administrative record.") (citations omitted)..

There is simply no serious contention that EPA's selected remedy at this Site is - in any possible sense - arbitrary or capricious or inconsistent with the NCP. In fact, Debtor's expert on these matters - Jeffrey Zelikson - has issued an updated opinion in which he asserts that because EPA is now insuring against the threat of recontamination from lead paint, he no longer asserts that EPA is acting in a manner inconsistent with the NCP. Proffer of Zelikson, Dkt No. 11259, ¶¶ 13-20.

**b. Parent's Limited Challenges Based on the Recontamination Study are in Error.**

The Committee and Parent focus on the Recontamination Study for their - now very marginalized - objections that the remedy is inconsistent with the NCP because the paint stabilization program that is now being actively implemented is not sufficiently robust. The

Recontamination Study is a new study issued, as a part of EPA's Remedial Investigation and Feasibility Study for the final remedy. ( Omaha Lead Site, Final Remedial Investigation Report, April, 2009, Appendix L, see Joint Exhibit List).

However, the Recontamination Study supports EPA's conceptual site model for the OLS, as well as a substantial recovery in settlement. The Recontamination Study's purpose was to investigate whether exterior lead-based paint was flaking off and increasing soil lead levels (i.e., recontaminating yards after they had been cleaned). The Study concluded that lead-based paint is increasing soil lead levels in the foundation areas at homes where the soil was cleaned before the paint was stabilized, but the increased levels do not require additional response actions. In short, paint must be addressed, but no yards will need to be remediated for a second time. The Recontamination Study supports EPA's final remedy for the OLS because it shows that lead-based paint could recontaminate yards if it is not stabilized – but with stabilization – EPA's yard remedy will be successful. Thus paint stabilization is a necessary part of the final comprehensive remedy, and EPA is correct to remediate and recover the costs associated with the complete final remedy.

Parent and the Committee distort the data from the Recontamination Study and ignore its conclusions to say that the OLS remedy is not working and is not permanent. They insist that yards will need to be remediated again, despite EPA's opposite conclusion from serious consideration of the data. In fact, the remedy will be protective and permanent with stabilization of exterior lead-based paint and the other components of the comprehensive remedy: soil remediation, resident education about lead hazards, and interior dust response. Feild Decl ¶ 37.

Nor are EPA's sampling methods from the Recontamination Study suspect, as Parent argues. The purpose of the soil sampling in the Recontamination Study was to determine if lead-based paint was affecting the soil lead concentration after a property was remediated, *not* to determine the combined concentration of lead in the soil and lead in paint chips on the surface of the soil. Feild Proffer ¶ 38. As a part of the final remedy, EPA vacuums soil surfaces to remove

paint chips when it stabilizes exterior lead-based paint. Thus, to mirror the final conditions at the OLS, EPA chose not to include surface paint chips in soil samples for the Recontamination Study. That way, the samples taken during the Study closely mimic the condition of the soil after the remedy. Parent is wrong to accuse EPA of bad faith in sampling when EPA determined the best sampling method for the question posed by the Study. The actual sample collection procedure used during the Recontamination Study was consistent with all previous sample collection efforts at the OLS. Feild Dec. ¶ 38.

**c. The Facts at the OLS Support Settlement and are Essentially the Same Since the Time of the Estimation Hearing**.

The contentious nature of the arguments at the OLS belie that many of the important facts are undisputed. No one challenges that a serious health threat exists at the Site. Nor does anyone challenge that Asarco contributed *in some part* to the contamination found at the Site.[37] Finally, numerous studies of the Site, including all of those by EPA and ATSDR, show that two sources of lead contribute to lead exposures at the Site: historic smelter emissions and lead based paint. Those essential facts have not changed.

Without fully re-arguing these matters, the United States refers this Court to its Post-Trial Submission, Dkt No. 5808. A review of that submission and the extensive evidence referenced therein which was presented at the hearing merely establishes what is obvious and entirely consistent with experiences at other - much smaller and briefer - smelting and refining operations around the nation: Asarco's 100 plus years of lead emissions have left significant deposits of lead from its facility throughout the adjacent areas and this lead poses the substantial majority of the lead EPA must now remediate to address the risks posed to the community. It is exactly this type of environmental legacy that CERCLA was enacted to address. The extensive evidence presented included, but was not limited to: Expert reports regarding the nature of the historic operations and

[37]The United States showed at the estimation hearing that Asarco's emissions are linked definitively to the contamination at the OLS and that those emissions count for well over 90% of the lead contamination found at the Site.

emissions by Allen Medine and Barbara Forslund; The speciation analysis performed by Dr. Drexler - which was the only effort undertaken by any scientist to identify the specific sources of lead being found in the yards; and, the clear evidence that reflects that the pattern of lead contamination shows clear reduction in contamination levels as the properties move farther and farther away from the former facility.

