**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**CORPUS CHRISTI DIVISION**

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

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEBTORS' MOTION FOR ORDER APPROVING SETTLEMENT OF ENVIRONMENTAL CLAIMS**

On this day came on for consideration the Motion Under Bankruptcy Rule 9019 For Order Approving Settlement of Environmental Claims (the "Settlement Motion"), filed by the Debtors (as defined herein), the United States', and all responses, objections, and briefing related to the Settlement Motion. Based on the record before it, the Court makes the following findings of fact and conclusions of law:

## I. INTRODUCTION

1. Through the Settlement Motion, the Debtors seek court approval of a comprehensive settlement comprised of five separate settlement agreements that together resolve approximately $3.5 billion of environmental claims filed against the bankruptcy estate. These settlements are the product of years of negotiation and analysis by and between the Debtors and federal and state government regulators, 13 days of estimation hearings in this Court, and a mediation that began in October 2007 under the supervision of a sitting bankruptcy judge.

2. Although these settlement agreements were negotiated on a global basis [*see* Joint Ex. 4 (Lapinsky Proffer) at ¶ 13], the parties documented them in the following five independent agreements (collectively, "the Settlement Agreements"):

(a) the Residual Environmental Settlement Agreement, which relates to three sites for which the federal and state governments claimed approximately $3 billion in response costs and natural resources damages [*see* Joint Ex. 69];

(b) the Multi-State Custodial Trust Settlement Agreement, which resolves claims at 18 sites in 11 states [*see* Joint Exs. 70, 71]

(c) the Montana Custodial Trust Settlement Agreement, which resolves claims at five sites in Montana [*see* Joint Ex. 67];

(d) the Texas Custodial Trust Settlement Agreement, which resolves claims at two sites in Texas [*see* Joint Ex. 72]; and

(e) the Miscellaneous Federal and State Environmental Settlement Agreement, which relates to 26 sites in 12 states [*see* Joint Ex. 68].[1]

3. ASARCO Incorporated ("Parent"), the Official Committee of Unsecured Creditors of ASARCO, LLC ("ASARCO Committee"), Mitsui & Co. (U.S.A.), Inc. ("Mitsui"), the City of El Paso, Blue Tee Corp.[2], and Union Pacific Railroad Company ("Union Pacific") filed objections to all or part of the relief contemplated by the Settlement Motion. In addition, the Official Committee of Asbestos Claimants ("Asbestos Committee") and the Future Claims Representative ("FCR") filed provisional objections and reserved their respective rights to object to and comment on the Settlement Motion after reviewing the evidence obtained through discovery and introduced at the evidentiary hearing.

4. On May 18-19, 2009, the Court conducted an evidentiary hearing on the Settlement Motion, and on May 29, 2009, the Court heard closing arguments. The Debtors, all objectors, the United States, various state governments, and numerous other interested parties attended the hearing and had an opportunity to be heard by the Court. In addition, the Court previously held three estimation hearings regarding three of the largest sites[3] (in terms of associated environmental claims) now at issue, which are further discussed below. The Court

[1] Attached hereto as Exhibit "A" is an explanatory chart of all sites and related claims.
[2] The objections of Mitsui & Co. USA, Inc., the City of El Paso, and Blue Tee Corp., subsequently settled.
[3] The Omaha Lead Site, Tacoma Smelter Plume, and Coeur D'Alene.

previously ruled that it could consider all of the evidence presented in the claims estimation hearings and took judicial notice of the evidence submitted at those hearings.

5. During hearings devoted to the Settlement Motion, the Court received testimony from 47 witnesses, and the parties tendered nearly 1700 exhibits, all but one of which the Court admitted without objection. The vast majority of the witnesses testified on behalf of the governments or the Debtors and in favor of the Settlement Agreements. The witnesses included ASARCO executives, environmental scientists, environmental regulators, and private consultants with decades of experience in environmental matters. The Parent offered three witnesses who testified solely with respect to two particular environmental sites addressed within the Settlement Agreements, Omaha and Coeur D'Alene. The ASARCO Committee proffered one witness who testified regarding only portions of the Settlement Agreements, and Union Pacific proffered two witnesses whose testimony related solely to a single site, Omaha. The Court also has received extensive briefing with respect to various issues relevant to the Settlement Agreements and to environmental liability generally. The Court also heard argument from counsel for the Debtors, the United States, the States of Arizona, Colorado, Montana, Texas, and Washington, the Parent, the ASARCO Committee, the City of El Paso, and Union Pacific. The parties have presented more than sufficient information to allow the Court to make an informed and independent decision.

6. As detailed below, based upon the record before the Court, the Court finds and concludes that the Settlement Agreements as a whole, and the settlement of each claim addressed in the Settlement Agreements (i) are fair, equitable, and in the best interests of the estate; (ii) are well within the range of reasonableness; and (iii) are fair, reasonable, and consistent with the purposes of environmental law, including 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.* The benefits of the settlement reasonably outweigh any uncertain benefit associated with continued litigation of the claims resolved.

## II. BACKGROUND AND PROCEDURAL HISTORY

### A. ASARCO'S Business and Its Bankruptcy

7. ASARCO LLC ("ASARCO") has been in operation for more than 100 years. It is an integrated mining, smelting, and refining company.

8. On August 9, 2005, ASARCO filed a Chapter 11 case in this Court. This was preceded and followed by bankruptcy petitions filed by ASARCO's subsidiaries.[4] Collectively, ASARCO and the subsidiary debtors are referenced as "the Debtors."

9. The Debtors filed a proposed plan of reorganization on July 31, 2008, which was amended on September 12, 2008 and September 25, 2008. [Dkt. Nos. 8569, 9101, 9350] The plan was to be primarily funded by ASARCO's sale of substantially all of its operating assets to Sterlite (USA), Inc. ("Sterlite") for $2.6 billion. On October 14, 2008, however, Sterlite informed the Court that it would not close on the asset purchase transaction. The Court then suspended the solicitation and balloting process, and the Debtors re-engaged in plan negotiations with creditor constituents and potential plan sponsors, including Sterlite.

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[4] On April 11, 2005, several of ASARCO's wholly owned direct or indirect subsidiaries, including Lac d'Amiante du Quebec Ltee; Lake Asbestos of Quebec, Ltd.; LAQ Canada, Ltd. ("LAQ"); CAPCO Pipe Company, Inc. ("CAPCO"); and Cement Asbestos Products Company (collectively, the "Asbestos Subsidiary Debtors") filed voluntary bankruptcy petitions. Later in 2005, after ASARCO's petition was filed, several more of ASARCO's wholly owned direct or indirect subsidiaries ("2005 Subsidiary Debtors") filed petitions for relief in this Court. On December 12, 2006, three additional ASARCO subsidiaries ("2006 Subsidiary Debtors") filed petitions for relief in this Court. On April 21, 2008, six more direct or indirect ASARCO subsidiaries ("2008 Subsidiary Debtors") filed petitions for relief in this Court.

10. Sterlite and the Debtors eventually entered into a new purchase and sale agreement, under which ASARCO is to receive $1.1 billion in cash plus the assumption of liabilities that were to be included in the original sale. In addition, Sterlite is providing a $600 million non-interest bearing note, payable over nine years. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 15]

11. On March 16, 2009, the Debtors filed a pending plan of reorganization, as amended on April 27, 2009, and May 11, 2009. [Dkt. Nos. 11221, 10554, 11027] Confirmation hearings on the Debtors' plan are scheduled for late June and early July 2009. [Dkt. No. 10666] In addition, the Parent filed a competing plan of reorganization on May 15, 2009. [Dkt. No. 11300] On May 21, 2009, Harbinger Capital Partners Master Fund I, Ltd ("Harbinger") sought the Court's permission to file a third plan of reorganization. [Dkt. No. 11429] On May 22, 2009, the Court granted Harbinger's request. [Dkt. No. 11497 (Courtroom Minutes)]

12. The Asarco bankruptcy case has, from its beginning, involved many complex issues which had to be resolved by agreement, litigation, or confirmation.

13. Asarco subsidiaries preceded Asarco in bankruptcies designed to deal with mass tort asbestos liabilities. As with most mass tort bankruptcies, these entities sought to quantify and limit liability and obtain an injunction pursuant to 11 U.S.C. §524(g), through plan confirmation. Consequently a Future Claims Representative and an Official Committee for the Subsidiary Debtors was appointed. Both the Debtors' and the Parent's Plan of Reorganization contemplate a Section 524(g) injunction.[5]

[5] The Parent reached an agreement with the Official Committee for the Subsidiary Debtors and the Future Claims Representative to essentially fund $750 million for the payment of asbestos claims. A Section 524(g) injunction requires a vote of 75% of the asbestos claimants and such vote is dependent upon the recommendation of the Official Committee for the Subsidiary Debtors and the Future Claims Representative. Therefore, it is likely that the Parent's agreement set the bottom line for any plan dependent upon a Section 534(g) injunction.

14. Asarco also has the dubious distinction of having the largest environmental claims in any bankruptcy proceeding. The claims involved 53 different sites throughout the United States. They included properties both owned and no longer owned by the Debtors. Among the properties owned by the Debtors, some of the sites were no longer necessary for the operations of the Debtors. Successful reorganization of the Debtors requires the determination, estimation, or settling of the Debtors' liabilities at all of these sites. Liabilities at the sites the Debtors no longer own can be dealt with as unsecured claims. Liabilities for past environmental claims at sites owned by the Debtors could be unsecured claims, while on-going costs are administrative claims. For those sites owned by the Debtors but no longer necessary for reorganization, both the Debtors' and the Parent's Plans provide for the creation and funding of a custodial trust which owns and remediates the site and limits the Debtors' liabilities to its contribution to the trust..

**B. ASARCO Has Investigated and Negotiated Potential Environmental Liability Since the Inception of the Bankruptcy Case.**

15. Knowing that the environmental claims would be a significant focus of the bankruptcy proceedings, ASARCO began an internal review of its potential environmental liabilities in 2005 and sought to determine the sites at which the Debtors could be considered a potentially responsible party ("PRP"). The Debtors then met with the United States Department of Justice to exchange information about environmental claims in advance of the August 1, 2006 claims bar date. [Joint Ex. 1 (Aldrich Declaration) at ¶ 6]

16. Numerous parties then filed Proofs of Claim related to environmental liabilities. The Debtors reviewed and analyzed the various Proofs of Claim and determined that: The United States filed Proofs of Claim asserting claims ranging from $3.6 billion to $4 billion, sixteen state governments filed Proofs of Claim asserting claims ranging from $3.8 billion to $4 billion, at least two Indian tribes filed Proofs of Claim asserting claims for approximately $800 million,

and numerous private parties filed Proofs of Claim asserting claims totaling almost $2 billion. When analyzed to eliminate obvious duplication, the Debtors determined that these Proofs of Claim asserted approximately $6.5 billion of environmental claims in determined amounts, with a significant number of additional claims in "undetermined" amounts.

17. After the filing of environmental claims, ASARCO continued its analysis of claims and retained outside consultants and advisors to assist in these efforts. ASARCO engaged NewFields, Hydrometics, and EnviroGroup to help evaluate claims and potential liabilities at the various sites. [Joint Ex. 1 (Aldrich Declaration) at ¶ 8] ASARCO also retained LECG as a testifying expert to testify regarding estimation of the claims during the bankruptcy proceedings. [Joint Ex. 1 (Aldrich Declaration) at ¶ 9]

18. Beginning in the fall of 2006, ASARCO engaged various federal and state governments and agencies in discussions to better understand and refine their environmental claims and to explore the possibility of settlements where appropriate. Throughout 2006 and into 2007, ASARCO had repeated communications and face-to-face meetings with regulators from Arizona, California, Colorado, Kansas, Missouri, Montana, New Mexico, Texas, and Washington, and their federal counterparts in various regional offices of the Environmental Protection Agency ("EPA"). During these meetings, the parties discussed technical considerations, natural resources damages, owned site maintenance and remediation costs, and applicable legal theories. Also, the parties exchanged relevant documents and coordinated discussions between their respective technical consultants. [Joint Ex. 1 (Aldrich Declaration) at ¶ 10]

### C. In 2007, the Court Conducted Estimation Hearings Regarding Three Major Sites.

19. On January 30, 2007, ASARCO moved in this Court to estimate the environmental claims. After discussions with federal and state governments and PRPs, the Court issued a case management order ("CMO") on March 23, 2007, which set forth procedures for estimating environmental claims at 21 sites. [Joint Ex. 146 (Dkt. No. 4238)] These 21 sites together comprised approximately $6 billion of the approximately $6.5 billion in asserted environmental claims. In the months following issuance of the CMO, the parties provided the Court with omnibus briefing of issues related to environmental claims generally.

20. By August 2007, before estimation hearings began, the parties had reached settlements of claims related to all or part of 19 of the 21 sites ("Previously Settled Claims"). These settlements were presented to and approved by the Court pursuant to Bankruptcy Rule 9019 and environmental law. No party appealed from approval of those settlements. The parties had not yet reached settlements with regard to certain claims at three sites covered by the CMO, and the Court thus proceeded with the scheduled estimation hearings for these claims.

21. Between August 6, 2007, and October 12, 2007, the Court conducted three separate estimation hearings to address the United States' claims at the Omaha Lead Site ("OLS") and the Coeur d'Alene Site, and certain claims of the State of Washington for the Tacoma Smelter Plume Site. During these hearings, which consumed a total of 13 days, the Court heard testimony from more than 50 witnesses, admitted nearly 1400 exhibits, and heard arguments from counsel to the Debtors, the federal and state governments, and various other parties in interest. As discussed below, at the parties' request, the Court refrained from ruling on estimation to allow additional settlement negotiations to proceed. The claims addressed during

the estimation hearing eventually were resolved in the Residual Environmental Settlement Agreement.

22. ASARCO also conducted significant investigation and analysis of other sites that were not subject to the CMO. In the fall of 2007, ASARCO retained ERM, one of the largest environmental risk management consulting firms, to estimate ASARCO's environmental liabilities at its owned, non-operating properties. ASARCO intended to use the information provided by ERM to evaluate whether to sell, keep, or place into a custodial trust each of its remaining owned, non-operating sites. Indeed, the information that ASARCO received from ERM in December 2007 and January 2008 assisted the company in better understanding the potential environmental costs relating to these sites. [Joint Ex. 1 (Aldrich Declaration) at ¶¶ 27-28] Liability at these sites eventually was resolved by the Custodial Trust Settlement Agreements.

23. ASARCO also evaluated claims at properties that ASARCO does not own. In late 2007, ASARCO asked NewFields to review the technical information that ASARCO had gathered and act as a "clearing house" for the claims related to un-owned properties. When global environmental settlement discussions began in October 2007, NewFields had completed its work as it related to most of the larger sites in this category, although it had not completed its work with respect to some of the smaller sites. As the discussions progressed, ASARCO coordinated with its own employees, its counsel, NewFields, and its other consultants to address any gaps in the data. With ASARCO's own investigatory work, NewFields' follow-on work, and ASARCO's historical understanding of the sites, ASARCO had a solid understanding of these claims throughout the settlement discussions. [Joint Ex. 1 (Aldrich Declaration) at ¶¶ 12-13]

The claims relating to un-owned properties eventually were settled as part of the Miscellaneous Federal and State Environmental Settlement Agreement.

### D. Mediation in 2007 Produced an Agreement in Principle to Globally Resolve Environmental Claims That Was Incorporated into ASARCO's 2008 Plan of Reorganization.

24. In October 2007, the Court directed ASARCO to engage in mediation of claims related to ASARCO's derivative asbestos liability. Judge Elizabeth Magner of the United States Bankruptcy Court for the Eastern District of Louisiana presided over the mediation, which began in New Orleans, Louisiana. The mediation also involved subsequent meetings in Dallas, Texas and multiple telephone conferences throughout the remainder of 2007 and into January 2008. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 12]

25. The Debtors, the Department of Justice, Environmental and Natural Resources Division ("DOJ"), the States of Montana and Washington, the ASARCO Committee, the Asbestos Committee, the FCR, the United Steelworkers Union, Harbinger (an ASARCO bondholder that has asserted hundreds of millions of dollars in claims), and the Parent were represented at the mediation. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 12]

26. Although originally intended to focus on asbestos liability, the mediation broadened and ultimately resulted in an agreement in principle with respect to the majority of the Debtors' environmental liabilities. Based upon this agreement in principle, the Debtors and the DOJ requested that the Court defer further hearings and rulings with respect to estimation of claims at the OLS, Coeur d'Alene, and Tacoma Smelter Plume sites that were the subject of previous estimation hearings. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 12]

27. The agreement in principle contemplated settling the majority of ASARCO's state and federal environmental claims for $1.63 billion, tentatively to be distributed as follows: (i) $530 million for Previously Settled Environmental Claims; (ii) $250 million for Custodial Trust

Claims; (iii) $100 million for Miscellaneous Federal and State Claims; and (iv) $750 million for Residual Environmental Claims. The tentative agreement specifically excluded (i) administrative costs for administering custodial trusts; (ii) costs relating to a site located in Houston, Texas; (iii) certain claims asserted by potential responsible parties, which at the time were estimated to total approximately $24 million; (iv) natural resource damages claims resolved by the Arizona NRD Settlement [Dkt. No. 10949]; and (v) liabilities associated with operating properties. With the exception of the Parent, all creditor constituents attending the New Orleans mediation supported the agreement in principle. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 13]

28. The agreement in principle reached at the mediation was incorporated into the plan of reorganization that the Debtors filed in this Court on July 31, 2008, and as amended on September 12, 2008, and September 25, 2008. [Dkt. No. 8569, 9101, 9350] Among other things, the plan divided the environmental claims into three categories: (i) the Previously Settled Environmental Claims; (ii) the Miscellaneous Federal and State Environmental Claims; and (iii) the Residual Environmental Claims. The plan also provided for certain properties of the Debtors to be transferred to environmental custodial trusts, which would be funded with sufficient cash to pay for remediation and restoration costs and administrative costs of the trusts.

29. A key component of the 2008 plan was the sale of substantially all of ASARCO's operating assets to Sterlite for $2.6 billion. Under the 2008 plan, the proceeds from the sale to Sterlite, along with the Debtors' distributable cash, would have been used, among other things, to satisfy creditors' claims and fund various trusts to be created pursuant to the plan. After other unsecured creditors were paid the principal amounts due on their claims, the class of Residual Environmental Claims and the asbestos trust were to receive $750 million each (amounting to

less than the full cash value of their claims) along with interests in a litigation trust that would be vested with various pending causes of action.

### E. After the 2008 Plan Was Suspended, ASARCO Continued Negotiations Regarding Environmental Claims.

30. On October 14, 2008, Sterlite informed the Court that, as a result of the dramatic downturn in world commodity and financial markets, it could not and would not close the purchase without a material price reduction. As a result, this Court suspended the solicitation procedures and balloting of the plan.

31. After Sterlite announced its intention not to proceed with the original agreement, ASARCO's board of directors considered several alternatives for addressing the environmental claims. The board of directors considered information and input from ASARCO's management and environmental personnel, legal counsel, and environmental consultants, including ERM and an expert report prepared by Brian Hansen. Ultimately, the board of directors decided that continuing with the settlement process for the environmental claims would best serve the estate. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 16]

32. For five months thereafter, the Debtors and the federal and state governments worked to resolve numerous issues left open by the previous agreement in principle and reach amended settlement agreements that would not depend on the approval of a particular plan of reorganization First, the parties agreed that ASARCO would receive a credit against the payments due for custodial trust remediation in the amount of certain capital expenditures made by ASARCO between February 1, 2009, and the effective date of a plan of reorganization. Second, the parties agreed that $14 million of the settlement for the Coeur d'Alene Site would be an allowed administrative expense because property that ASARCO owned at the site would be deeded to the trust established for the site. Third, the federal and state governments agreed not to

object to certain plan provisions that would effectively preclude the governments from asserting claims for as-yet identified sites in exchange for ASARCO's agreement to propose in its plan to guarantee the final two payments by AMC under a pre-petition environmental trust. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 17]

33. ASARCO also resumed negotiations with Sterlite, and on March 6, 2009, entered into a new agreement for the sale of substantially all of ASARCO's operating assets to Sterlite, which is conditioned on confirmation of a plan of reorganization. Under the new agreement, ASARCO is to receive $1.1 billion in cash plus the assumption of liabilities that were to be included in the original sale. In addition, Sterlite is providing a $600 million non-interest bearing note, payable over nine years. ASARCO filed its plan on March 16, 2009, as amended on April 27, 2009, and May 11, 2009, and confirmation hearings are scheduled to begin in July 2009.

