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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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January 27, 2015
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Public Record**

STB DOCKET NO. AB-33 (SUB-NO. 164X)

**UNION PACIFIC RAILROAD COMPANY – ABANDONMENT EXEMPTION –
IN BONNE TERRE, MISSOURI**

**REPLY OF UNION PACIFIC RAILROAD COMPANY TO ASARCO LLC'S
IMPROPER SURREPLY**

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On January 7, 2015, Asarco, LLC (“Asarco”) filed a so-called “Reply to Union Pacific Motion to Dismiss and Reply to Petition to Reopen,” thus continuing its efforts to misuse the Board’s processes to gain some leverage in ongoing CERCLA¹ litigation in the U.S. District Court for the Eastern District of Missouri (the “Missouri District Court Litigation”). Asarco’s improper pleading should be rejected, for Asarco has failed to demonstrate any good cause for the Board to disregard its settled rule prohibiting replies to replies. *See* 49 C.F.R. § 1104.13(c). Asarco’s desire to “supplement” its petition with responses to Union Pacific’s arguments is a transparent effort to “have the last word” that is not sufficient to overcome section 1104.13(c).²

In any event, Asarco’s own surreply confirms that the Board has neither the jurisdiction to “reopen” this abandonment nor any reason to do so. Asarco recklessly accuses Union Pacific of making “fraudulent” environmental representations in 2000, but presents no evidence to support that allegation. On the contrary, the evidence shows that Union Pacific consulted with

¹ “CERCLA” stands for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

² *FMC Wyoming v. Union Pac. R.R. Co.*, STB Docket No. 42022, at 1 n.2 (served Jan. 8, 1999) (“*FMC Wyoming*”) (rejecting surreplies that “simply appear to be an effort to have the last word”); *see Potomac Elec. Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989, at 1 n.1 (served June 27, 1997) (“*Potomac Electric*”) (disallowing reply to reply that was “merely an attempt to have the last word in argument”).

environmental authorities to ensure the accuracy of its representations to the Board at the time of the abandonment, and that Union Pacific has never been deemed to be potentially responsible for any environmental contamination at its former Bonne Terre line. Asarco does not (and cannot) deny either point. Instead, it concocts a new surreply theory that fraud as to the Bonne Terre, MO representations can somehow be presumed from Union Pacific's agreement to contribute to the environmental cleanup of Idaho rail lines located almost 2,000 miles away. This is utter nonsense—Union Pacific's voluntary agreement with the EPA to contribute to the cleanup of lines that were constructed half a continent away by different historic railroad companies than those involved in Missouri is completely irrelevant to the conditions of the Bonne Terre line. There is no evidence that Union Pacific made any fraudulent representations to the Board.

Moreover, the surreply provides further evidence that Asarco lacks standing in this proceeding. The Settlement Agreement it attaches in an effort to demonstrate its environmental liabilities actually shows that it has incurred no liability for Bonne Terre. Asarco thus has no legitimate interest in this proceeding. Indeed, Asarco does not deny that its primary purpose for “reopening” the abandonment of a former right of way is to attempt to extract discovery from Union Pacific beyond the scope of the district court's orders. The Board should not sanction a forum-shopping effort to circumvent a federal court's discovery limitations. Asarco's improper surreply should be rejected and its petition to reopen the 2000 abandonment should be denied.

I. ASARCO'S SURREPLY IS IMPERMISSIBLE AND SHOULD BE REJECTED.

Under Board regulations “[a] reply to a reply is not permitted.” 49 C.F.R. § 1104.13(c). Section 1104.13(c) reflects a longstanding agency policy to “promote[] quicker Board action” by

limiting parties to “one round of pleadings each.”³ Asarco was required to include all its arguments and evidence in the petition itself, and any party opposing the petition has one opportunity to respond. At that point “the pleading process ends . . . and replies to replies are not permitted.”⁴ The Board will only make an exception to Section 1104.13(c) “[w]hen good cause is shown, or when additional information is necessary to develop a more complete record.”⁵

Asarco at first tries to excuse its surreply by claiming that Union Pacific’s reply to its petition is “clearly” a motion to dismiss to which Asarco may reply. Asarco Surreply at 1. But Union Pacific simply submitted a “reply” to Asarco’s petition to reopen, and Asarco cannot recast that pleading as a fictional “motion to dismiss.”⁶ Asarco’s suggestion that any reply urging the Board to deny a petition can be recharacterized as a “motion to dismiss” to which the petitioner can reply would eviscerate the rule against replies to replies.