These basic assertions have been reaffirmed in the recent Supplemental Declaration of Robert Feild, Dkt. 11276 Ex. 6. and the Supplemental Proffer of Allen Medine, Dkt. 11269 Ex. 5.

**d. Parent's Ad Hominem Attacks are Specious**.

Unable to dispute the important facts at the Site, Parent argues that EPA has acted with bad faith in its administration of the cleanup at the Site and in settling this case. Parent Comments at 4. EPA has not acted in bad faith at any stage – whether when it disclosed documents under public information requests or when it decided its sampling protocols. Parent points to a statement about a health study affecting EPA's enforcement case as proof of the bad faith. Id. At deposition, the ATSDR employee stated that she did not make the statement attributed to her in notes, Casteel Dep. 46:7-25, and she did not have knowledge of EPA's enforcement case in 2004. Casteel Dep. 75:9-16. By comparing her 2004 statement about a health study that was not performed with the Recontamination Study that was performed and released in 2008, Parent attempts to muddy the issue of EPA's diligence at the OLS. In its attempt to create the impression of bad faith in EPA, Parent can point to no more than the discredited statement of a non-EPA employee in notes from 2004 because nothing more exists.

In a rehashing of its estimation arguments and those of Union Pacific, Parent argues that EPA ignores lead-based paint in investigating and addressing the public health threat posed at the OLS. EPA recognizes that lead-based paint is a source of lead exposure at the OLS, and together with the other primary source of historic smelter emissions, lead poses a serious health threat that EPA can and must address. Feild Proffer ¶ 46. In contrast to Parent's argument, the purpose of the Recontamination Study was to see if stabilization of paint was necessary to protect EPA's

soil remedy. Since paint was shown to elevate soil lead levels without stabilization, EPA is moving forward with stabilization of exterior paint (where paint assessments show stabilization to be necessary). With both soil cleanups and exterior paint stabilization as available tools, remediated OLS properties are expected to remain below health-based levels permanently. The Parent is wrong when it calls EPA's remedy a "temporary fix." As discussed at the estimation hearing, elevated blood lead levels in children at the Site have been decreasing for a decade or more, and those are also expected to continue decreasing. Feild Proffer ¶¶ 33-35.

Litigation risk to the United States' claim at OLS warrants less than a full recovery (though nowhere near the escape from liability that the Committee and Parent would like). Historic smelter emissions present a number of evidentiary problems, which were fully revealed in the estimation hearing, because the most severe smelter impacts date from the turn of the 20th Century. Issues relating to lead-based paints pose alleged litigation risks, as asserted, at other times, by UP. All of these difficulties weigh in favor of the United States settling for less than its full claims. On the other hand, EPA has a solid enforcement case against Asarco for several reasons including: EPA chose an effective comprehensive final remedy at the OLS; a similar remedy has been started as an interim measure and is succeeding; as the interim remedy continues, it has become more cost effective; and EPA has closely followed the requirements of the National Contingency Plan.

Thus, the OLS settlement is fair and reasonable because it reimburses some of the costs that EPA has spent protecting human health at the OLS, but also recognizes that risks to that claim exist. Given the potential outcomes, the present settlement falls both above the possible worst case scenario for the United States; and below the best case scenario for the United States.

## CONCLUSION

For all these reasons, the United States respectfully requests that the proposed Environmental Settlements be approved and entered.

Respectfully submitted,

FOR THE UNITED STATES:

JOHN C. CRUDEN
Acting Assistant Attorney General

/s/

ALAN S. TENENBAUM
DAVID L. DAIN
ERIC D. ALBERT
Department of Justice
Environment & Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-5409

**CERTIFICATE OF SERVICE**

I certify that on May 15, 2009 a true copy of the foregoing UNITED STATES' BRIEF IN SUPPORT OF DEBTORS' MOTION UNDER BANKRUPTCY RULE 9019 FOR ORDER APPROVING SETTLEMENT OF ENVIRONMENTAL CLAIMS AND NOTICE OF RESPONSE TO PUBLIC COMMENTS RECEIVED was served on all parties on the service list entitled to notice through the Court's electronic filing system.

/s/
Eric D. Albert