**F. The Settlement Motion and Public Notice Period.**

34. ASARCO filed the Settlement Motion on March 12, 2009. [Dkt. No. 10534]

35. Pursuant to the law governing environmental settlements, the United States published notice of the settlements in the Federal Register on March 24 and 26, 2009. [74 Fed. Reg. 12378, 12379, 12380, 13227]

36. The United States received approximately 1,750 written comments regarding the agreements through April 24 and 26, 2009.[6] Approximately 1,730 of these related to the El Paso Smelter Site and were non-unique form comments. The United States received 2 comments on the OLS and 4 comments on Coeur d'Alene. The United States received no comments regarding

[6] 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.

the Multi-State Custodial Trust Settlement Agreement and received comment regarding only one property included in the Miscellaneous Federal and State Environmental Settlement Agreement. [*See* Joint Exs. 85, 1768] Three comments were received regarding the Montana Custodial Trust Settlement Agreement. [*See* Joint Ex. 85] The United States and the Texas Commission on Environmental Quality ("TCEQ") received additional oral comments regarding the Texas Custodial Trust Settlement Agreement at a public meeting in El Paso, Texas on May 11, 2009.

37. The United States and the TCEQ then submitted briefs to the Court responding to the public comments and stating their continued support of the settlement agreements. [Dkt. No. 11343 (United States' [Corrected Version] 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 ("United States' Brief in Support")); Dkt. No. 11290 (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 ("TCEQ's Response to Public Comments"))] The State of Montana also expressly joined with the United States in its brief. [Dkt. No. 11329]

## III. TERMS OF THE SETTLEMENT AGREEMENTS

38. The Settlement Agreements for which the Debtors seek approval address claims at 52 different sites in 19 states, asserted by a variety of different federal and state agencies. The claims and liabilities resolved by the Settlement Agreements can be divided into three categories: Residual; Custodial Trust; and Miscellaneous Federal and State.

39. Although these settlement agreements were negotiated in an effort to achieve a global resolution of most of the Debtors' remaining environmental liabilities [*see* Joint Ex. 4

(Lapinsky Proffer) at ¶ 13], they are documented in five independent settlement agreements, which collectively are referenced herein as "the Settlement Agreements":

(a) the Residual Environmental Settlement Agreement, resolving certain claims at three sites;[7]

(b) the Multi-State Custodial Trust Settlement Agreement, addressing liability at 18 sites;[8]

(c) the Montana Custodial Trust Settlement Agreement, addressing liability at five sites;[9]

(d) the Texas Custodial Trust Settlement Agreement, addressing liability at two sites;[10] and

(e) the Miscellaneous Federal and State Environmental Settlement Agreement, resolving claims at 26 sites.[11]

40. The three Custodial Trust Settlement Agreements are referenced collectively herein as "the Custodial Trust Settlement Agreements." A claim for natural resource damages at the East Helena Site, which originally was one of the Miscellaneous State and Federal Sites, is

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[7] The Amended Settlement Agreement and Consent Decree Regarding Residual Environmental Claims for the Coeur d'Alene, Idaho, Omaha, Nebraska, and Tacoma, Washington Environmental Sites by and between the United States, the States of Washington and Nebraska, and ASARCO. [Dkt. No. 10541; Joint Ex. 69]

[8] 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 by and between the United States, ASARCO, ASARCO Master, Inc., AR Sacaton, LLC, CAPCO, Alta Mining and Development Company, the States of Alabama, Arizona, Arkansas, Colorado, Illinois, Indiana, New Mexico, Ohio, Oklahoma, Utah and Washington, LePetomane XXV (not individually but solely in its representative capacity as trustee of the custodial trust), and St. Paul Travelers. [Dkt. Nos. 10542, 10551; Joint Exs. 70, 71]

[9] The Consent Decree and Settlement Agreement Regarding the Montana Sites by and between the United States, the State of Montana, ASARCO, ASARCO Consulting, Inc., American Smelting and Refining Company, ASARCO Master Inc., and the Montana Environmental Trust Group, LLC (not individually but solely in its representative capacity as trustee of the custodial trust. [Dkt. No. 10539; Joint Ex. 67]

[10] 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, by and between the United States, the State of Texas, ASARCO and American Smelting and Refining Company [Dkt. No. 10567; Joint Ex. 72]

[11] The Amended Settlement Agreement Regarding Miscellaneous Federal and State Environmental Sites by and between the United States, ASARCO, the States of Arizona, Colorado, New Jersey, Oklahoma and Washington, and the New Jersey Department of Environmental Protection. [Dkt. No. 10540; Joint Ex. 68]

included within the Montana Custodial Trust Settlement Agreement. Certain small allowed claims relating to two sites that originally were Miscellaneous State and Federal Sites are included within the Multi-State Custodial Trust Settlement Agreement for administrative convenience. [*See* Joint Exs. 67, 68, 70, 71]

41. The Residual Environmental Settlement Agreement provides for the following allowed claims for the following three sites:

(a) Omaha Lead Site ("OLS") – an allowed general unsecured claim in the amount of $187,500,000;

(b) Coeur d'Alene Site – a $14 million allowed administrative claim and an allowed general unsecured claim in the amount of approximately $468 million; and

(c) Tacoma Plume Site – an allowed general unsecured claim for certain claims of the State of Washington in the amount of $80,357,000.

42. The Miscellaneous Federal and State Environmental Settlement Agreement provides for an allowed general unsecured claim of approximately $94.6 million.

43. The Custodial Trust Settlement Agreements allow an administrative claim of approximately $261.3 million, which includes $27.5 million for the administrative costs of the custodial trusts. With respect to the Custodial Trust Sites, the administrative claim will be paid in full on the effective date of any confirmed plan of reorganization. Also on the effective date, title to the property will be deeded to a custodial trustee pursuant to the Custodial Trust Settlement Agreements.

44. Under all of these settlements, the Debtors will receive a comprehensive covenant not to sue for civil environmental liability associated with these sites. The Debtors also receive contribution protection against claims by PRPs at the sites covered by the agreements.

## IV. RELEVANT BANKRUPTCY LEGAL STANDARDS

45. Pursuant to Bankruptcy Rule 9019(a), the Court may approve a compromise and settlement of claims against the bankruptcy estate. Fed. R. Bankr. P. 9019(a); *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Co.)*, 68 F.3d 914, 917 (5th Cir. 1995).

46. "Compromises are a 'normal part of the process of reorganization.'" *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (citation omitted). Compromises are "desirable and wise methods of bringing to a close proceedings otherwise lengthy, complicated and costly." *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (citation omitted). The debtor need only show that a compromise falls within the "range of reasonable litigation alternatives." *In re Roqumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008) (quoting *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983)).

47. Approval of a compromise lies within the sound discretion of the bankruptcy court. *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *In re Jackson Brewing Co.*, 624 F.2d at 602-03. A bankruptcy court should approve a settlement when it is fair, equitable, and in the best interests of the estate. *In re Foster Mortgage Co.*, 68 F.3d at 917. "Fair and equitable" is a term of art in the bankruptcy context, meaning that "senior interests are entitled to full priority over junior ones." *In re AWECO, Inc.*, 725 F.2d at 298 (citation omitted).

48. Like all other important determinations in reorganization proceedings, approval of a settlement must receive the informed, independent judgment of the bankruptcy court. *Protective Comm.*, 390 U.S. at 424. Before approving a settlement, a bankruptcy court must apprise itself of all facts necessary to for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. *Id.* The bankruptcy also must form an

educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting any judgment that might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. *Id.* Settlements must be fair and equitable, as that term is understood in the Bankruptcy Code. *Id.*

49. A factor weighing on the wisdom of compromise is the extent to which the settlement is the product of arm's length negotiations, and not fraud or collusion. *In re Foster Mortgage Co.*, 68 F.3d at 918 (noting that a settlement between insiders—the debtor and its parent company—reached without the participation of creditors required careful scrutiny). Another factor weighing on the wisdom of compromise is the interests of the creditors, with proper deference to their reasonable views. *Id.* at 917. In evaluating the interests of the creditors, the court must take into account the consideration offered by the settling party and the degree to which the creditors object to determine whether the settlement furthers their best interests. *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Coop., Inc.)*, 119 F.3d 349, 358 (5th Cir. 1997) (noting that although a numerical majority of the creditors opposed the settlement, the overall interests of the creditors were well served because the settlement ridded the estate of property that was a "major impediment to reorganization").

50. In evaluating the probability that the debtor would have prevailed in litigation, "it is unnecessary to conduct a mini-trial to determine the probable outcome of any claims waived in the settlement." *Id.* at 356. The court need not resolve disputed issues but should apprise itself of the relevant facts and law so that it can make an informed and intelligent decision as to the reasonableness of the settlement. *Id.; In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723 , 759 (Bankr. S.D.N.Y. 1992) ("Rather than being forced to decide all questions of law and fact

that are settled, a Court need only 'canvas the issues [to] see whether the settlement fall[s] below the lowest point in the range of reasonableness.'") (citations omitted). It is sufficient for the court to conclude that a substantial controversy with an uncertain outcome exists. *Am. Can Co. v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 605, 610 (5th Cir. 1980) (affirming approval of settlement where "the Court concluded that there was a substantial controversy between the Trustee and the [defendant] with an uncertain resolution").

51. The Court has considered all of the standards applicable to motions under Rule 9019, F. R. Bankr. Pro.

## V. APPLICATION OF THE RELEVANT BANKRUPTCY LEGAL STANDARDS TO THE SETTLEMENTS AT ISSUE

### A. The Settlement Agreements Result From Years of Arm's Length Negotiation and Analysis

52. One factor to be considered in determining whether to grant the Settlement Motion is "the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *In re Cajun Elec. Power Coop.*, 119 F.3d at 356. This factor weighs heavily in favor of approving the Settlement Agreements.

53. The Settlement Agreements undisputedly result from arm's-length negotiations. There is no evidence of fraud or collusion. The Settlement Agreements followed years of formal and informal negotiations and discussions regarding the environmental claims, court proceedings related to estimation of the various claims against the Debtors, and extensive analysis by experts on both sides of the table. It is undisputed that the settlement agreements described above evolved out of a formal mediation begun in October 2007 and presided over by Judge Magner. But the parties have been engaged in discussion regarding the Debtors' environmental liabilities since at least 2006; discussions actually began before ASARCO filed for bankruptcy in 2005.

With respect to some claims, ASARCO and the governments have been in discussions for decades.

54. ASARCO's CEO, Joe Lapinsky, confirmed that the negotiations "were hard fought but conducted in good faith." [Joint Ex. 4 (Lapinsky Proffer) at ¶ 5] Similarly, the United States has stated that the negotiations involved "experienced bankruptcy and environmental counsel on both sides" and were arduous and at arms-length. [Dkt. No. 11316 (United States' Brief in Support) at 13] The State of Washington characterized the settlement process as "vigorous . . . with a lot of give and take." [5/18/09 Tr. at 92:6]

55. Resolving these claims is an impressive example of persistence, organization, and dedication. The Settlement Agreements required the involvement of dozens of state and federal regulators throughout the country, sophisticated legal counsel experienced in bankruptcy and environmental law, scores of environmental scientists from the public and private sphere, and the gathering of voluminous information concerning decades of environmental pollution.

**B. The Settlement Agreements are Fair and Equitable**

56. The Settlement Agreements are fair and equitable and do not prefer the interests of junior creditors over senior creditors.

**C. Creditors' Positions**

57. All of the settlements were approved by the two independent members of ASARCO's board of directors following extensive analysis and consideration. ASARCO's board approved the original agreement in principle and the Settlement Agreements based upon input from the company's management, environmental personnel, legal counsel, and environmental consultants, both on an aggregate and site-by-site basis. [Joint Ex. 4 (Lapinsky Proffer) at ¶¶ 14, 16]

58. The vast majority of the settlements in question were not the subject of any objections by creditors. In fact, when the fundamental terms of these agreements were presented in 2008 following mediation supervised by Judge Magner, all parties in interest other than the Parent supported them. While the Court has carefully considered the current positions of all the parties in interest, in the context of the particular circumstances of this case, the fact that some creditors now object to some portion of the Settlement Agreements is not a sound or sufficient basis for disapproving them.

59. Creditors who currently object to some portion of the Settlement Agreements seek to protect economic or other interests particular to themselves but not necessarily reflective of the best interest of the estate as a whole. For example, Union Pacific is a PRP at the OLS and, in objecting, seeks to limit the extent of its own environmental liability at that site. The Parent's objections must be considered in light of its particular interest as a competing plan sponsor seeking to defeat confirmation of ASARCO's plan of reorganization.

60. Similarly, the objections of the Asbestos Committee must be considered in light of their purported contractual agreement with the Parent to support the Parent's plan and oppose ASARCO's plan. The Asbestos Committee presented no witnesses and no opening argument to support its objection. Counsel for the ASARCO Committee, while introducing limited objections to parts of the Settlement Agreements, conceded that "many, many of these settlements . . . are really very propitious settlements for the estate. They are important settlements for the estate." [5/18/09 Tr. at 164:3-5]

61. As the Court is well aware, the Debtors have been in bankruptcy for nearly four years, and the resolution of environmental claims is an important step in facilitating the Debtors' emergence from bankruptcy. By resolving the claims related to the Debtors' environmental

liabilities through the Settlement Agreements, the Debtors narrow the issues that remain to be resolved through a future plan of reorganization and narrow the parties necessary for such resolution. The Court considers these implications of the Settlement Agreements important.

**D. The Settlement Agreements Are in the Best Interest of the Estate**

62. From the beginning of this bankruptcy case, all parties agreed that identifying the extent of ASARCO's liability for environmental matters and asbestos-related claims were important steps that would help lead to confirming a plan of reorganization. Thus, there was no significant opposition to the process outlined in the two case management orders that governed estimation procedures for environmental claims. By eliminating the need to conduct additional contested hearings as to each of the 52 sites addressed in the Settlement Agreements, avoiding the risk of adverse litigation results (potential examples of which are detailed below), and fixing ASARCO's obligations for past and future, known and unknown environmental liabilities, the Settlement Agreements greatly benefit the estate.

63. The Settlement Agreements resolve significant factual and legal disputes between the Debtors and the federal and state governments regarding the Debtors' liability for environmental contamination. Generally, the factual disputes include: the selection of an appropriate remedy for a particular site; the reasonable scope of the remedy; the timing of the implementation of the selected remedy; the appropriate discount rate used to determine the present value of future costs; differing cost estimates; ASARCO's contribution to the contamination at the specific sites; the existence, viability, and responsibility of other PRPs; and whether federal or private contractors should implement the selected remedy. [Joint Ex. 6 (Robbins Declaration) at ¶ 16] Additional disputed issues include: the applicability of joint-and-several liability; the effect of state and federal laws; consistency with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. §§ 300 *et seq.* ("the National

Contingency Plan"); the appropriateness of penalties; and the applicability of the excusable neglect doctrine to several late-filed claims. [*Id.* at ¶ 17]

64. By resolving these issues through the Settlement Agreements, the Debtors avoid the litigation risk of adverse determinations regarding some or all of these disputed issues, particular examples of which are discussed below in connection with claims at particular sites. A determination adverse to the Debtors regarding the applicability of joint and several liability, for example, could have drastic consequences for the Debtors' estates. The change of a discount rate by merely on or two percent could result in the increase of future damage calculations by a hundred million dollars or more Through the Settlement Agreements, the Debtors also avoid the attorneys' fees, expert witness fees, and other substantial costs of continued litigation and appeals.

65. In evaluating the best interest of the estate and considering how the Debtors might fare in estimation proceedings or other litigation related to the affected sites, the Court need not, and does not, resolve the disputed issues and uncertainties associated with the sites. *In re Cajun Elec. Power Coop.*, 119 F.3d at 356. The Court has considered these issues in independently analyzing the Settlement Agreements, however, and finds that the controversies at the affected sites are sufficiently substantial and the resolution of the controversies sufficiently uncertain to support the reasonableness of the Settlement Agreements. *See In re Jackson Brewing Co.*, 624 F.2d at 610.

66. In summary, all the factors relevant to an analysis under Rule 9019 support approval of the Settlement Agreements. In addition, analysis of the particular terms of the Settlement Agreements as they relate to particular sites of environmental contamination confirms that approval is appropriate. This site-specific analysis follows.

### E. The Residual Environmental Settlement Agreement

#### 1. Omaha Lead Site

67. The Court is particularly familiar with the parties' contentions regarding the OLS because in 2007, the Court held five days of estimation hearings ("the OLS estimation hearing") during which the parties presented more than 25 witnesses and tendered nearly 700 documentary exhibits. For the reasons stated below, the Court finds that the settlement terms with respect to OLS are fair and equitable, within the range of reasonableness, and in the best interest of the estate.

68. ASARCO operated a 23-acre lead facility on the banks of the Missouri River in downtown Omaha, first as a primary lead smelter from 1871 to 1906, and then as a refinery for various metals until 1997. The ASARCO facility emitted lead from several stacks and for many years was the world's largest lead refinery. No one disputes that a serious health threat exists at the site and that thousands of Omaha children have elevated blood lead levels above the national average, both currently and in the past. Nor is it contested that ASARCO contributed at least in part to the lead contamination found at the site. Numerous studies have shown that two sources contribute to lead exposures at the site—historical smelter/refinery operations and lead-based paint.

69. The United States and the State of Nebraska asserted that past and future response costs at the OLS exceed $408 million. The OLS settlement provides for allowed general unsecured claims of $187,500,000 to the state and federal governments.

70. The extensive record before the Court regarding the OLS demonstrates that the settlement is fair and equitable, reasonable, and in the best interests of creditors given the risks and uncertainties presented by the complexity and likely duration of further litigation, including

appeals from any estimation finding. As is discussed below, the settlement is also fair, reasonable, and consistent with CERCLA.

71. The Parent, the ASARCO Committee, and Union Pacific, a PRP at the OLS, each objected to the OLS settlement. Each of the objecting parties argued that ASARCO is responsible for only the proportionate share of contamination caused by emissions from the facility and that the primary cause of lead in soils at the OLS is lead-based paint. The Parent and the ASARCO Committee contend that the settlement requires ASARCO to pay *more* than its proportionate share of responsibility, while Union Pacific argues that, if ASARCO is liable at all, the settlement represents *less* than its proportionate share. The Parent, the ASARCO Committee, and Union Pacific also argue that past and future response costs are unrecoverable because EPA's proposed remedy will not effectively address contamination caused by lead-based paint peeling from residential buildings and is therefore inconsistent with the National Contingency Plan.

72. At the OLS estimation hearing, the parties presented evidence and argument regarding: (a) the amount of lead emitted from the former ASARCO facility from 1871 until it ceased operating in 1997; (b) the extent of airborne deposition of that lead; (c) the role of lead-based paint as a contributing factor to the elevated blood lead levels of children in the OLS; (d) the recoverability of EPA's response costs based on the consistency of EPA's response actions with the National Contingency Plan; and (e) legal issues of divisibility, joint and several liability, and allocation of responsibility for response costs under CERCLA.

73. The governments aggressively litigated each of issues and presented evidence supporting their position at both the 2007 OLS estimation hearing and in connection with the Settlement Motion. The evidence presented by the governments included the results of (1)

analyses of risks posed by lead contamination at the OLS; (2) estimates of the sources of lead and the amount of total lead emissions from the ASARCO facility based on deposition patterns reflected in yard samples; (3) lead speciation of soil samples; (4) historical research from two different experts; (5) analysis of the total lead present throughout the OLS; (6) explanations of remedial activities and associated decision-making performed by the Branch Chief for the Superfund Division in EPA Region 7, EPA's remedial project coordinator at the OLS, and the State of Nebraska's OLS project manager; and (7) analyses of past and future EPA and DOJ costs and applicable discount and indirect rates, performed by federal financial management specialists and accountants, along with international economic, management and environmental consulting experts.[12] Because the Court did not rule on the estimation for the OLS, all of these issues and uncertainties presented by the litigation remain unresolved.