Quickly abandoning its silly argument that Union Pacific’s reply was really a motion to dismiss, Asarco then lists a series of reasons that it claims constitute “good cause” to allow its surreply. None of these scattershot arguments has merit. First, Asarco’s allegation that it was “surprised” by Union Pacific’s arguments is not a basis to allow a surreply. Asarco Surreply at

³ *Beaufort R.R. Co. – Modified Rail Certificate*, STB Fin. Docket No. 34943, at 5 (served July 21, 2009) (“*Beaufort*”); see *Interstate Commerce Commission: Revision and Redesignation of the Rules of Practice*, 47 Fed. Reg. 49534, 49556 (1982).

⁴ *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co. and Van Buren Bridge Co. in Aroostook Cty., ME*, STB Docket No. AB-124 (Sub-No. 2), at 3 (served May 6, 2003) (“*Waterloo*”); see also *Pennsylvania R.R. Co. – Merger – New York Cent. R.R. Co.*, STB Fin. Docket No. 21989 (Sub-No. 4), at 7 (served Jan. 10, 2011) (striking reply to reply); *Dairyland Power Coop. v. Union Pac. R.R. Co.*, STB Docket No. 42105, at 4 n.5 (served July 29, 2008) (same).

⁵ *Waterloo* at 3; see also *Beaufort* at 5 (litigant “provides no good cause to depart from” rule prohibiting replies to replies); *CSX Corp. – Control – Chessie System, Inc. & Seaboard Coast Line Industries, Inc.*, 2 S.T.B. 554, 556-57 (1997) (rejecting reply to reply where party seeking surreply “has not shown good cause”).

⁶ Indeed, under the Board’s rules motions to dismiss are typically only applicable to complaint proceedings. See 49 C.F.R. § 1111.5.

2. Asarco claims to be surprised by Union Pacific citing Supreme Court holdings that the Board lacks jurisdiction over former rail lines after a consummated abandonment, but Asarco's claimed ignorance of this law is no excuse to allow it to file an additional pleading. And the other three arguments that supposedly surprised Asarco were never made by Union Pacific, and are instead blatant distortions of Union Pacific's positions.⁷ Asarco can hardly be surprised by arguments that Union Pacific did not make.

Asarco next claims that it should be allowed to "supplement" its arguments because it thinks some unidentified Union Pacific arguments need to "be addressed." Asarco Surreply at 2, 3. But the Board has made clear that a litigant cannot demonstrate "good cause" simply by claiming disagreement with statements in the reply,⁸ asserting that a reply raised new arguments that require a response,⁹ or otherwise expressing a desire "to have the last word."¹⁰

Asarco also claims that it has a right to respond because Union Pacific "seeks affirmative legal relief and raises entirely new legal issues." Asarco Surreply at 2.¹¹ Each premise is meritless. Union Pacific's reply asking the Board to deny Asarco's petition did not request "affirmative legal relief," nor did it raise "new legal issues" by arguing that Asarco had failed to

⁷ See Asarco Surreply at 2 (claiming that Union Pacific argued (1) that district court "shared" jurisdiction over abandonments, (2) that Board had no ability to protect the integrity of its processes; and (3) that Union Pacific was not responsible for investigating its lines prior to abandonment).

⁸ See, e.g., *Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*, STB Docket Nos. MC-F-20904, MC-F-20908 & MC-F-20912, at 3 (served Apr. 20, 2011) (litigant's claims that reply contained misstatements that required correction did not constitute good cause for surreply); *Waterloo* at 3 (litigant's claims that reply "'blatantly mischaracterizes case law'" and "'grossly overstates'" facts was "merely an argument that [the other party's position] is incorrect" and did not constitute good cause for a surreply).

⁹ See, e.g., *Portland & Western R.R., Inc. – Pet. for Declaratory Order – RK Storage & Warehousing, Inc.*, STB Fin. Docket No. 35406, at 2 (served July 27, 2011).

¹⁰ *FMC Wyoming* at 1 n.2; *Potomac Electric* at 1 n.1.

¹¹ Asarco fails to specify what "new legal issues" supposedly justify a surreply.

establish that the Board has either jurisdiction to reopen the 2000 abandonment or any reason to do so.

In short, Asarco has not come close to providing good cause for the Board to disregard its prohibition on surreplies and accept a filing that is longer than Asarco's initial petition.

Compare Asarco Petition (14 pages) *with* Asarco Surreply (17 pages). Asarco's surreply should be rejected, and the Board should decide this case based on the record set forth in Asarco's November 28 petition and Union Pacific's December 18 reply. In the event that the Board nonetheless accepts Asarco's improper pleading, Union Pacific provides the following response to the surreply.

II. ASARCO'S SURREPLY DOES NOT CHANGE THE FACT THAT ITS PETITION TO REOPEN SHOULD BE REJECTED FOR MULTIPLE REASONS.

Regardless of whether the Board accepts or rejects Asarco's surreply, Asarco's petition to reopen is utterly meritless and should be rejected for multiple independent reasons. First, the Board does not have jurisdiction to reopen an abandonment that was consummated fourteen years ago. Second, Asarco's irresponsible claims that Union Pacific somehow perpetrated a fraud on the Board are supported by absolutely no credible evidence. The surreply reveals that Asarco's vociferous accusations of "fraud" in the Bonne Terre abandonment are predicated solely on two consent decrees—which Asarco neglected to provide to the Board. Perhaps that omission can be attributed to the fact that the decrees do not come close to supporting Asarco's claims. A review of the decrees shows that they apply to lines in Idaho located nearly 2,000 miles away from Bonne Terre and that they cannot be read to imply any knowledge of supposed environmental contamination of the former Bonne Terre line. Third, Asarco's claim that Union Pacific "failed to controvert" Asarco's claims about environmental contamination is untrue. As Union Pacific explained on reply and as Asarco well knows, Asarco's assertions have come

under withering attack in the district court. The fact that Union Pacific refuses to engage in Asarco's improper attempt to litigate CERCLA claims before the Board does not mean that Union Pacific is "conceding" Asarco's evidence. Fourth, Asarco's surreply confirms that Asarco does not have standing to bring this petition, for the settlement agreement it appends shows that none of Asarco's CERCLA liability is attributable to the Bonne Terre area. Finally, Asarco's surreply reaffirms that the primary purpose of its petition is to subvert discovery orders issued in the Missouri District Court Litigation. Any one of these reasons would be sufficient to deny Asarco's petition. Combined, they constitute overwhelming grounds to reject it.

A. The Board Does Not Have Jurisdiction to Reopen a 14-Year-Old Consummated Abandonment.

The Board does not have the authority to reopen this abandonment, which was fully consummated fourteen years ago. As Union Pacific explained in its reply, the Board's already limited authority to reopen a closed administrative proceeding is particularly constrained in the case of abandonments, for "[w]hen a rail line has been fully abandoned, it is no longer [a] rail line and . . . the line is not subject to our jurisdiction."¹² Here, the Bonne Terre abandonment was fully consummated fourteen years ago. The former line is no longer part of the rail transportation network, and indeed the land under the former right-of-way has been transferred to other parties. *See* Union Pacific Reply at 8-9. Under binding Supreme Court precedent, the Board has no statutory authority to reassert jurisdiction over this property by reopening the abandonment. *See Hayfield N.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633 (1984)

¹² *Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132, 135 (1980) (footnote omitted), *aff'd sub. nom. Simmons v. ICC*, 697 F.2d 236 (D.C. Cir. 1982); *see CSX Transp. Inc. – Abandonment – between Bloomington and Montezuma, in Parke County, IN*, STB Docket No. AB-55 (Sub-No. 579X), at 5 (served Sept. 13, 2002) ("But we do not have the same discretion to reopen and/or vacate an abandonment decision after any conditions that we have imposed are satisfied and the abandonment has been consummated.").

(“[U]nless the Commission attaches post abandonment conditions to a certificate of abandonment, the Commission’s authorization of an abandonment brings its regulatory mission to an end.”).

Asarco’s only response to *Hayfield* on surreply is to claim that the Board has authority to “clarify” the Supreme Court’s holding that the agency loses jurisdiction over consummated abandonments. Asarco Surreply at 7. That is simply not true—Supreme Court rulings are the law of the land, and the Board cannot devise exceptions to them. Indeed, the Supreme Court has subsequently reaffirmed its holding that once a rail line is abandoned “the line is no longer part of the national transportation system” and “ICC jurisdiction terminates.” *Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990). The former Bonne Terre line is not part of the rail system, and the Board has no more authority to regulate it than it does to regulate any other non-rail property.¹³

B. Asarco’s Irresponsible Allegations of “Fraud” Are Meritless.

Union Pacific takes its obligations of honesty and candor very seriously in all situations, and particularly when it is making representations on the record to the Board. For that reason, Union Pacific also takes allegations that it made fraudulent misrepresentations very seriously. After Asarco suggested in its petition that Union Pacific’s filings relating to the 2000 Bonne Terre abandonment contained misrepresentations, Union Pacific responded with a detailed explanation showing that environmental representations were only made after Union Pacific confirmed their accuracy with federal and state environmental authorities. *See* Union Pacific Reply at 10-11; V.S. Allamong at 1-2.

¹³ Asarco cites the general principle that the Board can revoke exemptions in the event of fraud, but under *Hayfield* that general principle cannot be applied to the unique situation of an abandonment. Abandonments are categorically different from any other Board action, for an abandonment necessarily removes the abandoned line from the class of property that the Board has jurisdiction to regulate.