74. The OLS settlement represents a considered evaluation by both the Debtors and the governments of the risk associated with continuing to litigate these and other issues. The terms of the settlement are well within the range of reasonableness. It is apparent from the evidence presented at the 2007 OLS estimation hearing and the hearing on the Settlement Motion that numerous factual and legal disputes present significant litigation risk to ASARCO absent this settlement.

75. The possibility that a court would find ASARCO jointly and severally liable for all of the response costs at the OLS presents a significant risk, and elimination of that risk is a reasonable justification for the settlement. There is no dispute that ASARCO's potential liability under CERCLA as the former owner/operator of a refinery located adjacent to the site presents a

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[12] *See* Docket Nos. 5402-11, 5402-7, 5402-9, 5402-3, 5396, 5402-2, 5402-12, 5402-5, 5402-6, 5402-8, 5402-4, 5402-10 (2007 OLS estimation hearing proffers of Anderson, DeHoff, Drexler, Feild, Felix, Gunn, Kime, Koch, Maniatis, Medine, Saladin, and Weis, on behalf of the federal and state governments).

substantial controversy with an uncertain resolution. The governments contend that ASARCO is jointly and severally liable for all the contamination because there is no reasonable basis for apportionment.

76. At both the OLS estimation hearing and the hearing on the Settlement Motion, the federal and state governments presented extensive expert testimony that ASARCO contributed a significant amount of lead throughout the OLS and vigorously contended that it was unlikely that the percentage of lead in the OLS specifically attributable to the Debtor could be quantified with any scientific certainty. The governments argued that it was therefore unlikely that ASARCO would be able to prove (i) that there is a single harm that is reasonably capable of apportionment, and (ii) a valid quantification of the harm attributable to ASARCO.

77. One geochemical expert who has conducted sampling at the OLS and analyzed data collected by others, Steven Helgen, testified at the Settlement Motion hearing that much of the lead found in OLS soils is in secondary forms that no longer retain a geochemical "footprint" that can be used to determine the exact contribution of each individual source to a particular sample. [Joint Ex. 3 (Helgen Proffer) at ¶ 2] Estimation of contamination from airborne sources is further complicated by the lack of historical records covering more than 100 years of refinery operations. The absence of this information requires the use of either estimates and/or assumptions as input parameters, making the results of such modeling highly variable. [*Id.* at ¶16] As a result of numerous factors such as these, "there are strong disagreements among the experts regarding the impact of the refinery on soil lead concentrations throughout the [OLS]." [*Id.* at ¶ 7] Information obtained since the 2007 OLS estimation hearing, such as EPA's 2008 lead paint recontamination study and cemetery and park sampling, [Joint Exs. 23, 1460, 1526],

"does not resolve the debate over the extent of the area within which the ASARCO refinery meaningfully contributes to the need for soil remediation." [Joint Ex. 3 (Helgen Proffer) at ¶ 29]

78. Even if ASARCO were only liable for a proportionate share of responsibility for the lead contamination at the OLS, quantifying that share presents a substantial litigation risk. The United States maintains that in the unlikely event that ASARCO could make a showing sufficient to require any apportionment, evidence presented by the United States from Drs. Drexler and Medine would be sufficient to show that ASARCO's estimated apportionment would be well over 75%, and closer to 90%. [*See* Dkt. No. 5808 (United States' and State of Nebraska's Post Estimation Hearing Submissions Regarding the OLS) at 11.] The Debtors, Union Pacific and the Parent each dispute this position. [*See* Dkt. No. 5810 (ASARCO LLC, Asarco Inc. and Union Pacific Post Estimation Hearing Submissions Regarding the OLS).]

79. ASARCO also faces substantial litigation risk with respect to the issue of the appropriate response costs and whether past or future response costs are unrecoverable as inconsistent with the National Contingency Plan.

80. The OLS has drawn considerable public attention since EPA began its work at the site in 1999. EPA has undertaken substantial investigations and site characterizations that serve as the bases for its ultimate decision-making at the OLS. These investigations include: two remedial investigations and feasibility studies; sampling of more than 35,000 properties; apportionment studies which identify former smelter/refinery emissions as a source of lead in OLS; and two baseline human health risk assessments which support the need to take action to protect Omaha children from the irreversible affects of lead poisoning. [Joint Ex. 22 (Feild Declaration) at 9-10, 17-18, 22, 24-25, 33, 37.)]

81. The United States has issued two records of decision regarding the OLS: an Interim Record of Decision in December 2004 ("Interim ROD"), [Joint Ex. 1436], and a Final Record of Decision in May 2009 ("Final ROD"). [Joint Ex. 1430] As to both decisions, formal comments on proposed plans were solicited from the public and significant public comment was generated. [*See* Joint Ex. 1430 (Final ROD) at 9-10]

82. An extensive administrative record supports the two records of decision. That record includes responsiveness summaries. The responsiveness summaries reflect the fact that EPA considered many complicated issues involved in assessing what all parties recognize are the substantial health risks faced in the OLS community and in determining the appropriate remedy for the site.

83. On October 28, 2008, EPA released its Proposed Plan for the OLS. [Joint Ex. 1528 (October 2008 Proposed Plan)] On May 13, 2009, the EPA issued the Final ROD, which includes a 170-page Responsiveness Summary that addresses all comments received on the Proposed Plan. [Joint Ex. 1430 (Record of Decision, May 2009); Joint Ex. 1431 (Responsiveness Summary, May 2009) ("2009 RS")]

84. Each of the objections to the OLS settlement asserted by the Parent and Union Pacific were raised as public comments and considered by EPA. EPA's 170-page responsiveness summary associated with the Final ROD reflects the extensive consideration that EPA gave to these comments before issuing its ROD. [*See* Joint Ex. 1431] In particular, the 2009 Responsiveness Summary reflects that EPA considered comments involving: (i) the role of lead-based paint; (ii) air modeling; (iii) the Drip Zone Width Study and other technical reports; (iv) arguments regarding protocols for sampling supporting the recontamination study; and (v) the potential for recontamination.

85. EPA's Final ROD is a comprehensive plan that includes the following components: (1) continuation of soil removals; (2) a multifaceted health education program; (3) exterior lead-based paint stabilization; (4) interior dust response; (5) continued partnering with other organizations; and (6) institutional controls. [*See* Joint Ex. 1430 at 44-46] EPA has determined that its Final ROD at the OLS is reasonable, effective, and consistent with the National Contingency Plan. [Joint Ex. 22 (Feild Declaration) at ¶ 48; Joint Ex. 1430 (ROD); Joint Ex. 1438 (ROD Declaration); Joint Ex. 1431 (2009 RS)]

86. The argument asserted by the Parent, the ASARCO Committee and Union Pacific that future response costs are unrecoverable because they are inconsistent with the National Contingency Plan has been substantially undermined by developments since the 2007 OLS estimation hearing. The Final ROD addresses many of the criticisms leveled in the OLS estimation hearing against EPA's 2004 Interim ROD and EPA's implementation of the remedy set forth therein. For example, the final remedy for the OLS selected in the ROD includes stabilization of deteriorating exterior lead-based paint.

87. In addition, the City of Omaha's nuisance ordinance deems deteriorating lead-based paint a nuisance under the Omaha Municipal Code, includes substantial enforcement provisions, and requires the City of Omaha to paint homes constituting a nuisance where homeowners fail to do so. [Joint Ex. 1764 (Omaha Nuisance Ordinance); Joint Ex. 1430 at 33.] The ordinance demonstrates EPA's collaboration with a local government in order to implement a comprehensive remedy and minimize cross-contamination between homes in the OLS. Use of the ordinance will help assure continuing maintenance of painted surfaces by property owners, which in turn will help provide long-term effectiveness of soil remediation. [Joint Ex. 1430 at 33]

88. The evidence at the Settlement Motion hearing included the testimony of Robert Feild, who has worked as an environmental engineer in the Superfund program for more than 25 years and is EPA's project coordinator for the OLS. He explained that in addition to soil remediation, stabilization of deteriorating exterior paint has been ongoing since the 2007 OLS estimation hearing. [Joint Ex. 22 (Feild Declaration) ¶ 6] In fact, EPA has significantly accelerated this component of the OLS cleanup. [*Id.* ¶ 14] Prior to the Settlement Motion hearing, EPA had performed lead-based paint assessments at more than 3,100 properties and completed stabilization of lead-based paint at 1,187 of the 1,482 properties that were determined to be eligible for this action. [*Id.* ¶ 3] It is EPA's goal as the remedy moves forward to complete any appropriate stabilization prior to soil removals. [Joint Ex. 1430 at 44] EPA's evidence indicates that any paint flaking that has or may occur will be limited in amount and deposition area and has not resulted in any soil levels that impair the protectiveness of the remedy that has been implemented to date. [*See* Joint Ex. 22 (Feild Declaration) at ¶¶ 37-38]

89. ASARCO presented testimony from Jeffrey Zelikson, who developed an estimate of the total response costs at the OLS using a probabilistic cost analysis. Mr. Zelikson has testified in connection with previous environmental settlements in this bankruptcy case. Mr. Zelikson also provided expert reports and testimony regarding the OLS in connection with the 2007 estimation hearings. For the hearing on the Settlement Motion, Mr. Zelikson supplemented this work by performing calculations to account for additional information that became available after the estimation hearing, including EPA's Proposed Plan and Final ROD for the OLS.

90. Mr. Zelikson concluded that "significant cost uncertainty remains around the ultimate cost to implement the future remedy at the [OLS]." [Joint Ex. 7 (Zelikson Proffer) at 10] Following issuance of the Final ROD, Mr. Zelikson testified that the total gross response

costs at the OLS could range as high as $328.1 million. [*Id.* at 11] Mr. Zelikson noted that his previous opinion discounted the expected value of future response costs based on his view that future costs incurred by EPA might be inconsistent with the National Contingency Plan (and therefore unrecoverable) unless the remedy selected included lead-based paint stabilization. [*Id.* at 7] Under the Final ROD, EPA incorporated lead-based paint stabilization into the remediation. Mr. Zelikson modified his prior opinion that the remedy was likely inconsistent with the National Contingency Plan. Mr. Zelikson both (1) decreased his estimate of the likelihood of inconsistency to 40%, [5/18/09 Tr. at 352:23-353:1], and (2) increased his current expected value calculation of future costs from his previous calculation of $21.4 million to $42.3 million, with a range of possible future costs as high as $171.5 million. [Joint Ex. 7 (Zelikson Proffer) at 4, 8]

91. In its Final ROD, EPA estimated the present value of future capital costs for the OLS remedy at $168,479,000. [Joint Ex. 1430 at 67] This estimate does not include indirect costs. EPA expects its future cost estimate to be accurate to within +50 to -30 percent of the actual project cost. [*Id.* at 47] If future capital costs increase by 50 percent, with an additional 52.39% of indirect costs, future costs could exceed $386 million. If future costs are less by 30 percent, with an additional 52.39% of indirect costs, future response costs would total approximately $180 million. [*See* Joint Ex. 1430 at 47, 67; Dkt. No. 5402-5 (Koch Proffer, 2007 OLS Estimation Hearing) at 6, 14.]

92. The governments have also countered the objecting parties' contention that EPA cannot recover its past costs of more than $96 million, the amount of which is undisputed. First, the governments argue that costs of their initial response to the health risks presented by the lead at the OLS are recoverable as removal costs under CERCLA. These include at least five years of

site-wide studies and sampling and soil removal prior to the issuance of the Interim ROD. The governments claim that these removal costs are consistent with the National Contingency Plan and are unaffected by arguments that the possibility of recontamination threatens the remedy. [*See* Dkt. 5808 (Governments' post-hearing submissions regarding the OLS)] The governments also contend that the Debtor's expert, Jeffrey Zelikson, agreed that EPA's removal actions were appropriate to begin with, [08/09/07 OLS Hearing Tr. at 62:18-21], and admitted that the actions by EPA have reduced the risks at the Site. [08/09/07 OLS Hearing Tr. at 70:15-21] Further, the governments contend that no objector has provided any actual data or sampling establishing that any future recontamination by lead based paint chips will, in fact, result in recontamination which makes any portion of the present clean-up not protective. The governments rely on evidence that, to date, all evidence supports its assertion that any recontamination would be limited in nature and, to date, no previously remediated yard has required further soil removals, and no additional costs have been incurred by EPA associated with alleged the violation of the National Contingency Plan.

93. The United States additionally argues that even if a portion of the remedy were found to be arbitrary and capricious and inconsistent with the NCP, the United States would still be able to recover all costs other than those that are demonstrably in excess of what it otherwise would have incurred. 42 U.S.C. § 9613(j)(3), (4); *United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 695 (10th Cir. 1999). The United States contends that there are no such excess costs with regard to the OLS and seeks neither past costs nor future costs related to further remediation of hypothetical recontaminated yards.

94. The United States argues that the recontamination issue is a narrow issue that has been properly managed. The United States has always acknowledged that stabilization of some

of the lead-based paint was a goal of its remediation program at the OLS and that the stabilization should occur prior to soil removal. However, EPA weighed the risk of recontamination against the risk of ongoing lead poisoning and concluded that it would not wait to implement the primary remedy of soil removal. [Dkt. No. 5402-3 (Feild 2007 Declaration) at ¶¶ 21-46; Joint Ex. 22 (Feild Declaration) at ¶¶ 31-26] The United States asserts that the amount of risk presented by the high lead levels in the soils in the properties that were subject to the removal actions and covered by the Interim ROD fully justified its decisions to act in advance of the paint stabilization program being implemented

95. The Parent presented evidence from two experts (Dr. Robert Powell and Ms. Marianne Horinko), both of whom offered opinions that only a lead "abatement" remedy would be protective of human health and the environment. [Joint Ex. 23 (Powell Proffer) at 5-7; 5/19/09 Tr. at 269:18 – 270:11 (Powell testimony); Joint Ex. 24 (Horinko Proffer) at 3-4; 5/19/09 Tr. at 349:13-17 (Horinko testimony)] When pressed, however, both experts acknowledged that EPA lacked jurisdiction to implement such a remedy, while simultaneously conceding that some amount of lead from the ASARCO facility was present throughout the OLS. [*See* 5/19/09 Tr. at 270:16-272:17; 272:18-22; 281:1-3 (Powell testimony); *id.* at 349:13-351:3 (Horinko testimony). Ms. Horinko also acknowledged that EPA could expend funds to protect a remedy once it was in place, and that those costs would be recoverable unless the remedy had failed. [*Id.* at 353:14-354:14]

96. The United States contends that it was always aware of the risk that some elevated soil-lead levels might occur due to limited paint flaking during the time between soil clean-up and paint stabilization and has always intended to address such issues. [*See, e.g.*, Dkt. No. 5402-

3 (2007 Feild Declaration) at 21-46] In fact, according to the testimony of Mr. Feild, the results of the recontamination study were not unexpected. [5/19/09 Tr. at 21:13-25]

97. The testimony of the expert retained by the ASARCO Committee, Dr. Mark Johns, is also significant to the issue of recontamination. [*See* Joint Ex. 41 (Johns Proffer) at 1-8; 5/19/09 Tr. at 243-50.] Dr. Johns estimated that between 33% and 50% of OLS homes will need lead-based paint stabilization. He also acknowledged that the inverse is true – between 50% to 66% of homes will not need lead-based paint stabilization. Dr. Johns relied on several other experts, including experts for EPA, the Parent, and the Debtor, who reached the same conclusions. Based on Dr. Johns' testimony, the objecting parties would not argue that EPA's response action is inconsistent with the National Contingency Plan with respect to 50 to 66% of the remediated yards. [*See* 5/19/09 Tr. at 247:8-19] Those costs – up to 66% of the governments' claim – would then be subject to increase by indirect costs. [*See* Dkt. No. 5402-5 (Koch Proffer, 2007 OLS Estimation Hearing) at 14]

98. The evidence further shows that, in considering whether to enter into the Settlement Agreements, ASARCO's Board of Directors specifically considered the recontamination report that issued subsequent to the estimation hearing. [Joint Ex. 4 (Lapinsky Proffer) at ¶ 25(ii)]

99. In assessing the Debtor's risk associated with continued litigation, the Court is mindful of presumptions of compliance with the National Contingency Plan that accompany remedies selected and implemented by EPA. *See* 42 U.S.C. § 9607(a)(4) (stating that PRPs are liable for "all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the [National Contingency Plan]"); *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 352-53 & n.3 (5th Cir. 1998) (stating that "as long as the government's

choice of response is consistent with the National Contingency Plan, costs are presumed to be recoverable") (citations omitted); *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992) ("When the government is seeking response costs, . . . consistency with the National Contingency Plan is presumed . . . ."); *U.S. Envtl. Prot. Agency v. Sequa Corp. (In re Bell Petroleum Servs., Inc.)*, 3 F.3d 889, 907 (5th Cir. 1993) (adopting the Tenth Circuit's reasoning in *Hardage*, that "[t]o show that the government's response action is inconsistent with the National Contingency Plan, a defendant must demonstrate that the EPA acted arbitrarily and capriciously in choosing a particular response action . . ."); *see also Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1121 (D. Idaho 2003) ("[W]here the United States government, a State, or an Indian tribe is seeking recovery of response costs, consistency with the National Contingency Plan is presumed . . . .") (citations and internal quotation marks omitted).

100. EPA makes a strong case that, both before the 2007 estimation hearing and since that time, EPA has followed appropriate administrative processes and fully and fairly investigated and analyzed potential response actions at the OLS. EPA's decision-making with respect to response action choices at the OLS will be entitled to deference, and it is not the role of a court in considering settlement approval to second-guess the Agency's determinations or substitute its own judgment for that of the Agency.[13]

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[13] 42 U.S.C. § 9613(j)(1)-(2) (stating that in a challenge to the adequacy of a federal response action, "the court shall uphold [EPA's] decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that [EPA's] decision was arbitrary and capricious or otherwise not in accordance with the law"); *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 352-53 & n.3 (5th Cir. 1998); *U.S. Envtl. Prot. Agency v. Sequa Corp. (In re Bell Petroleum Servs., Inc.)*, 3 F.3d 889, 905 (5th Cir. 1993) ("[W]e 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); *see also* 40 C.F.R. § 300.415(b)(1) (EPA may choose "any appropriate removal action necessary to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release"); *United States v. 150 Acres*

**2. Coeur d'Alene Site**

101. The Court is familiar with the parties' contentions regarding the Coeur d'Alene Site because in October 2007, the Court held four days of estimation hearings ("the Coeur d'Alene estimation hearing") during which the parties presented 14 witnesses and tendered 391 documentary exhibits.

102. The Coeur d'Alene Site is an immense site and the United States contends it will be one of the most expensive clean-ups that will ever be faced by the Superfund Program. The Coeur d'Alene Basin covers an extensive geographic area including over 150 river miles within the watershed of the Coeur d'Alene River and its tributaries. The North and South forks of the Coeur d'Alene River merge into the main stem, which then enters a system of lakes and wetlands that provide key habitat for a variety of wildlife before emptying into Lake Coeur d'Alene. One of the richest mining districts in the world, mining operations in the Basin produced over 140 million tons of ore and resulted in the disposal of over 72 million tons of waste onto the soils and into the waterways. The wastes contain various heavy metals including lead, zinc and cadmium. No one disputes that serious human health and environmental risks are presented throughout the Basin by the presence of this waste.

103. In 2001, the United States, Asarco and Hecla Mining Company engaged in a trial regarding this Site in the United States District Court for the District of Idaho. That trial was limited to liability issues. At the conclusion of that trial the Court concluded that "[p]laintiffs have established Defendants' liability for their claims for response costs and for damages to natural resources under CERCLA as well as damages under the CWA." *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1135 (D. Idaho 2003).

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*of Land*, 204 F.3d 698, 710 (6th Cir. 2000) ("The general tenor of the [National Contingency Plan] is permissive—the lead agency may take any appropriate action, including those on a list that is expressly not exhaustive . . . .").