Despite this definitive evidence that Union Pacific’s representations were truthful, Asarco claims over and over that Union Pacific committed “fraud”—repeating the word no fewer than forty-six times in its surreply. But nowhere does Asarco present any actual evidence of fraud. The only supposed evidence of fraud Asarco presents are two consent decrees that Union Pacific entered into for Idaho rail lines in the Coeur d’Alene region, located at least four states and nearly 2,000 miles away from Bonne Terre. *See* Attach. A (map illustrating distance between Bonne Terre and Coeur d’Alene). While Asarco centers its surreply on the supposed fraud proven by these consent decrees, it did not provide either of them to the Board. This is not surprising, because review of the consent decrees shows that they do not even come close to supporting Asarco’s claims.¹⁴

First, the consent decrees are expressly limited to right-of-way segments in the Coeur d’Alene River basin area of Idaho. *See* Attach. B at 17 (defining “Bunker Hill Superfund Site”); Attach. C at 15 (defining “Project Area” for the Trail of the Coeur d’Alene rails to trails project). These segments were located nearly 2,000 miles from Bonne Terre; built in an area with completely different terrain and geology than Bonne Terre; and constructed by different historic railroad companies. Nothing about these consent decrees has anything to do with Bonne Terre, and neither shows that Union Pacific “should have known” anything about supposed contamination from the Bonne Terre line.

Second, Union Pacific agreed to the Coeur d’Alene consent decrees because it had been identified by EPA as a potentially responsible party for contamination on its right of way in the Coeur d’Alene region.¹⁵ In contrast, Union Pacific has never been identified as a potentially

¹⁴ The consent decrees are enclosed as Attachments B and C.

¹⁵ It should be noted that the court that adjudicated the CERCLA litigation stemming from the Coeur d’Alene region found significant evidence that any lead contamination on Union Pacific’s

responsible party for any contamination in Bonne Terre. And it bears repeating that EPA identified no environmental concerns with the 1.1 mile segment of the former Bonne Terre right of way when Union Pacific consulted with it before seeking to abandon the line. *See* Union Pacific Reply at 10-11.

Third, both Idaho consent decrees provide that the decrees are inadmissible in any judicial or administrative proceeding against Union Pacific as proof of liability or as an admission of any fact dealt with in the decrees. *See* Attach. B at 9 (1995 Decree); Attach. C at 4 (2000 Decree). The only evidence Asarco presents to support its wild allegations of “fraud” is inadmissible on its face.

Asarco’s claim that it “has established that Union Pacific knew, or at bare minimum should have known, that its rail lines were negatively impacting the environment” is completely false. Asarco Surreply at 4. Union Pacific’s voluntary agreement to contribute to environmental remediation for Idaho lines nearly 2,000 miles away is irrelevant to this abandonment. Indeed, Asarco’s willingness to accuse Union Pacific of fraud on the basis of such flimsy evidence is telling evidence of how little weight the Board should give to Asarco’s wild allegations.

C. Union Pacific Continues to Adamantly Contest Asarco’s Allegations About the Former Bonne Terre Line.

Asarco grossly misrepresents the record when it claims that Union Pacific has “conceded” that the former Bonne Terre line has somehow contaminated the environment. Asarco Surreply at 9. On the contrary, Union Pacific emphasized that Asarco’s “supposed proof of environmental contamination on the line is highly suspect and has been subject to significant

Coeur d’Alene right of way was attributable to mining company dumping and not ballast used by the predecessor railroad. *See Coeur D’Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1113-14 (D. Idaho 2003). The court found that mining companies, including Asarco, dumped millions of tons of tailings into the Coeur d’Alene River and that flooding from the river deposited that waste throughout the flood plain, which included Union Pacific’s right of way. *Id.*

challenge in the Missouri District Court Litigation.” Union Pacific Reply at 10. In light of this unambiguous statement, it is difficult to read Asarco’s claim that “Union Pacific did not even deny Asarco’s claims or its expert’s conclusions” as anything but an attempt to mislead. Asarco Surreply at 9.