104. In the 2007 estimation hearing, the United States' claims related to three components: (1) $180 million in past costs, which neither Parent nor Debtor ever 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 and Agriculture. The total claim was approximately $2.56 billion.

105. The present settlement has three components: (1) a $14 million allowed administrative claim associated with the properties Asarco continues to own in the Basin; (2) a $401 million allowed general unsecured claim to resolve all other response cost claims (both past and future response costs); and (3) a $67.5 million allowed general unsecured claim for natural resource damages.

106. The record before this Court regarding the Coeur d'Alene Site demonstrates that the settlement is fair, reasonable, and in the best interests of creditors. As is discussed further in a later section of these findings, the settlement is also fair, reasonable, and consistent with CERCLA.

**a. Claims for EPA Response Actions and Past Costs**

107. At the hearing on the settlements, neither Parent nor the Committee presented any 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. In fact, neither the Parent nor the Committee presented any argument that the $14 million allowed administrative claim or the $401 million allowed claim related to EPA's past and future claims for response costs should not be approved.

108. EPA presented the detailed technical and legal bases for the Comprehensive Remedy at the 2007 estimation hearing. The Comprehensive Remedy represents EPA's long-

term cleanup plan for the Basin. The United States asserts that this plan is necessary for protection of human health and the environment, and thus provides the appropriate basis for the United States' claim regarding future response costs in this bankruptcy proceeding. At the 2007 estimation hearing EPA estimated the future 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.

109. 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. Debtors argued that political considerations, feasibility, and cost efficiency would prevent EPA from implementing any or much of the Comprehensive Remedy beyond EPA's Interim Record of Decision. The United States, in turn, asserted it intended to proceed with the Comprehensive Remedy and that there was, in fact, a substantial possibility that as further investigations continued, the scope and cost of the necessary work would expand rather than contract.

110. In support of the settlement the United States submitted supplemental testimony from Cami Grandinetti, EPA's manager for the Coeur d'Alene Basin. This evidence is consistent with EPA's prior assertions that the Comprehensive Remedy can be implemented. The supplemental declaration of Ms. Grandinetti notes that: EPA is currently pursuing an amendment to the 2002 Interim Record of Decision; 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; the Amended ROD will also address EPA's strategy for implementing the Comprehensive Remedy in the Lower Basin which will

come later than the Upper Basin due to the general sequencing of the Basin cleanup schedule; EPA anticipates issuing the ROD Amendment in the middle of 2010; 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. [Joint Ex. 14 (Grandinetti Supplemental Declaration) at ¶¶ 5, 6, 10, 24-27]

111. There is evidence that supports the conclusion that the magnitude of the known and unknown costs associated with EPA's past and future response actions could ultimately be as extensive as – or more extensive than - EPA's Comprehensive Remedy and therefore that the proposed settlement for those claims should be approved.

**b. Claims for Natural Resource Damages**

112. The Natural Resource Trustees – the U.S. Departments of the Interior and Agriculture and the Coeur d'Alene Tribe of Idaho – conducted one of the most extensive natural resource damage assessments in history. More than two dozen studies were conducted to determine the type and extent of injuries to natural resources due to mine-related contamination. Those studies documented severe and widespread injuries to a variety of resources, including the waters, soils, plants, sediments, fish and wildlife throughout the Basin. The studies demonstrated that the injuries continue even to today, and that they are the result of historic and ongoing releases of heavy metals into the environment. After a several month trial on these issues, the Idaho District Court agreed that these resources, and ground water in the Basin, had been injured by the vast amount of wastes released into the Basin. *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1123-24.

113. The United States natural resource damage claim constitutes only 13.6% of the United States' total claim at the Basin which includes three component parts: (1) damages to birds and wetlands; (2) damages to Federal Lands; and (3) damages to surface waters.

114. The United States' claim for damages is based on replacing the services that have been lost as a result of the destruction of natural resources by mine wastes. While the Natural Resource Trustees are entitled to recover both the amount of money necessary to restore all injured resources to their pre-release condition plus that amount necessary to replace the services lost, the United States' claim does not reflect the expectation that its eventual claim will seek all such recoveries. *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 463 ( D.C. Cir. 1989) ("Congress intended the damage assessment regulations to capture fully *all aspects of loss*.") (emphasis added).

115. The United States presented a claim for $333.2 million in damages for injuries to natural resources within the trusteeship of the United States Department of the Interior and U.S. Department of Agriculture-Forest Service. The United State argues that number reflects the low-end estimate of the amount of damages to which the United States is entitled. [Joint Ex. 10 (Lipton Proffer) at ¶ ¶ 7, 10 and Table 1] At the estimation hearing, the Debtor argued that the United States overstated its claim, and that the damages should be reduced to $7,520,000.

116. The Parent objected to the settlement with respect to the Coeur d'Alene Basin. At the Coeur d'Alene estimation hearing, Parent presented testimony and evidence that certain habitat characteristics were not considered by the Natural Resource Trustees when developing a baseline for aquatic injuries, thus overstating damages for that component of the claim. In addition, Parent presented four arguments in its pre-hearing brief. First, they argue that the United States' damages calculations increased when more fish were found in a small portion of

Canyon Creek, one tributary to the South Fork Coeur d'Alene River. Second, they contend that the population of tundra swans living in the Pacific Flyway of North America is increasing, and thus the United States' damages must necessarily be overstated. Third, they contend that the Court should endorse a restoration plan that buys additional easements on nesting grounds rather than restore the damaged and destroyed wetland habitat in the Basin. Finally, the Parent asks the Court to adopt the purchase of conservation easements in the Basin to compensate the United States for the large-scale contamination of federally-owned and managed lands.

117. The United States asserts that the Parent's objections are not supported by the record or the law and that the calculations for damages related to contaminated surface waters in the Coeur d'Alene Basin are conservative for several reasons, including that the settlement amount includes no damages for injuries to the main stem Coeur d'Alene River and Lake Coeur d'Alene. [Joint Ex. 10 (Lipton Proffer) at ¶¶ 13-15; U.S. Proof of Claim] This is so even though the U.S. District Court for the District of Idaho found both to be injured. *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1106.

118. The United States also asserts that the baseline used to calculate damages for the contaminated surface waters throughout the Coeur d'Alene River was also conservative and that the only alternative methods in the record for determining baseline conditions would result in a substantially higher damages calculation. [Joint Ex. 10 (Lipton Proffer) at ¶¶ 6-10; CdA 2007 Hearing Debtor's Ex. D-112 at 37, 41; 10/10/07 CdA Hearing Tr. at 185:13-186:8, 187:25-189:4, 191:3-19]

119. The new evidence presented by the Parent at the hearing on the Settlement Motion was only with regard to injuries to surface waters. [Joint Exs. 1347, 1348] No new evidence was presented regarding the United States' claims for federal lands, tundra swans and

restoration of the supporting wetland habitats. The studies presented were conducted by local fisheries scientists from the Idaho Panhandle, working for the Idaho Department of Fish & Game and the U.S. Forest Service. [*See, id.*; 10/10/07 CdA Hearing Tr. at 200:8-12] The United States asserts that both studies support the United States' position that metals are the primary factor controlling aquatic health in the Coeur d'Alene Basin. [Joint Ex. 1347 at 149] ("It's our professional opinion that we believe the elevated heavy metals play the biggest role in suppressing this cutthroat trout population. This seems to be appear logical given cutthroat trout population was 10 to 100 times higher upstream of Canyon Creek where heavy metal concentrations were low.")

120. The United States also rejects Parent's argument the damage assessment conducted by the Natural Resource Trustees was "unlawful" because the Trustees violated damage assessment regulations. The United States asserts that it did substantially comply with the regulations. [5/18/09 Tr. at 269-272]. Moreover, the Department of the Interior's damage assessment regulations are not, by their own terms, mandatory. The regulations provide that "[t]he assessment procedures set forth in this part are not mandatory." 43 C.F.R. § 11.10. Under CERCLA, the only penalty for not following the damage assessment regulations is a loss of the rebuttable presumption of correctness in the findings. 42 U.S.C. § 9607(f)(2)(C). In fact, natural resource trustees may choose methods of damages calculations that have not even been included in the regulations. *Dep't of the Interior*, 880 F.2d at 472.

121. The United States also disagrees with the Parent's assertion that it is arguing that more fish means more damages. Despite the revised damages calculations, the amount of damages sought by the United States in this settlement have not changed. The United States argues that this is so even though new sampling 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.

122. The United States has also argued that the other objections which have been asserted regarding these claims – in particular the Parent's challenges to United States' calculation of damages for injuries to federal lands and challenges to the United States' calculation of damages for injuries to migratory birds, in particular the tundra swan, and their supporting wetlands habitat – are not appropriate as the alternative easements proposed by Parent are not feasible options. [CdA 2007 Hearing U.S. Exs. USCdA090, USCdA091; 10/10/07 CdA Hearing Tr. at 22:14 to 26:2, 205:17 to 207:17]

**c. The Effect of the District Court's Ruling on Divisibility**

123. The U.S. District Court found that divisibility was appropriate in this matter and assigned a 22% allocation to ASARCO.

124. In reviewing this settlement, this Court may consider the risk that the District Court's ruling will be overturned. ASARCO contends that the 22% allocation would be upheld by the controlling precedent established by *U.S. Envtl. Prot. Agency v. Sequa Corp. (In re Bell Petroleum Servs., Inc.)*, 3 F.3d 889, 895 (5th Cir. 1993). *See Montgomery County Md. v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 489 (S.D.N.Y. 2005) ("A federal bankruptcy court, like a federal district court, is bound to apply federal laws as they have been interpreted by the Court of Appeals in the circuit where it sits."). ASARCO believes that *Bell Petroleum* has just been reaffirmed in *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).

125. The United States disagrees and contends that the Supreme Court's decision in *Burlington Northern* supports its position, in that the Court confirmed that liability under

CERCLA is presumptively joint and several unless the defendant establishes that there is a reasonable basis for apportioning a single harm, which courts should refuse arbitrarily to make "for its own sake." 129 S.Ct. 1870, No. 07-1601 at 13-14. Thus both before and after that decision, the United States argues that defendants like ASARCO 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 United States further asserts that under these principles, the District Court's ruling is flawed in several respects, any one of which could lead to a reversal on appeal. First, the Idaho Court does not define the "harm" which is capable of apportionment; indeed, the Court found that children in the Basin were being exposed to lead, and that various natural resources were being injured by various metals. Second, the record on which the Court relies does not support the Court's conclusions. In fact, the record quite plainly supports the opposite finding. Finally, the ruling does not take into account continuing releases in the Basin, and reserves for the next Phase of trial a determination on the amount of contribution from sources such as leachate, waste piles, and mine adits. Thus, according to the United States, any of these factors could lead an appellate court to overturn this ruling.

### 3. Tacoma Smelter Plume Site (State of Washington Claims)

126. From 1905 to 1986, ASARCO owned and operated a lead smelter at a site in Tacoma, Washington. As a result of these operations, metals from stack emissions were deposited in soils over a wide area in the vicinity of the smelter, which caused elevated levels of arsenic and lead in shallow soils that extend downwind from the smelter site. The State of Washington contends that the Tacoma Smelter Plume Site includes approximately 450 square miles in King County, Pierce County, and portions of other counties in the state. [Dkt. No. 5871 (9/19/07 Zelikson Proffer) at ¶¶ 4-6] Areas in the immediate vicinity of the former smelter are being addressed as part of the federal Commencement Bay/Nearshore Tidal Flats Superfund Site

and the United States' claims at that Site are addressed by the Miscellaneous Federal State and Environmental Settlement Agreement. Areas outside of the federal site are the subject of the State of Washington's proposed cleanup actions and are addressed by the Residual Environmental Settlement Agreement.

127. The State of Washington, based on its expert's opinion has asserted future cost claims for remediation of soils at developed and undeveloped properties allegedly affected by smelter emissions totaling approximately $112.7 million. [Dkt. No. 5886 (9/20/07 Koch Proffer) at ¶ 1] Debtors' experts opined that estimated present value of future costs should not exceed $7,270,000. [Dkt. 5871 (9/19/07 Zelikson Proffer) at 1]

128. On September 24-27, 2007, the Court held an estimation hearing on the State of Washington's Proof of Claim concerning future response costs at the Tacoma Smelter Plume Site. During the hearing, the Court heard testimony from 14 witnesses and considered 280 exhibits. The key issues at the estimation hearing included disputes regarding the number of properties requiring remediation and the appropriate cleanup cost per property. Both sides presented competing bases for identifying the number of properties that might require remediation and the associated costs.

129. The Residual Environmental Settlement Agreement settles this claim for a general unsecured claim in the amount of $80,357,000. No party objected to this portion of the Settlement Agreements, but the Court has conducted an independent analysis of the settlement terms related to this Site and finds them reasonable, fair and equitable, and in the best interests of the estate, warranting approval under Rule 9019.

**F. The Custodial Trust Settlement Agreements**

130. The Court also finds that the Custodial Trust Settlement Agreements are well within the range of reasonableness, fair and equitable, and in the best interest of the estate, both as a whole and with respect to each site addressed by these agreements.

131. The ASARCO Committee's principal objection with respect to the Custodial Trust Settlement Agreements is that the total amount of the settlement exceeds the estimate of ASARCO's expert as to the cost of environmental liability associated with the sites included in the settlement. The estimate of ASARCO's expert, however, rests on assumptions regarding the nature and cost of future response work with which the government experts disagree. The settlement allows ASARCO to avoid the risk of adverse litigation results. In addition, under the terms of the settlements, the government assumes the risk and cost associated with incomplete information, unknown events and cost overruns. The Committee's expert conceded that obtaining a complete release from uncertain future liability has significant value. [5/19/09 Tr. at 311:9-16]

132. The Debtors' expert, James Perazzo, submitted an export report [Joint Ex. 1374] and testified at the hearing on the Settlement Motion. In both his report and his testimony, he stated his opinion as to the costs of cleaning up the Custodial Trust Sites and recounted the probabilistic analysis used to determine the expected value of the costs. Mr. Perazzo's analysis considered the known environmental conditions at the sites and took into account identified uncertainties around the known conditions. [Joint Ex. 5 (Perazzo Proffer) at ¶ 12] His analysis resulted in an expected value of approximately $153 million for future environmental cleanup costs at the Custodial Trust Sites. [*Id.* at ¶ 14] Perazzo did not, however, consult with any state or federal representative to determine their views of the possible remedial needs or costs of any of the Custodial Trust Sites before developing his opinions.

133. Mr. Perazzo's testimony acknowledged, however, that "the governments may have a different view of the known environmental conditions, the range of costs around the known environmental condition, and/or the issues around the risks of unknown environmental conditions. Hence, the various governments may not agree with my model inputs, cost estimates or resulting model outputs in all instances." [Joint Ex. 5 (Perazzo Proffer) at ¶ 17 (emphasis in original)]

134. Dr. Mark Johns, testifying on behalf of the ASARCO Committee, stated that he concurred in Mr. Perazzo's conclusions and calculations. Dr. Johns reviewed Mr. Perazzo's methods, report, and calculations and determined that they were "reasonable and reliable." [Joint Ex. 40 (Johns Proffer) at ¶ 7] Dr. Johns also opined that the proposed settlement value of $233.8 million for the Custodial Trust Sites "far exceeds a fair and reasonable settlement value" for these sites. [*Id.* at ¶ 27] In his Court testimony, however, Dr. Johns conceded that he had "no basis to answer" whether the Custodial Trust Settlement Agreements were reasonable [5/19/09 Tr. at 309:7-21], and admitted that he lacked adequate information to opine on whether the Debtors used reasonable business judgment in settling these sites [*Id.* at 31021-25]

135. Both the Debtors and the governments supported the Custodial Trust Settlement Agreements with expert testimony analyzing the particular circumstances at various sites addressed in the agreements, which the Court has considered. [*See* Joint Exs. 5 (Perazzo Proffer); 8 (Brusseau Proffer on Taylor Springs; 26 (Martin Declaration on Iron Mountain); 46 (Bucher Proffer on Iron Mountain); 11 (Nelson Proffer on Iron Mountain and Combination); 16 and 17 (Wintergerst Declaration on Combination Mine and Combination Mill); 21 (Lavelle Declaration on Murray Smelter); 27 (Wilson Declaration on Alton); 31 (Proffer Costello on El Paso); 33 and (Turner Proffer on Salero and Trench); 35 (Crandall Proffer on Salero); 37 (Shih-

Hong Sher Proffer on Amarillo); 47 (Bucher Proffer on Upper Blackfoot/Mike Horse); 48 (Adenuga Declaration on Federated Metals; 54(Linebaugh Declaration on Taylor Springs)]

136. In court, the ASARCO Committee refined its objection to center on three sites: East Helena, MT; Black Pine, MT; and Sacaton, AZ. [5/18/09 Tr. at 161:10-13] In fact, the Committee essentially waived any objection to settlements for any of the Custodial Trust Sites or Miscellaneous Federal and State Sites except for: East Helena, MT; Black Pine, MT; Sacaton, AZ; Tacoma, WA; USIBWC; and Monte Cristo, WA. [5/18/09 Tr. at 164: 2-5] Thus, it appears that the overwhelming bulk of the sites subject to the settlement agreements are uncontested.

137. The Court is not surprised that the settlement amounts for most of the Custodial Trust Sites and Miscellaneous Federal and State Sites are uncontested. These uncontested settlement amounts are all well within the range of estimates developed by the Debtors' experts and are generally well below the opposing estimates. [Joint Ex. 2 (Hansen Proffer) at ¶ 7; Joint Ex. 62 (1374) (PerazzoReport) at Ex. 3] With respect to the Custodial Trust Sites, the settlement amounts for at least eight uncontested sites (Globe, Trench/Salero, Columbus/Blue Tee, Beckemeyer, Ragland, Van Buren, McFarland, and Iron Mountain) are actually lower than the expected values calculated for those sites by the Debtors' expert, Mr. Perazzo, with which the Committee's expert, Mr. Johns, agreed. [Joint Ex. 62 (1374) (Perazzo Report) at Ex. 3; Joint Ex. 40 (Johns Proffer) at ¶ 6, 12] As such, the Court finds that the settlement amounts for the uncontested Custodial Trust Sites and Miscellaneous Federal and State Sites are fair, reasonable, and in the best interest of the estate.

138. As for the contested sites, along with criticisms that these individual sites were settled at an excessive "premium" over Debtors' experts' estimates, the ASARCO Committee and the Parent also intimated that these settlements did not properly consider the value of the

properties at issue, that costs for demolition of buildings were not recoverable under CERCLA, and that the $27.5 million settlement for administrative costs was excessive. [Joint Ex. 40 (Johns Proffer) at 25, 28; Joint Ex. 63 (Johns Report) at §A 10, § C 8]

139. That ASARCO settled some of the Custodial Trust Sites for amounts in excess of its experts' costs estimates is not surprising, as these settlements were the product of negotiations between parties with markedly different opinions as to the costs that might be incurred in addressing these sites. For instance, although ASARCO contends that the East Helena site can likely be addressed for an amount between $48 and $56 million, [Joint Ex. 62 (1374) (PerazzoReport) at Ex. 3], the state of Montana contends that the site will require work in an amount between $161 and $224 million. [Joint Exs. 45 (Bucher Proffer) at 5, and 8 (Brusseau Proffer) at 10-11] One of the primary differences of opinion as to the various experts' costing assumptions is the degree to which additional work will be needed to address a selenium groundwater plume discovered since the filing of the bankruptcy [5/19/09 Tr. at 366: 15-20; 367: 9-13]] ASARCO's experts assigned a five percent probability to this event occurring. [Joint Ex. 62 (Perazzo Report) at Ex 4, p 12 of 24] Since the preparation of Mr. Perazzo's report, the company has been ordered to further delineate and address this plume. [5/19/09 Tr. at 367: 5-8] As a result, the probability of having to address this selenium plume is now reasonably estimated at 100%. [5/19/09 Tr. at 367: 9-13] Likewise, while ASARCO estimated the costs of cleaning up the contaminated groundwater at the site at between $10 and $16 million, [Joint Ex. 62 (Perazzo Report) at Ex. 5, p. 8], the United States believes those costs alone will range from approximately $58 to $122 million, [Joint Ex. 8 (Brusseau Proffer) at App. A, Figs. 2, 3]. This change alone could drive Mr. Perazzo's most-likely-case scenario up by $11.9 million on an undiscounted basis and his reasonable-worst-case scenario up by $23.2 million on an

undiscounted basis. [Joint Ex. 5 (Perazzo Proffer) at 1] Such differences of opinion on complex technical considerations [*see, e.g.*, Joint Ex. 45 (Bucher Proffer) at 26-35] are to be expected in these cases and account for the reasonableness of the $100 million settlement at East Helena.

140. Similar reasoning applies to the Black Pine site, where the settlement of $17,500,000 reflects a reasonable compromise between ASARCO's estimates of $4.3 to $8.7 million and the government's claim for $44.9 million, [Joint Ex. 62 (Perazzo Report) at Ex. 3; Joint Ex. 662 (Bucher Report) at p. 9], and Sacaton, AZ, where the settlement amount of $20 million reflects a reasonable compromise of the technical differences of opinion between Debtors' expert who estimates this site's costs at a range of $1.9 to $10.8 million, and the State of Arizona's Department of Environmental Quality staff and outside environmental engineering experts, who estimate these costs at an amount between $13.4 million and $30.1 million. [Joint Ex. 62 (Perazzo Report) at Ex. 3; Joint Ex. 36 (Breckenridge Proffer) at ¶ 8].

141. The ASARCO Committee's expert admitted that whether a particular response action would be accepted by the government agency with decision-making authority for a particular site is important in projecting future costs at a Site. [Joint Ex. 116 (Johns Tr.) at 141:22-142:2] The United States maintains that Mr. Perazzo did not adequately consider this factor, among many others (including, e.g., the incurrence of government oversight costs with respect to CERCLA sites).

142. Along with the value of resolving known environmental liabilities and the uncertainties surrounding them, the Custodial Trust Settlement secures for the Debtors a release of unknown liabilities relating to these sites. Such value is not reflected in the estimates of Debtors experts, as their inquiry centered on known conditions and the uncertainties surrounding

them. Accordingly, settlement above the Debtors' estimated costs for addressing known conditions is reasonable, as they are securing a broader release.

143. Finally, as outlined by Debtors' expert Mr. Perazzo, the total cost—absent administrative costs, which are addressed separately—of $233 million assigned to these sites is very close to the amount that the market would ascribe for a liability transfer with a shorter term and less overall protections were one to assume that Debtors' Expected Value calculation were correct and acceptable to the various governments. [Joint Ex. 5 (Perazzo Proffer) at ¶ 26].

144. Collectively, these various lines of reasoning demonstrate that the Custodial Trust Settlement Agreements are well within the bounds of reasonableness and in the estate's best interest.

145. Both the ASARCO Committee and the Parent contend that the Settlements do not properly account for the residual value of properties deeded to the trusts and that ASARCO is "forfeiting" the "value" of theses properties. [Joint Ex. 40 (Johns Proffer) at ¶ 25; 5/18/09 Tr. at 123: 3-11] The objectors did not attempt to present evidence of any current or future value associated with the properties to be transferred They instead relied on a marketing document that was several years old and contained out-of-date appraisal information which was used in a marketing effort that was unsuccessful. [Joint Ex. 450 (ASARCO LLC Non-Operating Properties); 5/18/09 Tr. at 233: 10-15; 5/18/09 Tr. at 256: 9-13] There is uncontroverted testimony that these properties have no current or expected future value and in fact represent a liability to the estate. In particular, ASARCO's vice-president for environmental affairs, Thomas Aldrich, testified that ASARCO spent more than three years trying to divest itself of these properties and found no buyer at any price. ASARCO literally could not pay anyone to accept responsibility for these properties because of the environmental liability associated with them.

On four separate occasions between 2006 and 2008, ASARCO made concerted efforts to identify and communicate with potential purchasers, all with no success. It is apparent that the market places no value on these contaminated sites. In contrast, obtaining a release for all known and unknown environmental liabilities at these sites and transferring responsibility for the sites to a custodial trustee has a demonstrably significant value to the estate.

146. Debtors submitted the testimony of both Joe Lapinsky and Tom Aldrich, each of whom noted that: (1) the company engaged in numerous attempts both before and during the bankruptcy to market these properties; (2) the company was unable to sell, donate, or pay others to take any of the properties; and (3) the company therefore placed little positive value on these properties [Joint Ex. 1 (Aldrich Declaration) at ¶¶ 17-32; Joint Ex. 4 (Lapinsky Proffer) at ¶¶ 11-12] Similarly, various government witnesses suggested that these properties would have no significant value, even upon remediation, which at some sites will not occur for decades. [*See, e.g.*, Joint Ex. 52 (Jacobson Declaration) at ¶ 20-21]. This uncertainty as to the timing of any sale further limits any residual value that could be assigned to these properties. [Joint Ex. 5 (Perazzo Proffer) at ¶ 28] Moreover, Debtors secured concessions within certain of the Settlement Agreements that allowed the Estate to secure value from future sales or operations at key sites. [Joint Ex. 72 (Texas Custodial Trust Agreement); Joint Ex. 70 (Other Custodial Trust)]. Taken as a whole, these facts suggest that Debtors properly considered the residual value of the Custodial Trust Sites in negotiating these settlements.

147. In any event, to the extent that there is any residual value associated with any of the properties, it is consideration bargained for by the governments and is justified by the fact that the costs at the custodial sites could potentially significantly exceed the amount of the

allowed claim due to the substantial risk of unknown or unexpected conditions at many of theses sites.

148. Both the ASARCO Committee and the Parent argue that the costs of demolition outlined by Debtors' expert, Mr. Perazzo, are not typically recoverable under CERCLA. As a preliminary matter, the Court notes that neither the Committee nor the Parent presented any evidence that the demolition costs ascribed by Mr. Perazzo are of the kind that might be disallowed under CERCLA. Moreover, the Committee's sole witness on the matter, Dr. Johns, conceded that site demolition is often required at industrial sites under a host of environmental programs including both CERCLA and RCRA, the two regulatory programs of particular importance at closed industrial facilities. [5/19/09 Tr. at 312: 9-25].

149. Similarly, Debtors' witnesses Mr. Perazzo, Mr. Robbins and Mr. Aldrich noted the frequent use of demolition at metals processing and other similar industrial facilities as a cost effective means of accomplishing government-mandated decontamination. [/18/09 Tr. (Perazzo) at 325: 2-19; 5/18/09 Tr. (Robbins) at 263: 17- 264:1; Joint Ex. 1 (Aldrich Declaration) at ¶ 34] For example, in response to a State of Montana order on consent, ASARCO has chosen to address contaminated buildings at the East Helena site by demolition. [5/18/09 Tr. at 264, line 11 through 266, line 14; Joint Ex. 52 (Jacobson Declaration) ¶¶ 33-36] Another example is the proffered testimony of TCEQ Expert Witness, James Shih-Hong Sher that demolition of the buildings and structures on the El Paso site is the most cost effective remedy for the long term care of the facility. [Joint Ex. 37 (Sher Proffer) at pg. 6 para. 16] [Joint Ex. 31 (Costello proffer) at pp. 3-4, para. 3, 7] In addition, neither the ASARCO Committee nor the Parent dispute the fact that as property owners, the various trusts will be charged with maintaining these properties and any structures associated with them in a safe and reasonable manner and thus may need to

demolish these structures for non-environmental reasons. As Mr. Perazzo explained, such asset retirement obligations are considered liabilities under General Accepted Accounting Principles that would flow through to the Trusts. [Joint Ex. 5 (Perazzo Proffer) at ¶¶ 2, 11] Ultimately, the Court finds that Debtors' decision to settle for an amount that accounts for some demolition costs at some sites was reasonable.

150. Although not developed at the hearing, the ASARCO Committee has suggested in the proffer of Dr. Mark Johns that it takes issue with the $27.5 million set aside in the various custodial trust settlements for trust administration costs. [Joint Ex. 40 (Johns Proffer) at p. 3]. This settlement amount reflects a reasonable compromise between the parties and is in the best interests of the estate.

151. Recognizing that trust administration fees were not addressed in the earlier agreement in principal resolving the governments claims, the parties endeavored to reach a compromise on administrative costs through a separate exchange of information. ASARCO began the process by analyzing administrative costs from prior environmental bankruptcy settlements. [Joint Ex. 4 (Lapinsky Declaration) at ¶ 22]. Feeling that these examples were extreme and not representative of ASARCO's costing expectations, [*Id.* at ¶ 23], the company created an administrative costing model "from the ground up" using its own past property carrying costs for the sites and prospective costing assumptions for other administrative cost categories. [Joint Ex. 4 (Lapinsky Declaration) at 23; Joint Ex. 1 (Aldrich Declaration) at ¶ 15] When added together, the company came up with an initial estimate of $23.7 million, which when discounted at an 8% rate yielded $17.3 million. [Joint Ex. 1 (Aldrich Declaration) at ¶ 15] Two key assumptions underlying ASARCO's estimates were the 8% discount rate and a 6-year term for calculating costs. [*Id.*; Joint Ex. 4 (Lapinsky Declaration) at ¶¶ 23] Although the

company recognized that these two assumptions were aggressive in the sense that they favored a lower cost for this component, ASARCO believed that these estimates were a reasonable basis from which to begin its negotiations with the governments. [*Id.*]

152. The governments did not agree with ASARCO's more aggressive discounting and lifespan assumptions and countered with estimates ranging as high as $60 million on an undiscounted basis. [Joint Ex. 1 (Aldrich Declaration) at ¶ 16]. The $27.5 million settlement reflects a reasonable compromise of the two parties' positions as it is based on actual costs prepared and documented by the Debtors and a reasonable "middle-ground" assumptions on discount rates and remedial timing.

**1. The Texas Custodial Trust Agreement**

153. On May 12, 2009 the El Paso City Council voted 7-1 to support the Texas Custodial Trust Settlement. [5/18/09 Tr. at 106 16-24].

154. The terms of the Custodial Trust for the Owned Smelter Site in El Paso, Texas and the Owned Zinc Smelter Site in Amarillo, Texas are fair, reasonable, and consistent with environmental law.

155. The El Paso Smelter site consists of approximately 422 acres on both sides of [Highway] Interstate 10 connected by a private bridge. [Joint Ex. 37 (Sher Proffer) at pg. 3, ¶1]. The El Paso site operated as an industrial smelter for more than 110 years. Id. at pg. 3, ¶ 4. The buildings on the El Paso site consist of, inter alia, an acid plant, sulfuric acid storage tanks, unloading building, bedding building, dryer baghouse, settling furnace and anode casting. Id. at pg. 6, ¶ 16.

156. The Court has reviewed the proffers of the Texas Commission on Environmental Quality's experts, James Shih-Hong Sher and Benjamin Costello.[14] The Court finds the findings and conclusions of Mr. Sher and Mr. Costello to be supportive of the $52 million settlement for the El Paso site.

157. The proposed settlement of $52 million for the Owned Smelter Site in El Paso is based in part on the following TCEQ estimates of costs, all of which the Court finds to be well within the range of reasonableness:

(a) $8.9 million to demolish the existing buildings and structures on the El Paso site (obtained from Shaw Environmental) [Joint Ex. 37 (Sher Proffer) at pg. 6, ¶ 16]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 7];

(b) $9.8 million to complete the additional asphalt paving [Joint Ex. 37 (Sher Proffer) at pg. 6, ¶ 17]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 12];

(c) $5.9 million to construct the additional repository cell and to excavate and relocate the subject waste to that cell, as well as install a chain link fence around the northern part of the plant [Joint Ex. 37 (Sher Proffer) at pp. 6-7, ¶¶ 18,19]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 14];

(d) $1.8 million to construct a slurry wall along the northern portion of the groundwater plume [Joint Ex. 37 (Sher Proffer) at pg. 7, ¶ 21(a)]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 8];

(e) $200,000 to install 50 additional groundwater extraction wells [Joint Ex. 37 (Sher Proffer) at pg. 7, 21(b)]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 8];

(f) $5 million to construct a groundwater treatment plant [Joint Ex. 37 (Sher Proffer) at pp. 7-8, ¶ 21(c)]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 8].

(g) $100,000 to install a 800-foot injection well [Joint Ex. 37 (Sher Proffer) at pg. 8,¶ 21(d)]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 8];

(h) $14.8 million for the operation and maintenance of the groundwater treatment plant [Joint Ex. 37 (Sher Proffer) at pg. 8, ¶ 22]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 9]; and

[14] Proffer of TCEQ Expert Witness James Shih-Hong Sher is Exhibit 37 on the Joint Exhibit list submitted to the Court and is filed at docket No. 11264, Exhibit B Proffer of TCEQ Expert Witness Benjamin Costello is Exhibit 31 on the Joint Exhibit List submitted to the Court and is filed at Docket No. 11264, Exhibit A.

(i) $3.3 million for post-closure care of the site [Joint Ex. 37 (Sher Proffer) at pp. 8-9, ¶ 23]; [Joint Ex. 31 (Costello Proffer) at pg. 4, ¶ 15].

158. The $52 million settlement is also within the range of costs estimated by the Debtor to be necessary to address environmental liabilities at the El Paso Smelter site. [Joint Ex. 1374 (62) (Perazzo Report) at Ex. 3]

159. The $52 million settlement amount for the El Paso site is within the expected range of costs for a project of this scope and duration and is well within the range of reasonableness. [Joint Ex. 37 (Sher Proffer) at pg. 11, ¶¶ 29,29]; [Joint Ex. 31 (Costello Proffer) at pg. 1, § A, pp. 3-4, ¶¶ 3-15]

160. The Amarillo Zinc Smelter Site was operational until 1975 and all buildings and structures were demolished by 1994. [Joint Ex. 37 (Sher Proffer) at pg. 2, ¶ 1]. A 12-inch soil cap was constructed to cover contaminated soil at the site and the property was "closed" in 1999. *Id.* at pg. 3, ¶ 3. There is no long-term groundwater monitoring requirement for the cap area. *Id.*

161. The settlement amount of $80,000 for post-closure care of the Amarillo facility (including but not limited to maintaining the cap by mowing the grass) is well within the range of reasonableness for this task. [Joint Ex. 37 (Sher Proffer) at pg. 3, ¶¶ 4-6].

**G. The Miscellaneous Federal and State Environmental Settlement Agreement**

162. The Court finds that the Miscellaneous Federal and State Environmental Settlement Agreement—as a whole and with respect to the compromises of particular claims within that agreement—is well within the range of reasonableness, fair and equitable, and in the best interests of the estate.

163. The Debtors face a number of legal and practical risks associated with its potential liabilities at these sites, and the rewards of continued litigation are uncertain at best. The disputed issues are numerous and substantial, and there is a risk that the Debtors' position

ultimately would not prevail. By contrast, the Miscellaneous Federal and State Environmental Settlement Agreement eliminates these risks and provides the Debtor and its creditors with the benefit of certainty at a reasonable cost. The benefits to the estate far exceed the benefits of continued litigation and weigh heavily in favor of granting the Settlement Motion. The allowed claims under the Settlement Agreements are fair taking into account the various litigation risks on both sides and are well within the range of reasonableness for approval of bankruptcy settlements.

164. Notably, of the 26 sites resolved by the Miscellaneous Federal and State Environmental Settlement Agreement, only three sites are the subject of any objection: the Tacoma Federal Site; the Monte Cristo Site; and the USIBWC Site. [5/18/09 Tr. at 161:14-164:5] Given the circumstances at these Sites outlined below, the settlements of associated claims are reasonable and in the best interest of the estate.

165. Although the objectors complain that the settlement is too generous, the objectors presented no evidence of their own to value the response costs associated with any of these sites. Experts who did testify with respect to sites covered by this agreement acknowledge that cost estimates are subject to great variation. The Debtors' expert, Brian Hansen, has more than 24 years of professional experience with subsurface investigations, waste disposal, Superfund, hazardous waste site investigations, and site remediation. He testified that "the settlement amounts for each of the Sites in the Miscellaneous Federal and State Environmental Settlement Agreement are within a reasonable range of cost outcomes given the technical variables at the Sites and the uncertainties regarding actual costs estimates." [Joint Ex. 2 (Hansen Proffer) at ¶ 7]

### 1. Tacoma Federal Site

166. The United States has asserted claims seeking between $50,700,000 and $54,700,000 for the completion of ASARCO-related remedial work at the Commencement Bay/Nearshore Tidal Flats Superfund site. [Joint Ex. 155(United States Proof of Claim 10746)]

167. Under a consent decree entered before the Debtors' bankruptcy filings, the site has been divided into operable units ("OUs"), three of which are at issue here: OU2; OU4; and OU6. [Joint Ex. 9 (Koch Proffer) at ¶ 3; Joint Ex. 20 (Rochlin Declaration) at ¶¶ 2, 5]

168. The key issues of dispute and uncertainty related to future costs at this site concern the scope and timing of the proposed cleanup, the costs of dredging, the timing for implementing necessary steps to protect the groundwater, and whether the site's current owner complies with its remediation obligations at the site. [Joint Ex. 6 (Robbins Declaration) at Part II, ¶ 1]

169. A remedy for this site has been selected, and ASARCO is responsible for residential yard cleanup, armoring and capping the tip of the slag peninsula, and dredging a portion of the yacht basin. [Joint Ex. 6 (Robbins Declaration) at Part II, ¶ 1.] ASARCO estimated its potential liabilities at a range from $18,717,000, reflecting its estimate of "ASARCO-only" costs, to more than $50,000,000, reflecting costs to ASARCO if Point Ruston fails to perform its share of the work. [Joint Ex. 2 (Hansen Proffer) at ¶¶ 18-19.] The EPA estimated that the expected value of future remediation costs at the site total approximately $73,000,000. [Joint Ex. 9 (Koch Proffer) at ¶ 7.] EPA estimates that, even assuming Point Ruston fully performs its cleanup obligations, the expected value of the United States' future costs is $55.4-$58.7 million. [Joint Ex. 9 (Koch Proffer) at tbl. C-5A] The parties agreed to resolve the claims at this site for $27,000,000.

170. The Debtors face substantial risk and uncertainty at this site. First, ASARCO is responsible pursuant to the previously issued consent decree for sampling and remediating, where necessary, more than 200 residential yards. Second, the parties disagree about the costs to dredge offshore sediments, and the parties also disagree about when to implement necessary steps to protect groundwater at the site. [Joint Ex. 6 (Robbins Declaration) at Part II, ¶ 1]

171. The Debtors also risk the failure of the site's current owner, Point Ruston, to perform the remediation responsibilities it assumed upon purchase of the property. If Point Ruston fails to perform this work, ASARCO remains liable for completing it. [Joint Ex. 6 (Robbins Declaration) at Part II, ¶ 1] The current site manager testified that Point Ruston is currently one year behind schedule on its remediation schedule. [Joint Ex. 20 (Rochlin Declaration) at ¶ 21] Even if Point Ruston fully performs in accordance with its prior agreements, the costs for completing ASARCO's remaining work at the site could cost as much as $57,069,774. [Joint Ex. 9 (Koch Proffer) at tbl. 2]

172. Two other potential RPRs exist at this site—the State of Washington and the Tacoma Metropolitan Parks District. [Joint Ex. 127] Neither the State nor the Parks District conducted industrial operations at the site. [5/18/09 Tr. at 240:23-241:4; 5/19/09 Tr. at 152:23-153:1] ASARCO personnel familiar with the site testified that, to date, EPA has not pursued either of these parties as a PRP and that even if they were pursued, owners like the State and the Metropolitan Parks District typically are not held responsible for a significant portion of the cleanup costs in this situation. [5/18/09 Tr. at 241:22-242:7; *id.* at 244:3-7] Whether the EPA would pursue these passive owners of portions of land at the Tacoma site remains uncertain.

173. Given these variables, the Debtors' expert Mr. Hansen concluded that the settlement amount is within a reasonable range of expected costs outcomes for the Tacoma Site. [Joint Ex. 2 (Hansen Proffer) at ¶ 20] The Court agrees.