Asarco’s false claims are even less defensible given how vigorously Union Pacific has challenged Asarco’s claims in the Missouri District Court Litigation. The expert report that Asarco’s surreply claims is “uncontroverted” was in fact thoroughly rebutted by Union Pacific’s expert Brian Hansen. Mr. Hansen’s report explains, among other things, that large mining chat piles for which Asarco is responsible have dispersed contaminants over a widespread area through wind-blown dust and erosion. *See* Attachment D at 4 (Hansen Expert Report). Union Pacific’s former right of way is within the area potentially impacted by this wind-blown dust. Mr. Hansen also identifies significant reasons to doubt Asarco’s claims about the supposed presence of chat ballast in the former Union Pacific right of way. *Id.* at 5-6. While it is not the Board’s role to weigh the evidence in the CERCLA dispute, it should squarely reject Asarco’s claim that its evidence is “uncontroverted.”¹⁶

D. Asarco’s Own Surreply Confirms That It Lacks Standing.

As Union Pacific illustrated in its reply, Asarco has no standing to seek reopening of this abandonment. *See* Union Pacific Reply at 13-15. Asarco was not a party to the original abandonment, the abandonment caused no injury to Asarco, and reopening the abandonment would not redress any injury Asarco may have suffered.¹⁷

¹⁶ Of course, even if Asarco’s environmental testing were reliable and credible (and it is not), testing performed in 2013 does not prove anything about the state of the line in 2000, let alone what Union Pacific knew about the supposed state of the rail line in 2000.

¹⁷ *See James Riffin d/b/a The N. Cent. R.R. – Acquisition and Operation Exemption – In York County, Pa.*, STB Fin. Docket No. 34501, at 5 (served Feb. 23, 2005) (noting that the Board follows the traditional federal court three-part test to determine whether a party has standing,

Asarco claims that it has standing because its payment of damages in Southeast Missouri “address[es] all locations where hazardous substances have come to be located” and that therefore it has suffered an injury traceable to the abandonment. Asarco Surreply at 15. But the Settlement Agreement Asarco filed along with its surreply disproves that assertion. Bonne Terre was not one of the sites covered by the settlement agreement, and therefore Asarco’s settlement funds have not been spent there. *See* Asarco Surreply Ex. 1 at 4 (Settlement Agreement identifying site specific special accounts to which Asarco’s settlement funds are to be deposited). Asarco’s claim of injury also ignores Union Pacific’s reply evidence—which included testimony from Asarco’s corporate representative—that showed that none of the money Asarco has paid has been attributed to rail lines. *See* Union Pacific Reply at 14, Attach. B (excerpt of testimony from Asarco’s own corporate representative’s deposition acknowledging that he was “not aware” of any Asarco money being used for Union Pacific property or railroad right-of-ways). Asarco’s own evidence and testimony thus show that it has not expended any funds for cleanup of the former Bonne Terre line segment and thus that it has no cognizable injury attributable to the abandoned line.

E. The Board Should Not Disrupt the Missouri District Court Litigation by Interposing Itself Into This Dispute.

Asarco’s surreply similarly fails to contradict Union Pacific’s argument that the Board should avoid disrupting the district court litigation. Asarco does not dispute that the district court is considering the central question of whether Union Pacific has any liability to Asarco. And it does not dispute that the question of whether the Bonne Terre line was properly abandoned has no impact on that question of CERCLA liability. Nor does Asarco disagree that the district court

which requires that: “(1) the party must have suffered an injury in fact; (2) the injury must be fairly traceable to the defendant’s challenged conduct; and (3) the injury must be one that is likely to be redressed through a favorable decision”) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))).

has closed discovery while it considers motions for summary judgment or that a Board order that Union Pacific provide environmental “reports” to Asarco would circumvent this ruling.

Instead, Asarco responds with the non sequitur that the Board cannot “delegate” its authority over abandonments to the district court. Asarco Surreply at 15. But the Board’s exclusive authority over abandonments is not the issue. The issue is whether the Board should allow a party to invoke that abandonment authority as a tactical ploy to gain some advantage in unrelated district court litigation. Asarco is not seeking to “reopen” the abandonment in any meaningful way. Neither Asarco nor any other party is seeking restoration of rail service. Instead, Asarco intends to use a reopened proceeding for the sole purpose of requiring Union Pacific to “report” on the environmental condition of abandoned lines in southeastern Missouri. Granting this request would directly contravene the district court’s discovery limitations and would inject the Board into a CERCLA dispute that is far outside its jurisdiction and expertise. The Board should not entertain Asarco’s request and should reject Asarco’s attempt to do an end-run around the district court’s rulings.

III. CONCLUSION

Asarco’s impermissible surreply should be rejected, because Asarco has not shown the “good cause” required to allow such a pleading. Even if it were accepted, the surreply does not alter the conclusion that Asarco’s petition to reopen must be rejected for multiple independent reasons. Even assuming that the Board has any jurisdiction over a rail line abandoned fourteen years ago and no longer owned by Union Pacific (and it does not), Asarco has failed to demonstrate that Union Pacific committed any fraud in connection with the 2000 abandonment of the Bonne Terre line. The Board should reject this improper surreply and should reject Asarco’s petition to reopen this fully consummated abandonment.