**2. Monte Cristo Site**

174. The Monte Cristo Site consists of a series of abandoned mine workings in the Mt. Baker-Snoqualime National Forest in Snohomish County, Washington. [Joint Ex. 8 (Brusseau Proffer) at ¶ 24] Mining operations occurred in the region from 1889 through the 1920s, with ASARCO conducting active operations at the site for a 5-year period from 1903 through 1907. [Joint Ex. 18 (Lentz Declaration) at ¶¶ 5, 9; Joint Ex. 6 (Robbins Declaration) at Part II, ¶ 4] Although a number of other companies conducted mining operations over time at the Site, no other significant, viable PRP has been identified by the United States or ASARCO. [5/18/09 Tr. at 243:11-14; Joint Ex. 18 (Lentz Declaration) at ¶ 13] Thus, as the only remaining viable, mining PRP at the Site, ASARCO stands to bear the brunt of the cleanup costs at this site. The United States contends that Debtors are, if not jointly and severally liable outright, at least liable for their share of the orphan shares at the site.[15]

175. Preliminary site assessment work has identified widespread soil contamination as well as the release of metals-contaminated water from mine adits. [Joint Ex. 8 (Brusseau Proffer) at ¶ 26; *see* Joint Ex. 2 (Hansen Proffer) at ¶¶ 31-35] More study is needed to delineate the full extent of the environmental issues at this site. [Joint Ex. 2 (Hansen Proffer) at ¶ 33]

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[15] *See* RESTATEMENT (SECOND) OF TORTS § 433A, cmt. h; *cf. Co., Inc. (R&M) v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1193 (10th Cir. 1997); *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1135 (10th Cir. 2002); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 n.12 (6th Cir. 1998) *overruled on other grounds by United States v. Atl. Research Corp.*, 551 U.S. 128 (2007); *Pinal Creek v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997), *overruled on other grounds by United States v. Atl. Research Corp.*, 551 U.S. 128; *Vine Street, LLC v. Keeling*, 460 F. Supp. 2d 728, 761 n.129 (E.D. Tex. 2006).

176. Both the State of Washington and the United States have asserted claims at the Site. The U.S. Forest Service has incurred a total of $295,220 in past costs associated with its preliminary assessment work at the Site. [Joint Ex. 18 (Lentz Proffer) at ¶ 10] According to the United States' expert, Dr. Gregory Brusseau, costs at the site total $25,196,078, which include the past costs, $12,641,658 costs for future investigation and remediation of the site, and $12,209,200 in natural resource damages. [*Id.*] ASARCO disagreed with this claim amount and calculated the costs of future investigative and remedial work at $8,079,205. [Joint Ex. 2 (Hansen Proffer) at ¶ 39] ASARCO disputes the claim for natural resource damages in its entirety. Thus, inclusive of past costs, ASARCO estimated the total claim for the Monte Cristo Site at $8,424,425, while acknowledging that the higher range of costs contemplated by the governments is well within the range of reasonable cost outcomes at a site where so much remains unknown. [*Id.* at ¶¶ 39-40] Accordingly, ASARCO agreed to settle this claims for a general unsecured claim of $11,000,000. This also represents a reasonable compromise.

**3. USIBWC Site**

177. The United States' claims at the USIBWC Site center predominantly on the need to address metals-contaminated groundwater emanating from the former ASARCO El Paso smelter complex in connection with proposed construction projects on the American Canal, a man-made waterway connected to the Rio Grande River in El Paso, Texas. According to the United States' experts, the costs to address this groundwater could range as high as $23,963,800. [Joint Ex. 193 (11/30/07 Koch Proffer) at ¶ 4]. When coupled with costs for future soil remediation and past costs, the United States' claim totals $27,453,394. [Joint Ex. 310 (7/27/07 Koch Report) at 2:10; Joint Ex. 2 (Hansen Proffer) at ¶ 22] ASARCO's expert, Brian Hansen, estimated total costs to address ASARCO's liabilities for the Site to be $3,947,500. [Joint Ex. 2

(Hansen Proffer) at ¶ 25] The parties agreed to resolve the United States' claims at the Site for an allowed general unsecured claim of $19,000,000.

178. The key dispute between the parties relates to the amount of water that will need to be treated at the Site. Based on available Site data, ASARCO contends that the Site's hydraulic conductivity is such that only 350 gallons per minute ("gpm") will require cleanup. [Joint Ex. 2 (Hansen Proffer) at ¶ 25]. In contrast, based on the USIBWC Conceptual Design Report, the government's expert contends that as much as 8,000 gpm will need treatment. [*Id.* at ¶ 28; Joint Ex. 324 (9/19/07 Koch Rebuttal Report) at 3:18] Because of the complexity of riverine depositional environments, it is impossible to say which of these assumptions will prove to be correct absent additional testing at the sit. Hydraulic conductivity can vary by orders of magnitude in such environments. [*See* Joint Ex. 2 (Hansen Proffer) at ¶¶ 26-28]

**4. Uncontested Sites**

179. No party to the Debtors' bankruptcy proceeding objected to the resolution of the claims at the following Miscellaneous Federal and State Sites: the Jack Waite Mine Site, the Lower Silver Creek/Richardson Flat Site, the Circle Smelting Site, the Van Stone Site, the Kusa Site, the Vasquez Boulevard/I-70 Site, the Terrible Mine Site, the South Plainfield Site, the Helvetia Site, the Stephenson/Bennett Mine Site, the Flux Mine Site, the Bonanza Site, the Golden King Site, the Cholett Site, the Coy Mine Site, the Black Pine Site, the Henryetta Site, the Summitville Site, the Northport Smelter Site, the Anderson Calhoun Site, and the Azurite Site.

180. Debtor submitted evidence on each of these uncontested sites. [Joint Ex. 2 (Hansen Proffer); Joint Ex. 6 (Robbins Declaration)]. In addition, the governments submitted expert testimony and other evidence regarding the following uncontested sites:

(a) Vasquez Blvd/I-70 [Joint Ex. 8 (Brusseau Proffer)];

(b) Flux Mine [Joint Ex. 15 (Curiel Declaration); Joint Ex. 8 (Brusseau Proffer)];

(c) Isle Mine/Terrible Mine [Joint Ex. 12 (Lange Declaration); Joint Ex. 8 (Brusseau Proffer)];

(d) Richardson Flat/Lower Silver Creek [Joint Ex. 19 (Hernandez Declaration); Joint Ex. 8 (Brusseau Proffer)];

(e) Van Stone [Joint Ex. 28 (Roland Declaration)];

(f) Golden King and Cholett [Joint Ex. 29 (Roeder Declaration)];

(g) Helvetia [Joint Ex. 32 (Turner Proffer)];

(h) Circle Smelting (Declaration of Stavros Emmanouil, Joint Ex. 50);

(i) Vasquez Blvd./I-70 [Joint Ex. 51 (Garcia Declaration)]; and

(j) Jack Waite [Joint Ex. 53 (Johnson Declaration); Joint Ex. 8 (Brusseau Proffer)].

181. The Court has reviewed and carefully considered this uncontested evidence. The Court has reviewed and carefully considered this uncontested evidence. The settlement amounts for each of these uncontested sites are within the range of estimates developed by Debtors' expert, Mr. Hansen, and are generally well below the opposing estimates. The record demonstrates that the settlements with respect to the uncontested sites also warrant approval under Rule 9019, F.R.Bankr.Pro..

## VI. RELEVANT LEGAL STANDARDS FOR APPROVAL OF SETTLEMENTS UNDER ENVIRONMENTAL LAW

182. Most of the governments' claims are brought pursuant to CERCLA. 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.[16] 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.

183. CERCLA provides EPA with several options in formulating a response action 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. *Id.* § 9607(a)(4)(C). EPA may also issue administrative orders under CERCLA Section 106 directing responsible parties to implement response actions. *Id.* § 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. *Id.* § 9607.

184. 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.[17] CERCLA encourages settlements by providing protection from

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[16] *See generally United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1500 (6th Cir. 1989); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1416-18 (6th Cir. 1991); *Eagle-Picher v. U.S. Envtl. Prot. Agency*, 759 F.2d 922, 925 (D.C. Cir. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-06 (S.D. Ohio 1983).

[17] *See Akzo Coatings*, 949 F.2d at 1436 (noting that a "presumption in favor of voluntary settlement" exists); *Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110 (2d Cir. 1992); *United States v. Cannons Eng'g 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 Co.*, 717 F. Supp. 507, 514-19 (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.

contribution claims to parties who settle with the United States. *Id.* § 9613(f)(2). This provision provides settling parties with a measure of finality in return for their willingness to settle.[18]

185. Some of the liabilities relating to the Custodial Trust Agreements are under RCRA, also known as the Solid Waste Disposal Act, which 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. *Id.* § 6928. RCRA regulations impose on owners and operators of hazardous waste generation, treatment, storage, disposal, and transportation facilities obligations regarding dealing with hazardous wastes. *See id.* §§ 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. *Id.* §§ 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 also can 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. *Id.* § 7003.

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[18] *United States v. Pretty Prods.*, 780 F. Supp. 1488, 1494 (S.D. Ohio 1991); *see Cannons Eng'g*, 899 F.2d at 92; *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989); *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 103 (1st Cir. 1994); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S. Code Cong. & Ad. News 2862.

186. Because the Settlement Agreements involve the settlement of liabilities under CERCLA and RCRA, the Court is charged with ensuring that the agreements are reasonable, fair, and consistent with the statutory aims. *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *see also United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992).

187. Approvals of settlements under environmental law include a procedure for obtaining public comment, and are based on a record consisting of those comments, the United States' (and any States') responses thereto, and the information in the record before the Court. *See* 28 C.F.R. § 50.7.

188. The well settled standard for reviewing the governments' proposed environmental settlements under CERCLA is whether a settlement is fair, reasonable and consistent with CERCLA.[19] "While the district court should not mechanistically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement *de novo*." *Cannons Eng'g*, 899 F.2d at 84. Review of such settlements is committed to the discretion of the reviewing court, *see United States v. Hooker Chem. & Plastics Corp.*, 776 F.2d 410, 411 (2d Cir. 1985), which is to exercise this discretion in a limited and deferential manner. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991). *See also Cannons Eng'g*, 776 F.2d at 84; *Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 118 (2d Cir. 1992).

189. Judicial deference to settlements reached by the parties to litigation is "particularly strong" when the settlement "has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the

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[19] *See Cannons Eng'g*, 899 F.2d at 84; *Akzo Coatings*, 949 F.2d at 1424; *United States v. Hercules, Inc.*, 961 F.2d 796, 800 (8th Cir. 1992). Courts have also applied this standard to RCRA settlements. *See Cal. Dep't of Toxic Substances Control v. Witco Corp.*, 2005 U.S. Dist. LEXIS 29517 (E.D. Cal. Aug. 30, 2005) (ascribing the same standards of review for RCRA settlements).

environmental field." *Akzo Coatings*, 949 F.2d at 1436; *see also United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994). 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 Co.*, 717 F. Supp. 507, 515 (W.D. Mich. 1989) (citation omitted), because 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. 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 protection 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 v. Exxon Corp.*, 697 F. Supp. 677, 692 (S.D.N.Y. 1988)).

190. A court's inquiry into the fairness of the proposed settlement has a procedural component and a substantive component. *Cannons Eng'g*, 899 F.2d at 86.

191. Procedural fairness is measured by examining the negotiation process to determine the level of "candor, openness, and bargaining balance." *Id.*; *United States v. Wallace*, 893 F. Supp. 627, 632 (N.D. Tex. 1995). Parties should demonstrate good faith with respect to settlement negotiations by showing, for example, that negotiations were at arm's length. *Hercules*, 961 F.2d at 800; *Exxon Corp.*, 697 F. Supp. at 693.

192. In reviewing substantive fairness, the court determines whether a proposed settlement reflects a reasonable compromise of the litigation. *Rohm & Haas Co.*, 721 F. Supp. at 685. 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).

193. 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*, 717 F. Supp. at 517 (quoting *United States v. Hooker Chem. & Plastic Corp.*, 607 F. Supp. 1052, 1057 (W.D.N.Y. 1985), *aff'd,* 776 F.2d 410 (2d Cir. 1985)).

194. 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 Eng'g*, 899 F.2d at 87. Although the settlement should have "some reasonable linkage" to the proportionate share of the settling parties, *id.*, "[r]easonable linkage" does not mean that the agency must choose "the best or even the fairest method of apportioning liability." *Wallace*, 893 F. Supp. at 633; *Cannons Eng'g*, 899 F.2d at 88.

195. Reasonableness focuses on three inquiries: (1) whether the settlement adequately addresses the hazards at the site; (2) whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures; and (3) the relative strength of the parties' litigation positions. *Cannons Eng'g*, 899 F.2d at 89-90.

196. Where a settlement obligates settling parties to perform remediation, whether a settlement is "reasonable" may involve review of the technical effectiveness of cleanup requirements. None of the proposed settlements here, however, requires Debtors to perform remediation. Rather, the Settlement Agreements generally provide money (in the form of allowed claims in the bankruptcy) either to a special account or a trustee for use in cleanup of

particular Sites. Specific response or corrective action measures have been or will be selected separately according to administrative processes. Courts typically find such monetary settlements reasonable. *See, e.g., Kelley*, 717 F. Supp. at 518 (finding that a settlement providing monetary recovery was reasonable because it "functions exactly as the CERCLA cost recovery action was intended"). Reasonableness may also focus on whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of anticipated remedial and response measures and the relative strength of the parties' litigating positions. *Cannons Eng'g*, 899 F.2d at 89-90.

197. Finally, an environmental settlement is reviewed for consistency with the purposes of environmental law: "(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 identified problems bear the costs and responsibility for remedying the harmful conditions they created." *Wallace*, 893 F. Supp. at 636.

198. 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 e.g., In re Bell Petroleum Servs.*, 3 F.3d at 897; *Kelley*, 717 F. Supp. at 518.

## VII. APPLICATION OF ENVIRONMENTAL LAW STANDARDS TO THE AGREEMENTS AT ISSUE

199. As an initial matter, it is questionable whether the Parent has standing to object to the environmental settlements under CERCLA or RCRA, because the Parent has not asserted any interest protected by those statutes. Further, the Parent argues that ASARCO has *overpaid* in the Settlement Agreements, not that the settlement amounts are insufficient to achieve environmental cleanup. Assuming that the Parent did have standing, however, its objections, which are discussed below, are without merit. Likewise, to the extent other objectors challenge approval of the Settlement Agreements under environmental law, their objections are without merit.

### A. The Settlement Agreements Are Procedurally Fair

200. One factor to be considered when reviewing CERCLA settlements is the good faith efforts of the negotiators.

> Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table. That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length . . . itself deserves weight in the ensuing balance.

- - *Cannons Eng'g*, 899 F.2d at 84.

201. The history of negotiations in this case shows that this factor weighs heavily in favor of approving the settlements. As detailed above, the Settlement Agreements resulted from a years-long process of formal and informal negotiations involving experienced bankruptcy and environmental lawyers for both the Debtors and the governments. By all accounts of those involved in the lengthy proceedings leading up to the Settlement Agreements, the governments conducted negotiations forthrightly and in good faith. With one exception that is discussed below, no party argued otherwise.

202. With respect to the sites covered by the Residual Environmental Settlement Agreement, the parties vigorously and ably presented their respective positions on the complicated legal and factual issues presented through extensive estimation proceedings, thereby ensuring that the risks of those positions were well understood by the negotiating parties.

203. The United States also posted notice of the settlements for public comment. The government received no public comments regarding the Multi-State Custodial Trust Settlement Agreement, and comments with respect to only one of the 26 sites covered by the Miscellaneous Federal and State Environmental Settlement Agreement. Other comments received by the governments are discussed throughout these findings.

204. The Parent's objection focuses on the OLS settlement. Assuming that the Parent has standing to object under environmental law, its assertion that EPA allegedly withheld evidence related to contamination or recontamination at the site caused by lead based paint is not supported by the record and does not indicate any procedural unfairness associated with the settlement pertaining to the OLS.

205. The Parent relied on meeting minutes reporting statements allegedly made in 2004 by an ATSDR employee that a 2004 health study "could effect [sic] the enforcement case" [Joint Ex. 1659], but the United States' evidence discredits the statements relied upon by the Parent. At the deposition of the ATSDR employee, for example, the employee stated that she did not make the statement attributed to her and that she had no knowledge of the enforcement case at the OLS in 2004. [Joint Ex. 104 (Casteel Dep. Tr.) at 46:7-25, 75:9-16] The Parent also purported to show that EPA presented one plan of remediation to the public while proceeding with another plan [*See e.g.* Joint Ex. 1773], but the United States rebutted this contention. Robert Feild testified about statements he made in an email sent to his supervisor, Gene Gunn,

and Mr. Gunn's response. In the email, Mr. Feild explained what he told the OLS Community Action Group (the "OLS CAG"), a group holding meetings open to the public in which private construction contractors participate as a means of obtaining information, regarding EPA's plan for the OLS. [5/19/09 Tr. at 39:25-40:2] Mr. Feild testified that he ran his statements to the OLS CAG by Mr. Gunn in order to ensure that those statements were consistent with procurement policies and regulations prohibiting statements about future work to be performed before making a formal, public request for proposals from contractors. In response, Mr. Gunn indicated his belief that Mr. Feild had complied with procurement and contracting regulations and policies regarding disclosure of information about EPA's plans to award a contract for remedial work at the OLS. [*Id.* at 17:12-18:21.] Mr. Feild testified that he did not disclose not-yet public information regarding EPA's upcoming bid for that work to the OLS CAG, because "it would have been a violation of the Federal [p]rocurement regulations to talk about the contracts prior to the pre-solicitation notice[,]" and would have provided a basis for bid protests by contractors in the future who were not present at the OLS CAG meeting. [*Id.* at 30:24-31:4] In the Court's view, the email does not indicate that EPA had more than one cleanup plan that it was pursuing for cleanup of the OLS.

206. Evidence presented by the United States and the Debtors indicates that all parties involved in the OLS negotiations considered the impact of contamination and the alleged recontamination of remediated properties by lead-based paint. The record establishes that all parties were aware of the presence of lead-based paint contamination at the site and the issue presented by the potential for recontamination of remediated properties by lead-based paint. [*See, e.g.*, Joint Ex. 3 (Helgen Proffer) at ¶ 26; Joint Ex. 22 (Feild Declaration) at ¶ 46] The fact that the parties disagree about the extent of the contamination at the site attributable to lead-

based paint and the fact that EPA continues to study the issues related to recontamination of remediated properties by lead-based paint, does not mean that the negotiations regarding this site were conducted in bad faith.

207. Furthermore, the issues of procedural fairness raised by the Parent do not concern the negotiation process. Even if the Court were to accept the Parent's allegations, the allegations do not concern the procedural fairness of the of the United States' negotiations with the Debtors concerning settlement of the United States' claims at the OLS. Because they do not show that the actual negotiations process was procedurally unfair, these allegations fail to demonstrate that the Settlement Agreements are procedurally unfair under CERCLA.

208. As discussed in section V(f)(1) above, it is undisputed that multiple sources of lead contributed to the contamination of soils at the OLS. It is undisputed that ASARCO's historical emissions and the presence of lead-based paint throughout the site are two of those sources of lead. One of the most significant disputes at the OLS concerned the potential application of joint and several liability for EPA's response costs. The fact that the United States maintains that ASARCO's emissions contributed a greater percentage of the contamination in OLS soils than do ASARCO, Union Pacific and the Parent does not mean that the United States engaged in bad faith during the OLS negotiations, or that the settlement at the site was procedurally unfair.

209. The Court finds that the negotiations concerning the OLS were procedurally fair.

210. Moreover, noting that there has been no objection as to the procedural fairness of the negotiations involving the other sites resolved by the Settlement Agreements and finding no evidence of procedural unfairness in the record before it, the Court finds that the Settlement Agreements are procedurally fair.