Respectfully submitted,



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Counsel to Union Pacific Railroad Company

Dated: January 27, 2015

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. §1104.12, I hereby certify that on this 27th day of January 2015, I caused a copy of the foregoing Union Pacific Reply in Opposition to Asarco Reply to Petition to Reopen to be served by email and overnight delivery upon the following parties of record identified on the STB Service List.

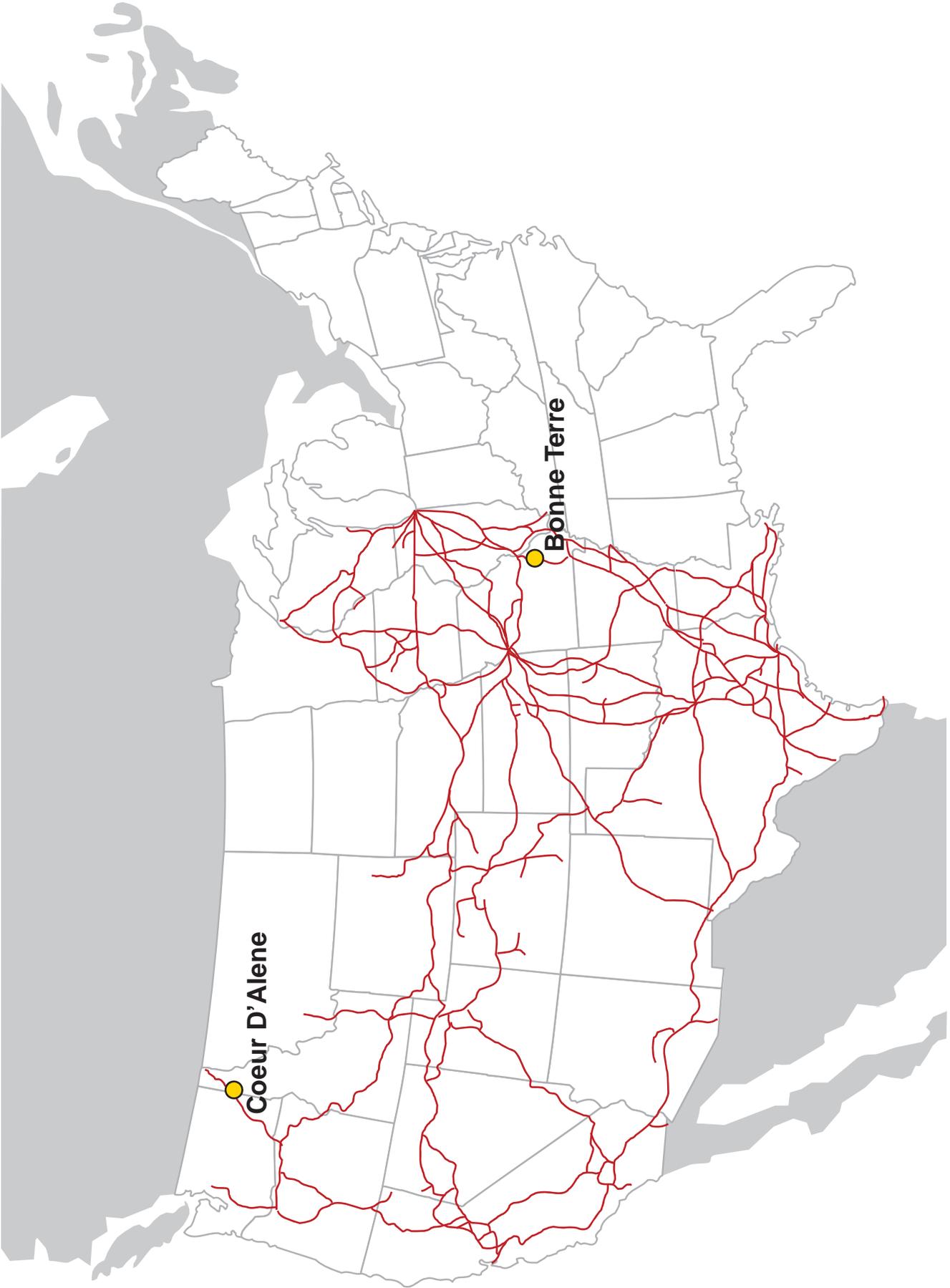
Gregory Evans
Laura G. Brys
Integer Law Corporation
633 West Fifth Street, Floor 67
Los Angeles, CA 90071



Hanna M. Chouest

ATTACHMENT A

Union Pacific System Map



ATTACHMENT B

U.S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at _____

SEP 12 1995

CLERK, U.S. DISTRICT COURT

By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and)
STATE OF IDAHO,)
)
Plaintiffs,)
)
vs.)
)
UNION PACIFIC RAILROAD COMPANY,)
STAUFFER MANAGEMENT COMPANY, and)
RHONE-POULENC, INC.,)
)
Defendants.)