**B. The Settlement Agreements Are Substantively Fair**

211. The substantive fairness of the proposed Settlement Agreements necessarily includes consideration of the litigation risks and possible outcomes of proceeding to estimation hearings or other litigation. *See Akzo Coatings*, 949 F.2d at 1435 (among the factors bearing on substantive fairness are "the possible risks involved in the litigation if the settlement is not approved") (citation omitted). Absent the Settlement Agreements, the government faces numerous litigation risks associated with proceeding to estimation at any of the Sites. These include: 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 decision-making 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 Settlement Agreements. *See United States v. DiBiase*, 45 F.3d 541, 546 (1st Cir. 1995) ("[S]ettlement requires compromise. Thus, it makes sense for the government, when negotiating, to give a PRP a discount on its maximum potential liability as an incentive to settle.").

212. The substantive fairness of a CERCLA settlement does not require a rigid adherence to any mathematical formula. *See Cannons Eng'g*, 899 F.2d at 87-88 ("[T]he agency must also be accorded flexibility to diverge from an apportionment formula in order to address special factors not conducive to regimented treatment."). 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.[20]

213. 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. Mont.) (pertaining to the East Helena Site), and the Consent Decree in *United States & Texas v. Encycle/Texas & ASARCO*, No. H-99-1136 (S.D. Tex.) (pertaining to the El Paso Site).

214. As explained in the United States' Brief in Support of the Settlement, [Dkt. No. 11343], the compromise at any given site 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. The proposed settlement amounts reflect significant compromises by the United States and state governments 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.

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[20] *See Cannons Eng'g*, 899 F.2d 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.*, 124 F.3d at 1193 (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 Enters.*, 302 F.3d at 1135; *Pinal Creek*, 118 F.3d at 1303; *Centerior Serv. Co..*, 153 F.3d at 354 n.12; *Vine Street LLC*, 460 F. Supp. 2d at 761 n.129.

215. With respect to the OLS in particular, the settlement is fair because it appropriately takes into account the litigation risks associated with the parties' positions on joint and several liability, apportionment, and consistency with the National Contingency Plan.

216. It should be noted that the Parent contends that the settlements are not substantively fair because Debtors are paying too much under the proposed Environmental Settlements. This argument is really a bankruptcy objection, which is covered above, because it does not identify any issue germane to the purpose of environmental law, *i.e.,* that the government is recovering too little under the settlement to meet the public interest in cleanup of environmental sites.

217. The substantive fairness inquiry focuses on fairness to the non-settling liable parties whose right to contribution from the settling party might be cut off by approval of the settlement. *United States v. Davis*, 11 F. Supp. 2d 183, 189 (D.R.I. 1998), *aff'd*, 261 F.3d 1 (1st Cir. 2001). Thus, environmental law does not require that a responsible party bear no more than some mathematical calculation of harm. An environmental 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. *Cannons Eng'g*, 899 F.2d at 87; *Charles George Trucking*, 34 F.3d at 1088 (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"). The Parent is not a responsible party for these Sites and thus does not have any risk of disproportionate liability under environmental law.

218. Moreover, case law counsels significant deference to both the government's chosen measure of comparative fault and the government's view of factors justifying divergence

from that measure. *Cannons Eng'g*, 899 F.2d at 87-88. Indeed, the court in *Cannons* explicitly identified additional factors at play in the substantive fairness analysis, some of which justify premiums above comparative fault. *Id.* at 88. In that case, 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.

219. Here, while there is no indication that the governments are receiving a premium under these settlements, nothing in *Cannons* suggests that a settlement is necessarily 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 the Parent has conceded that liable parties must pay their share of orphan shares. Dkt. No. 4743 at 7; *see also* RESTATEMENT (SECOND) OF TORTS §433A, cmt. h (noting that the existence of orphan share can defeat apportionment of single harm). As indicated in the United States Brief in Support of the Settlement Motion, [Dkt. No. 11343], many of the sites at issue here have large orphan shares.

**C. The Settlement Agreements Are Reasonable**

220. The Settlement Agreements are reasonable because they satisfactorily compensate the public for the actual (and anticipated) costs of remedial and response measures and, as already set forth in great detail above, take into account the relative strength of the parties' litigation positions. 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.

221. The Parent's contentions relating to the "efficacy, cost-effectiveness, and adequacy of remedial measures" as the metric for the reasonableness of these proposed Settlements is misplaced. *See* Dkt. No. 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. No. 10741 at 7-8 (citing *Akzo Coatings*, 949 F.2d at 1426 and *Cannons Eng'g*, 899 F.2d at 89-90).

222. Further, it is not the role of the Court in considering a settlement agreement to evaluate the substance of an actual agency decision that was reached after an exhaustive administrative process. Rather, as detailed above, in evaluating the reasonableness of the settlements under bankruptcy law, the Court has considered potential challenges to claims for costs based on response actions selected by the Government and the likelihood of success of such challenges. As detailed above, consideration of the risks associated with continued litigation strongly supports approval of the Settlement Agreements under both bankruptcy law and environmental law.

**D. The Settlement Agreements Are Consistent with the Objectives of CERCLA and Other Applicable Environmental Laws**

223. The proposed Settlement Agreements are consistent with environmental law 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 In re Bell Petroleum Servs.*, 3 F.3d at 897; *Wallace*, 893 F. Supp. at 636; *Kelley*, 717 F. Supp. at 518. The Settlement Agreements negotiated between the Debtors and the federal and state governments provide compensation for past environmental cleanup actions and damages and provide significant funding for future environmental remediation efforts.

224. It is undisputed that the Debtors are liable for past response costs and future remediation costs at many of the sites resolved by the Settlement Agreements. CERCLA and other applicable environmental laws were designed to shift the costs of cleanup to the party that caused the contamination. *Wallace*, 893 F. Supp. at 636.

225. By providing compensation for past response costs, the Settlement Agreements promote the purposes of CERCLA and other applicable environmental laws because the agreements reimburse the taxpayers for cleanup work already performed by various federal and state agencies.

226. The Settlement Agreements also promote the purposes of CERCLA and other applicable environmental laws by securing funds for future cleanup activities that will be required at many of the sites at issue. Providing compensation and funding promotes the goals of CERCLA and other applicable environmental laws by forcing the Debtors to bear the costs of cleaning up sites where Debtors' activities contaminated the surrounding environment.

227. As the Court has seen throughout the four years that the Debtors' have been in bankruptcy, fluctuations in the commodities markets influence greatly the Debtors' solvency and resources available to devote to its operations, including environmental cleanup. Using the Debtors' limited resources for environmental cleanup instead of continued litigation concerning these sites ensures that environmental cleanup will continue and that the Debtors bear a reasonable portion of the cleanup costs attributable to its contamination. "[T]he finite resources of the [Debtors] are better put to use in helping to clean up the [affected sites] than in litigation costs." *Hercules*, 961 F.2d at 800.

228. The Court finds therefore that the Settlement Agreements are consistent with environmental laws' purposes of shifting the costs of cleanup to the polluting party and ensuring that environmental cleanup actually occurs.

**E. The DOJ Is Entitled to Deference**

229. Judicial deference to settlements reached by parties is "particularly strong" when the 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.

230. Here, the parties entered into the Settlement Agreements after extensive negotiations and discussions. The DOJ, representing the EPA, led the negotiations for the United States.

231. As the Court has found above, the Settlement Agreements are the products of arm's-length negotiations.

232. The Court has considered the DOJ's responses to public comments on the Settlement Agreements, which provide no reason that the Settlement Agreements should not be approved.

**F. Union Pacific's Objections Are Without Merit.**

233. With respect to the public comment of Union Pacific on the OLS, it is striking that Union Pacific's position has changed so starkly, and that it is attempting to simultaneously maintain two opposite positions with respect to the Debtors' liability at the OLS. From 2007 through May 2009, Union Pacific sought to disallow the United States' claim entirely. [*See* Dkt. No. 4218 (Objection of Union Pacific to Proofs of Claim Filed by the United States Relating to the OLS); Dkt. No. 5810 (ASARCO LLC, Asarco Inc. and Union Pacific's Joint Post-Trial Brief Regarding the OLS)]. Yet in April 2009, Union Pacific argued that a $187.5 million recovery

for the OLS "inadequately reflects ASARCO's actual contribution to contamination to the OLS . . . ." [Joint Ex. 85 (comments submitted on behalf of Union Pacific re: the OLS settlement by Patton Boggs, April 23, 2009) at PUB_COM001305] Union Pacific goes further, alleging that it would be "unconscionable" for ASARCO to pay less than 50% of EPA's past and future costs. [*Id.* at PUB_COM001526] Yet at the settlement approval hearing, Union Pacific's own expert opined that ASARCO's share of liability at the OLS was more than zero, but no more than 17%. [5/19/09 Tr. at 215:8-221:13] The Court is satisfied that the litigation risks already described are an adequate basis for the settlement for the OLS.

234. The Settlement Agreements are 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. [Joint Ex. 85 at PUB_COM001534] On the closing date, ASARCO will have resolved its liability under 42 U.S.C. § 9613(f)(2) and will therefore be 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 the Settlement Agreements then the United States or any other party is free to explore whether it is still the case that ASARCO has resolved its liability.

235. Union Pacific objects to paragraph 13 of the Amended Settlement Agreement and Consent Decree Regarding Residual Environmental Claims, [Joint Ex. 85 at PUB_COM001533], which provides that only the amount or value EPA receives from Debtors under 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. That credit will reduce the liability of non-settling PRPs like Union Pacific for the particular site by the amount of the credit. The significance of this language relates to whether Union Pacific will continue to be liable for the full amount of the United

States' remaining unreimbursed cleanup costs under CERCLA. Union Pacific 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.

236. Union Pacific's objection is misplaced because the language of paragraph 13 is consistent with the express language of CERCLA and with Congress' intent that PRPs rather than the public should bear the burden of cleanup costs. Specifically, paragraph 13 is consistent with 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). In a bankruptcy settlement, 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" under the Amended Settlement Agreement is therefore the amount or value that is received under the Plan, which is consistent with paragraph 13.

237. Paragraph 13's consistency with CERCLA is further illustrated by the fact that CERCLA section 113(f)(3) plainly contemplates that the United States can pursue non-settlors whenever it obtains "less than complete relief" from settlors. 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 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." *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. This is in accord with one of the fundamental Congressional purposes in enacting CERCLA: PRPs bear the costs for remedying the harmful conditions they created. *Cannons Eng'g*, 899 F.2d at 90-91; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). If a settling party does not pay the United States all of its response costs, Congress wanted the other PRPs to provide the United States with complete relief. *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).

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

239. The United States' position of prioritizing recovering funds for cleanup actions over its civil penalty claims for the OLS is reasonable.

240. Union Pacific makes reference to Section 122 of CERCLA, 42 U.S.C. § 9622. [Joint Ex. 85 at PUB_COM001306.] 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., Hercules*, 961 F.2d at 798; *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 benefited other PRPs by reducing their liability. *See, e.g., In re Cuyahoga Equip. Corp.,* 980 F.2d at 112-13, 119-20; *In re Eagle-Picher Indus., 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 Coop., Inc.*, 173 B.R. 363, 372 (N.D. Ill. 1994).

241. Finally, 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 Union Pacific asserts in its comments. *Compare In re ASARCO, LLC*, Civ. No. 09-cv-91 (S.D. Tex. May 1, 2009), *with* Joint Ex. 85 at PUB_COM001310, n.60. In any event, Union Pacific did not filed a timely motion to withdraw the reference.

242. The United States' brief in support of the Settlement Motion describes in detail comments received regarding the Texas Custodial Trust Settlement as it relates to the El Paso, Texas smelter site and responses to those comments provided by the United States and the State of Texas. One example of a comment received by the governments dealt with the expected cost of remediation and the future land use of the site. The Court has reviewed the TCEQ's Response to Comments and the Proffer of TCEQ Expert Witness James Shih-Hong Sher that it would cost in excess of $600 million to remediate the site for residential use, and finds the TCEQ's Response to Comments to be reasonable. [Joint Ex. 37 (Sher Proffer) at pg. 10 para. 25(g)] [Joint Ex. 1051 (TCEQ Response to Comments) at Ex. A, pg. 2] The record demonstrates that the governments have given due consideration to the comments received, that they governments have provided reasonable and adequate responses to the comments received, and that the comments do not provide a basis for finding the settlement to be unreasonable.

243. In summary, considering the record as a whole, the Court finds that the United States has provided plausible explanations for all aspects of the Settlement Agreements; that the terms of the Settlement Agreements bear a reasonable linkage to ASARCO's responsibility for environmental contamination, taking into account the particular circumstances presented at each site addressed by the Settlement Agreements; and that the history of litigation, negotiation, and resolution between ASARCO and the governments during the nearly four years of this bankruptcy case mandate deference to the governments' determinations regarding the fairness and reasonableness of the Settlement Agreements and their ability to promote the objectives of environmental law.

## VIII. MISCELLANEOUS ISSUES

### A. The Court Has Evaluated the Environmental Claims on a Site-by-Site Basis and an Aggregate Basis.

244. The Parent and the ASARCO Committee object to combining multiple sites into five settlement agreements and seeking approval of all of these agreements in one motion. [Dkt. No. 10741 at 2; Dkt. No. 10734 at 9-10] The Court finds that these objections are without merit. Neither the Parent nor the ASARCO Committee cited any authority supporting its position. The Debtors and the federal and state governments presented evidence that the environmental claims related to each site at issue were considered and evaluated on an individual basis. [*See e.g.*, Joint Ex. 4 (Lapinsky Proffer) at ¶ 14; Dkt. No. 11316 (United States' Brief in Support) at 41] The Debtors and the federal and state governments also presented witnesses and other evidence addressing the cost estimates and significant issues related to the claims at each of the sites resolved by the Settlement Agreements. Furthermore, in reviewing the Settlement Agreements under the applicable legal standards, the Court has considered the agreements' allocation of funds on a site-by-site basis and on an aggregate basis. Under both approaches, approval is warranted.

**B. The Settlement Agreements Do Not Constitute a *Sub Rosa* Plan**

245. The ASARCO Committee and the Parent's contention that the Settlement Agreements constitute a *sub rosa* plan of reorganization is also without merit. [Dkt. No. 10734 at 10-12; Dkt. No. 11321 at 2-9]

246. In *Pension Benefit Guaranty Corp., Continental Air Lines, Inc. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935 (5th Cir. 1983), the bankruptcy court had approved a transaction that effectively transferred all the assets of Braniff – cash, airplanes, terminal leases, and landing slots – to an operating airline, PSA. *Id.* at 939. In return, the Braniff estate received only "scrip" entitling the holder to travel on PSA, which could be issued only to former employees, shareholders or, in limited amounts, unsecured creditors.

247. The Fifth Circuit reversed because the transaction "short circuit[ed] the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets." *Id.* at 940. If the transaction were approved, the court observed, "little would remain save fixed equipment and little prospect or occasion for further reorganization." *Id.* The agreement was also defective because it (i) required secured creditors to vote in favor of any future reorganization plan approved by the unsecured creditors' committee and (ii) released claims by all parties against Braniff, its secured creditors and its officers and directors. *Id.*

248. The Fifth Circuit has never found an agreement similar to the Settlement Agreements, which lack these elements, to be a *sub rosa* plan. Instead, that Court consistently has rejected *sub rosa* arguments where the transaction in question "does not 'alter creditors' rights, dispose of assets and release claims to the extent proposed in the wide ranging transaction disapproved' in *Braniff*." *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Electric Power)*, 119 F. 3d 349, 355 (5th Cir. 1997) (affirming order approving

debtor's authority to enter agreement over creditors' assertion that transaction was *sub rosa*); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1313 (5th Cir. 1985) (finding settlement of litigation between debtor and two of its largest creditors was not a *sub rosa* plan of reorganization).

249. This case is distinguishable from the *Braniff* case and the effect of the Settlement Agreements is not a *sub rosa* plan. The environmental settlements do not restrict creditors rights, dictate the terms of ASARCO's ultimate plan of reorganization, or dispose of substantially all of the Debtors' assets. To the contrary, creditors will have at least two plans to vote on—ASARCO's plan and the Parent plan. The environmental settlements leave creditors free to vote for or against either plan. Although the Custodial Trust Agreements obligate the Debtors to transfer property if a plan is confirmed, the evidence suggests that this property is essentially a liability to the estate, not an asset. In fact, ASARCO tried at various times during the past decade to market the property for sale and was unable to find a purchaser at any price. [Joint Ex. 1 (Aldrich Declaration) at ¶¶ 17-32; Joint Ex. 4 (Lapinsky Proffer) at ¶ 10] The evidence suggests that the property is so contaminated that there is no reasonable prospect that it ever will be redeveloped. Neither the Parent nor the Committee presented any evidence that the property has a current positive value. Further, the assets committed under the Settlement Agreements to resolve claims regarding the Custodial Trust sites are a fraction of the total consideration that would be available for distributions to creditors under ASARCO's plan. The Debtors' estate will retain ample resources to provide meaningful recoveries to all creditors. Finally, both the Debtors' plan and the Parent's plan will be subjected to the requirements of 11 U.S.C. § 1129. Neither plan will be confirmed if it is not, among other things, fair and equitable.

250. The Settlement Agreements do not dictate the terms of all future plans of reorganization, because the environmental claims that are allowed pursuant to the agreements are paid through whatever plan of reorganization is ultimately confirmed, and the custodial trusts become effective if any plan of reorganization is confirmed.

251. By contrast, the agreement in the *Braniff* changed the composition of Braniff's assets" because it required that the scrip obtained in exchange for the $2.5 million paid by Braniff be used only in a future Braniff reorganization and that it be issued only to former Braniff employees or shareholders or, in a limited amount, to unsecured creditors." *In re Braniff*, 700 F.2d at 939. The Settlement Agreements make no such restrictions, and the settled environmental claims can be paid pursuant to the terms of any plan of reorganization, including the Parent's.

252. The Settlement Agreements also do not attempt to vary creditor priorities or alter other creditor rights. *See In re Braniff Airways*, 700 F.2d at 939 (finding that the transaction at issue would "require significant restructuring of the rights of Braniff creditors"); *In re Torch Offshore, Inc.*, 327 B.R. 254, 260 n.7 (E.D. La. 2005) (stating that such settlement provisions are prohibited); *In re Condere Corp.*, 228 B.R. 615, 627 (Bankr. S.D. Miss. 1988) (finding that a settlement agreement was not a *sub rosa* plan because the settlement distributed money according to the Bankruptcy Code). The claims allowed by approval of the Settlement Agreements will be treated as general unsecured claims, or administrative claims, as the case may be, but how those allowed claims are treated for purposes of distribution depends on the terms of the plan that is confirmed. All of the plan confirmation procedures are left intact and it appears that in this case creditors might have three competing plans from which to choose.

253. The Settlement Agreements do not limit the voting rights of any party with regard to any future plan of reorganization. Unlike the *Braniff* agreement, the settling creditors are not required to vote for or against any future plan of reorganization. *See In re Braniff Airways*, 700 F.3d at 940; *see also In re Allegheny Int'l, Inc.*, 117 B.R. 171, 175-76 (W.D. Pa. 1990) (finding that agreement was not a *sub rosa* plan because creditors were free to accept or reject the debtor's plan of reorganization).

254. Finally, the assets being transferred to custodial trusts are non-operating, undesirable properties that are burdened by substantial environmental liabilities and have been marketed unsuccessfully several times. [Joint Ex. 1 (Aldrich Declaration) at ¶¶ 17-32; Joint Ex. 4 (Lapinsky Proffer) at ¶ 10] The funds provided to the custodial trusts are only a small portion of the total consideration provided to the creditors via operating cash, present value from Sterlite, and litigation trust interests. These properties are "not so much the crown jewel of [the Debtors'] estate but its white elephant." *In re Cajun Elec. Power Coop.*, 119 F.3d at 355.

255. The Court finds that the Settlement Agreements do not dictate terms of all future plans of reorganization, do not limit voting rights, and do not dispose of all or substantially all of the Debtors' assets. The Settlement Agreements therefore do not constitute a *sub rosa* plan of reorganization.