Case No. CV 95-0152-N-HLR

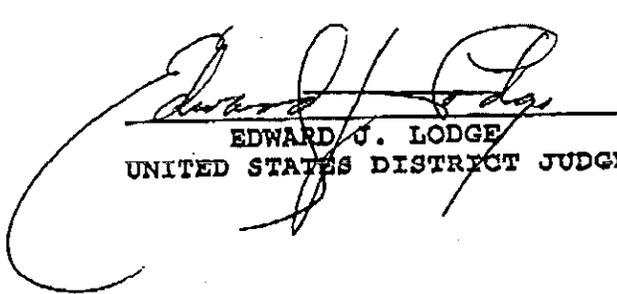
ORDER

On March 24, 1995, a Notice of Lodging Consent Decree (Dkt. #2) was filed with the court and the proposed consent decree was lodged with the court. The requisite commentary period has passed and the limited comments have been addressed by the parties. On July 28, 1995, the United States of America and the State of Idaho moved for the court to enter the consent decree which was lodged with the court. No objection to the motion was filed by any party to the lawsuit and, in accordance with Section XXXIII of the consent decree, the defendants have waived further notice of the decree.

The court has reviewed the consent decree and the memorandum in support of the motion to enter the consent decree. The court finds that the limited comments of third parties have been adequately addressed by the consent decree; that the settlement terms of the consent decree are "fair, adequate, and reasonable"; and that the consent decree furthers the policies of CERCLA. See, Walsh v. Great Atlantic & Pacific Tea Co., Inc., 726 F.2d 956, 965 (3rd Cir. 1983).

Being fully advised in the premises, IT IS HEREBY ORDERED that the consent decree lodged on March 24, 1995, is hereby approved and entered as a judgment of this court, and the court clerk is directed to file the consent decree in the record and mail a copy of this order as well as the first page (with the file stamp verification) and page 100 (with the court's signature) of the consent decree to each party. The entire executed consent decree (106 pages) will be available to the parties upon written request to the clerk of the court and a payment of \$15.00 (for copying and postage).

Dated this 12th day of September, 1995.


EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

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CAMERON S. BURKE
CLERK IDAHO

U.S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SEP 12 1995

CLERK, U.S. DISTRICT COURT
By Deputy

UNITED STATES OF AMERICA and)
STATE OF IDAHO)
)
Plaintiffs,)
)
v.)
)
UNION PACIFIC RAILROAD COMPANY;)
STAUFFER MANAGEMENT COMPANY;)
RHONE-POULENC, INC.)
)
Defendants.)

CIV 95-0152-N-HLR

CIVIL ACTION NO.

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CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA") filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973.

1 B. The United States in its complaint seeks,
2 inter alia: (1) reimbursement of certain costs incurred and to be
3 incurred by EPA and the Department of Justice for response
4 actions in connection with the Bunker Hill Superfund Site
5 ("Site") in Shoshone County, Idaho, together with accrued
6 interest; and (2) performance of studies and response work by the
7 Defendants at the Site consistent with the National Oil and
8 Hazardous Substance Pollution Contingency Plan, 40 C.F.R. Part
9 300 (as amended) ("NCP").

10 C. In accordance with the NCP and Section 121(f)(1)(F)
11 of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA formally notified the
12 State on November 3, 1992, of negotiations with potentially
13 responsible parties regarding the implementation of the remedial
14 design and remedial action for the Site, and EPA has provided the
15 State with an opportunity to participate in such negotiations and
16 be a party to this Consent Decree.

17 D. The State of Idaho ("State") has joined the
18 complaint against the Defendants pursuant to Section 107 of
19 CERCLA, 42 U.S.C. § 9607, and relevant state law.

20 E. EPA formally notified the United States Department
21 of the Interior, the United States Forest Service, and the
22 Coeur d'Alene Tribe on November 3, 1992, of negotiations with
23 potentially responsible parties regarding the release of
24 hazardous substances that may have resulted in injury to natural
25 resources that are or may be under their trusteeship. However,
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1 the notification letter further stated that natural resource
2 damages would not be a subject of negotiations.

3 F. The Defendants that have entered into this Consent
4 Decree do not admit any liability to the Plaintiffs arising out
5 of the transactions or occurrences, including releases, alleged
6 in the complaint.

7 G. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,
8 EPA placed the Bunker Hill facility on the National Priorities
9 List, set forth at 40 C.F.R. Part 300, Appendix B, by publication
10 in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658.