**C. Mitsui's Objection Is Overruled By Stipulation of the Parties.**

256. In its Proof of Claim and its objection to the Settlement Motion, Mitsui contends that it possess a lien in silver inventory and work in process embedded in process equipment at the El Paso Smelter Site and the East Helena Site. [Dkt. No. 10721] Mitsui objected to the Custodial Trust Settlement Agreements to the extent that the El Paso Smelter Site and the East Helena Site are transferred to custodial trusts free and clear of all liens. [*Id.*]

257. On May 19, 2009, the Debtors and Mutsui filed a stipulation resolving Mitsui's objection to the Settlement Motion. [Dkt. No. 11356] Based upon the parties' stipulation, which the Court has already entered, Mitsui's objection to the Settlement Motion is withdrawn and overruled. [Dkt. No. 11358]

**D. City of El Paso's Objection Has Been Resolved by Agreement of the Parties**

258. In its objection, the City of El Paso requested a specific allocation of the funds to be used for remediation at the El Paso Smelter and the Amarillo Smelter Sites and requested input on the selection of a trustee for the trust established by the Texas Custodial Trust Settlement Agreement. [*See* Dkt. No. 10733] On May 15, 2009, the City of El Paso and the Texas Commission on Environmental Qualify filed a stipulation agreeing that, of the $52,080,000 received by the Texas Custodial Trust from the Debtors' estate under the Texas Custodial Trust Settlement Agreement, $52,000,000 shall be allocated for use by the Custodial Trustee at the El Paso Designated Property. [Dkt. No. 11314] The Court has approved the stipulation.

259. Furthermore, in its response to public comments on the Texas Custodial Trust Settlement Agreement, the TCEQ stated that it welcomed the input of the City of El Paso in the trustee selection process and would invite it to observe interviews of trustee candidates. [Dkt. No. 11290-1 (Ex. A to TCEQ's Response to Public Comments) at ¶ 14] The Court finds therefore that the parties have mutually resolved the issues raised by the City of El Paso's objection.

**E. Blue Tee's Objection Has Been Resolved By Stipulation of the Parties**

260. Blue Tee Corp. ("Blue Tee") filed an objection to the Settlement Motion with respect to the Taylor Springs Site resolved by the Multi-State Custodial Trust Settlement Agreement. The limited objection contemplated the parties reaching an agreement as to the

portion of the United States' allowed claim for the site due to Blue Tee as a result of a prior stipulation between ASARCO, the United States, and Blue Tee. [Dkt. No. 10737]

261. The parties have now reached such agreement and filed a stipulation, which the Court has entered. [Dkt. No. 11036] The stipulation allocated to Blue Tee $237,271.78 of the $1,662,541 allowed claim at the Taylor Springs Site, which represents 20% of the response costs incurred by Blue Tee at the non-ASARCO owned portion of the site from the date of ASARCO's bankruptcy filing to the present. The remaining portion of the allowed claim, $1,425,269.22, shall be allocated to the United States. Blue Tee's objection has been resolved therefore by agreement of the parties.

**F. Payments Pursuant to the Custodial Trust Settlement Agreements Are Entitled to Administrative Expense Priority**

262. The parties have conditioned the Custodial Trust Settlement Agreements on the Court's approval of the payments pursuant to these agreements being entitled to administrative expense priority. [Joint Ex. 67 (Montana Custodial Trust Settlement Agreement) at 18; Joint Ex. 71 (Multi-State Custodial Trust Settlement Agreement) at § 10(e)] The Parent objects to affording administrative expense priority to approximately $260 million in expenses related to the Custodial Trust Settlement Agreements. [Dkt. No. 10741 at 37].

263. Absent these settlements, the Debtors 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 Debtors would have to provide for compliance with the 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, nonoperating properties. *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).

264. Section 503(b) of the Bankruptcy Code defines administrative expenses as including "the actual and necessary costs of preserving the estate . . . ." 11 U.S.C. § 503(b)(1)(A).

265. A debtor-in-possession's liability to cleanup property of the bankruptcy estate is entitled to an administrative expense priority as an actual and necessary cost of preserving the estate since the trustee or debtor-in-possession has an obligation to manage its property in accordance with applicable non-bankruptcy law. *See* 28 U.S.C. § 959(b); *In re H.L.S. Energy Co.*, 151 F.3d 434, 438-39 (5th Cir. 1998); *Pennsylvania v. Conroy*, 24 F.3d 568, 569-70 (3d Cir. 1994) (Alito, .J.); *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991); *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987); *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988); *In re Am. Coastal Energy Co.*, 399 B.R. 805, 809-16 (Bankr. S.D. Tex. 2009). Moreover, the custodial trusts pave the way for confirmation of a plan that is not "forbidden by law" and therefore unconfirmable. *See* 11 U.S.C. § 1129(a)(3); *In re: Eagle Picher Holdings, Inc.*, 345 B.R. 860 (Bankr. S.D. Ohio 2006).

266. As the Court has found above, the amount of the settlements encompassed by the Custodial Trust Settlement Agreements is fair and reasonable under the applicable bankruptcy and environmental law.

267. The government contends that the properties transferred to the various custodial trusts cannot be abandoned by the estate. The Debtors agree that these sites require significant remediation before they meet applicable environmental standards. The $261.3 million provided for by the Custodial Trust Settlement Agreements compensates for expenses necessary to redress the Debtors' liabilities at these sites. These are appropriate administrative expenses of the bankruptcy estate, and the payments are entitled to administrative priority. Accordingly, the Court approves the provision of the Custodial Trust Settlement Agreements providing for treatment of payments totaling $261.3 million as administrative expenses.

**G. ASARCO's Guarantee of AMC's Payments to the Pre-petition ASARCO Environmental Trust is Fair and Reasonable**

268. In its objection, the ASARCO Committee contends that the ASARCO's agreement to guarantee payments by Americas Mining Corporation ("AMC") to an environmental trust established before the Debtors filed their bankruptcy petitions is "without consideration." [Dkt. No. 10734 at 10]

269. In exchange for this guarantee and the Settlement Agreements, however, the Debtors secure a release from future liability, even if the federal and state governments are presently unaware of the liability. [*See e.g.*, Joint Ex. 68 (Miscellaneous Federal and State Environmental Settlement Agreement) at 32] These potential liabilities would otherwise not be discharged through the Debtors' bankruptcy proceeding. *See La. Dep't of Envtl. Quality v. Crystal Oil Co. (In re Crystal Oil Co.)*, 158 F.3d 291, 296 (5th Cir. 1998) (holding that, for bankruptcy purposes, an environmental claim arises when the "claimant can tie the bankruptcy debtor to a known release of a hazardous substance"). In addition, the United States agreed to lower allowed claims for certain sites under the Settlement Agreements on the understanding that

the Debtors would perform certain work at some sites using funds from the Prepetition ASARCO Environmental Trust. [Dkt. No. 11343 (United States Brief in Support) at 48 n.30]

270. Contrary to the ASARCO Committee's assertion, the Court concludes that the release of liability for future, as-yet-undiscovered environmental liabilities and the agreement to certain lower allowed claims by the United States provide sufficient consideration for ASARCO's guarantee of AMC's final two payments to the pre-petition environmental trust.

## IX. CONCLUSION

271. The Settlement Agreements represent a significant milestone in the nearly four-year history of this enormously complex bankruptcy case and in the history of governmental efforts to remedy environmental injuries that are the legacy of this country's industrialization.

272. After hearing the evidence and arguments of counsel presented at the hearing, reviewing the exhibits submitted to the Court and the briefing related to various environmental issues and the Settlement Motion, considering the voluminous records established at the previous estimation hearings on the claims at the Coeur d'Alene Site, the OLS Site, and the Tacoma Site, and considering the applicable law and authorities, the Court finds and concludes as follows:

(a) the Settlement Agreements resulted from good faith, arm's-length negotiations between the Debtors and the relevant federal and state governments that spanned years;

(b) the Settlement Agreements are well within the range of reasonableness, fair and equitable, and in the best interest of the estate as they resolve genuine and substantial disputes among the parties related to each of the covered sites, avoid risks of adverse judgments, and avoid the significant costs of continued litigation and appeals associated with estimating each of the claims;

(c) the Settlement Agreements are procedurally and substantively fair, reasonable and consistent with the purposes of environmental law.

(d) the Settlement Agreements should be approved.

A separate Order shall be entered granting the Settlement Motion and approving the Settlement Agreements pursuant to Rule 9019, F.R.Bankr.Pro. and applicable environmental law.

At Corpus Christi, Texas, this 5th day of June, 2009

RICHARD S. SCHMIDT
United States Bankruptcy Judge

| RESIDUAL SITES | | | | | | |
|---|---|---|---|---|---|---|
| **Site** | **Debtor Estimate** | **Settlement** | **Government Estimate** | **Parent's Estimate** | **OCUC Estimates** | **Objections** |
| Coeur d' Alene | | | | | | |
| - Past Costs | $ 36,000,000 | **$ 41,464,000** | $ 180,020,000 | $ 36,000,000 | n/a | |
| - Oversight | $ 2,470,000 | **$ -** | $ 67,660,000 | $ 2,470,000 | n/a | |
| - Future Response | $ 74,650,000 | **$ 373,179,000** | $ 1,983,840,000 | $ 74,650,000 | n/a | |
| - Natural Resource Damages | $ 7,520,000 | **$ 67,500,000** | $ 333,200,000 | $ 0 | n/a | Parent (aquatic) |
| Total | $ 120,640,000 | **$ 482,143,000** | $ 2,564,720,000 | | n/a | |
| Omaha | $ 5,400,000 - 21,500,000 | **$ 187,500,000** | $ 406,000,000 | $ 0 | n/a | Parent, OCUC, UP |
| Tacoma | $ 7,650,000 | **$ 80,357,000** | $ 112,700,000 | n/a | n/a | n/a |
| **TOTAL** | **$ 133,690,000-149,790,000** | **$ 750,000,000** | **$ 3,083,420,000** | | | |

Note: For the CDA site, the U.S. also included $4.5M in interest through June 15, 2007.
The Government Claim for $406M at Omaha does not include the State of Nebraska's claim for past costs of $2.3M. The settlement amount includes $1M for Nebraska's past costs.

EXHIBIT A

| CUSTODIAL TRUSTS | | | | | | | |
|---|---|---|---|---|---|---|---|
| Site | Debtor Low Estimate | Debtor High Estimate | Proposed Settlement | Government Estimate | Parent/OCUC Estimate | Objections | Objection |
| **Multi-State Custodial Trust** | | | | | | | |
| Sacaton, AZ | $ 1,894,800 | $ 10,778,460 | **$ 20,000,000** | $ 30,000,000 | n/a | OCUC, Parent | |
| Globe, CO | $ 20,974,051 | $ 24,241,186 | **$ 16,000,000** | $ 18,820,102 | n/a | Parent | |
| Alton, IL | $ 4,484,665 | $ 5,887,272 | **$ 7,000,000** | $ 9,600,000 | n/a | Parent | |
| Taylor Springs, IL | $ 2,064,238 | $ 4,776,676 | **$ 4,200,000** | $ 18,855,092 | n/a | Parent | |
| Silverton, CO | $ 560,488 | $ 1,987,466 | **$ 4,000,000** | $ 3,587,580 | n/a | Parent | |
| Trench/Salero, AZ | $ 3,385,821 | $ 5,478,248 | **$ 2,825,000** | $ 4,350,000 | n/a | Parent | |
| Murray, UT | $ 711,112 | $ 1,555,822 | **$ 2,430,000** | $ 3,500,000 | n/a | Parent | |
| Magadelena, NM | $ 993,113 | $ 1,789,304 | **$ 1,340,000** | $ 1,789,304 | n/a | Parent | |
| Whiting, IN | $ 806,587 | $ 1,293,235 | **$ 1,200,000** | $ 1,293,235 | n/a | Parent | |
| Columbus/Blue Tee, OH | $ 734,231 | $ 871,386 | **$ 420,000** | $ 871,386 | n/a | Parent | |
| Beckmeyer, IL | $ 1,506,604 | $ 1,930,190 | **$ 200,000** | $ 1,930,190 | n/a | Parent | |
| McFarland, WA | $ 276,078 | $ 561,312 | **$ 200,000** | $ 561,312 | n/a | Parent | |
| Ragland, AL | $ 539,839 | $ 1,240,620 | **$ 200,000** | $ 1,240,620 | n/a | Parent | |
| Van Buren, AR | $ 285,323 | $ 714,981 | **$ 200,000** | $ 714,981 | n/a | Parent | |
| Murray Smelter | $ 112,000 | $ 697,486 | **$ 167,486** | $ 200,000 | n/a | | |
| Deming, NM | $ 1,011,645 | $ 1,558,703 | **$ 120,493** | $ 1,558,703 | n/a | Parent | |
| Sand Springs, OK | $ 86,956 | $ 135,441 | **$ 130,000** | $ 135,441 | n/a | Parent | |
| Gold Hill/Belshazzar, UT | $ - | $ 440,557 | **$ 100,000** | $ 440,557 | n/a | Parent | |
| Admin. Costs | $ 10,400,000 | $ 10,400,000 | **$ 10,400,000** | $ 10,400,000 | n/a | | |
| **Total** | **$ 40,427,551** | **$ 76,338,345** | **$ 71,132,979** | **$ 109,848,503** | n/a | | |
| **REMEDIATION TOTALS** | **#REF!** | **#REF!** | **#REF!** | **#REF!** | | | |
| **ADMIN. COSTS TOTAL** | | | 27,500,000 | $ 61,000,000 | | | |

Note: The Debtor High Estimates reflect the 95% confidence levels in the April 20, 2009 ERM report, Joint Ex. 62.

| | | | | |
|---|---|---|---|---|
| **Total** | **#REF!** | **#REF!** | **#REF!** | **#REF!** |
| **Total** | **#REF!** | **#REF!** | **#REF!** | **#REF!** |
| **Total** | **$ 40,427,551** | **$ 65,938,345** | **$ 60,732,979** | **$ 99,448,503** |

EXHIBIT A

| CUSTODIAL TRUSTS | | | | | | |
|---|---|---|---|---|---|---|
| **Site** | **Debtor Low Estimate** | **Debtor High Estimate** | **Proposed Settlement** | **Government Estimate** | **Parent's Estimate** | **Objections** |
| **Montana Custodial Trust** | | | | | | |
| East Helena | $ 48,836,913 | $ 56,019,615 | **$ 100,000,000** | $ 160,161,702 | n/a | OCUC, Parent |
| East Helena NRD | $ - | $ 12,410,678 | **$ 5,000,000** | $ 21,676,334 | n/a | Parent |
| Black Pine | $ 4,290,449 | $ 8,703,746 | **$ 17,500,000** | $ 44,427,332 | n/a | OCUC, Parent |
| Mike Horse | $ 7,786,084 | $ 11,220,608 | **$ 10,000,000** | $ 12,753,773 | n/a | Parent |
| Iron Mountain | $ 2,258,495 | $ 3,800,821 | **$ 1,900,000** | $ 1,940,909 | n/a | Parent |
| Admin. Costs | $ 8,900,000 | $ 8,900,000 | **$ 8,900,000** | $ 8,900,000 | n/a | n/a |
| **Total** | **$ 72,071,941** | **$ 101,055,468** | **$ 143,300,000** | **$ 249,860,050** | n/a | |

Note: The Government Estimate listed is the average of the Governments' low and high estimates. The Government high estimate is $224M for East Helena and approximately $347M total for all of the Montana Custodial Trust Sites.

EXHIBIT A

| CUSTODIAL TRUSTS | | | | | | |
|---|---|---|---|---|---|---|
| **Site** | **Debtor Low Estimate** | **Debtor High Estimate** | **Proposed Settlement** | **Government Estimate** | **Parent/OCUC Estimate** | **Objections** |
| **Texas Custodial Trust** | | | | | | |
| El Paso smelter | $ 48,642,020 | $ 60,308,149 | **$ 43,800,000** | $ 60,205,186 | n/a | Parent |
| Amarillo | $ 63,791 | $ 96,690 | **$ 80,000** | $ 80,000 | n/a | Parent |
| Admin. Costs | | | **$ 8,200,000** | | n/a | |
| **Total** | **$ 48,705,811** | **$ 60,404,839** | **$ 52,080,000** | **$ 60,285,186** | n/a | |

EXHIBIT A

**MISCELLANEOUS FEDERAL AND STATE SITES**

| Site Name | Debtor Low Estimate | Debtor High Estimate | Proposed Settlement | Government Estimate | Parent/OCUC Estimate | Objections |
|---|---|---|---|---|---|---|
| Tacoma Federal, WA | $ 18,717,000 | $ 50,000,000 | **$ 27,000,000** | $ 71,450,000 | n/a | OCUC |
| USIBWC, TX | $ 3,947,500 | $ 27,453,394 | **$ 19,000,000** | $ 26,817,795 | n/a | OCUC |
| Jack Waite Mine, ID | $ 8,200,000 | $ 13,250,000 | **$ 11,300,000** | $ 11,540,000 | n/a | n/a |
| Monte Cristo, WA | $ 8,079,205 | $ 14,279,205 | **$ 11,000,000** | $ 25,196,078 | n/a | OCUC |
| Lower Silver Creek/Richardson Flat, UT | $ 3,607,000 | $ 17,270,000 | **$ 7,400,000** | $ 46,278,320 | n/a | n/a |
| Circle Smelting, IL | $ 4,840,784 | $ 8,158,638 | **$ 6,052,390** | $ 9,257,656 | n/a | n/a |
| Van Stone, WA | $ 250,000 | $ 4,000,000 | **$ 3,000,000** | $ 4,000,000 | n/a | n/a |
| Kusa, OK | $ 1,245,900 | $ 2,313,800 | **$ 1,780,000** | $ 1,780,000 | n/a | n/a |
| Vasquez Blvd. / I-70, CO | $ 1,002,481 | $ 2,000,000 | **$ 1,500,000** | $ 2,011,010 | n/a | n/a |
| Terrible Mine, CO | $ 945,000 | $ 1,755,000 | **$ 1,400,000** | $ 2,145,215 | n/a | n/a |
| South Plainfield, NJ | $ 806,000 | $ 1,586,601 | **$ 1,000,000** | $ 1,586,601 | n/a | n/a |
| Helvetia, AZ | $ 720,000 | $ 1,935,000 | **$ 880,000** | $ 1,472,500 | n/a | n/a |
| Stephenson Bennett Mine, NM | $ 339,095 | $ 791,221 | **$ 550,000** | $ 9,100,000 | n/a | n/a |
| Combination, MT | $ 195,000 | $ 542,037 | **$ 542,000** | $ 542,037 | n/a | n/a |
| Flux Mine, AZ | $ 355,000 | $ 507,597 | **$ 487,000** | $ 498,755 | n/a | n/a |
| Bonanza, CO | $ 236,000 | $ 736,000 | **$ 400,000** | $ 560,000 | n/a | n/a |
| Golden King, WA | $ 225,000 | $ 1,850,000 | **$ 400,000** | $ 1,850,000 | n/a | n/a |
| Cholett, WA | $ 40,000 | $ 400,000 | **$ 300,000** | $ 300,000 | n/a | n/a |
| Coy Mine, TN | $ 200,000 | $ 200,000 | **$ 200,000** | $ 200,000 | n/a | n/a |
| Black Pine, MT (unowned) | $ 93,500 | $ 209,516 | **$ 190,000** | $ 209,516 | n/a | n/a |
| Henryetta, OK | $ 76,200 | $ 141,400 | **$ 109,000** | $ 108,772 | n/a | n/a |
| Summitville, CO | $ 86,000 | $ 86,000 | **$ 86,000** | $ 86,000 | n/a | n/a |
| Colorado Permits & Fees | $ 2,800 | $ 2,800 | **$ 2,800** | $ 2,800 | n/a | n/a |
| Northport Smelter, WA | $ - | $ - | **$ -** | $ 5,000,000 | n/a | n/a |
| Anderson Calhoun, WA | $ - | $ - | **$ -** | $ 1,400,000 | n/a | n/a |
| Azurite, WA (state claim) | $ - | $ - | **$ -** | $ 10,000 | n/a | n/a |
| **TOTAL** | **$ 54,209,465** | **$ 149,468,209** | **$ 94,579,190** | **$ 223,403,055** | n/a | |

Note: The Debtor High Estimates were taken from the April 20, 2009 report of Brian Hansen, Joint Ex. 61.

EXHIBIT A