11 H. The Site has been damaged by over 100 years of
12 mining and 65 years of smelting activity, as well as a variety of
13 other natural and man-made events. Heavy metals have been
14 released into soils, surface water and groundwater throughout the
15 Site to varying degrees through a combination of occurrences
16 including airborne particulate dispersion, alluvial deposition of
17 tailings through various mechanisms, including the flooding of
18 the extensive floodplain area within the Site, and other
19 contaminant movement from both on-Site and off-Site sources.

20 I. For the purposes of conducting the Remedial
21 Investigation and Feasibility Study ("RI/FS"), the Site has been
22 divided into Populated Areas and Non-Populated Areas. A separate
23 RI/FS and Record of Decision was performed for each of these
24 identified areas.

1 J. In April 1991, EPA and the State completed the
2 Populated Areas RI/FS. Pursuant to Section 117 of CERCLA,
3 42 U.S.C. § 9617, EPA published notice of the completion of the
4 FS and of the proposed plan for the Residential Soil Operable
5 Unit remedial action on April 26-30, 1991, in the Shoshone News
6 Press, a major local newspaper of general circulation. EPA
7 provided an opportunity for written and oral comments from the
8 public on the proposed plan for remedial action. A public
9 hearing was held on May 23, 1991, to answer questions and take
10 comments. A copy of the transcript of the public meeting is
11 available to the public as part of the administrative record upon
12 which the Regional Administrator based the selection of the
13 response action.

14 K. The decision by EPA on the remedial action to be
15 implemented for the Residential Soil Operable Unit of the Site is
16 embodied in a final Record of Decision (the "1991 ROD") which was
17 executed on August 30, 1991, by EPA and the State. The 1991 ROD
18 includes a responsiveness summary to the public comments. Notice
19 of the final plan was published in accordance with Section 117(b)
20 of CERCLA, 42 U.S.C. § 9617(b).

21 L. In June 1992, EPA and some of the PRPs completed the
22 Non-Populated Areas RI/FS. According to UP and the Stauffer
23 Entities, they participated in the Non-Populated Areas RI/FS.
24 Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA
25 published notice of the completion of the FS and of the proposed
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1 plan for remedial action on June 13, 1992, in the Shoshone News
2 Press and the Spokesman-Review, major local newspapers of general
3 circulation. EPA provided an opportunity for written and oral
4 comments from the public on the proposed plan for remedial
5 action. A public meeting was held on June 25, 1992, to answer
6 questions and take comments. A copy of the transcript of the
7 public meeting is available to the public as part of the
8 administrative record upon which the Regional Administrator based
9 the selection of the response action.

10 M. The decision by EPA on the remedial action to be
11 implemented for the Non-Populated areas and the remaining
12 populated areas of the Site is embodied in a ROD (the "1992
13 ROD"), executed on September 22, 1992, by EPA and the State of
14 Idaho. The 1992 ROD includes a responsiveness summary to the
15 public comments. Notice of the final plan was published in
16 accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

17 N. Throughout the years, a number of removal actions
18 have been conducted at this Site.

19 O. The Panhandle Health District (PHD) has agreed to
20 seek to adopt and implement an environmental health code which
21 will provide the basic regulatory framework for implementation of
22 an Institutional Control Program (ICP). PHD agrees to work with
23 the local governments within the Site to incorporate enabling
24 language into their planning and zoning ordinances that will
25 complement the environmental health code and aid in the
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1 implementation of the ICP. If a local government is unable or
2 does not adopt the necessary enabling provisions, PHD will seek
3 to implement the ICP through its own authorities. The existence
4 of the ICP, as well as the existence of the provisions for the
5 ICP's enforcement, through either the PHD's environmental health
6 code or the planning and zoning ordinances of local governments
7 within the Site, are an acceptable and integral component of
8 remedial actions for the 1991 ROD and 1992 ROD.

9 P. This Consent Decree addresses certain enumerated
10 liabilities of the Settling Defendants at the Site. Pursuant to
11 this Consent Decree, the Settling Defendants are performing
12 specified Work. Settling Defendants are making specified
13 payments to the Plaintiffs for the ICP. The Stauffer Entities
14 are making a specified payment for the Phosphoric Acid/Fertilizer
15 Plant subarea. The Stauffer Entities are paying a premium to
16 address any past costs at the Site and any liability which the
17 Stauffer Entities may have for the non-NIPC areas of the Site.
18 Union Pacific is paying a premium to address any past costs at
19 the Site and any liability that Union Pacific may have for non-
20 Union Pacific areas at the Site. Pursuant to this Consent
21 Decree, the Settling Defendants are receiving the covenants not
22 to sue provided in Section XXII of this Consent Decree and the
23 contribution protection provided in Section XXIV of this Consent
24 Decree.

1 Q. Based on the information presently available to EPA,
2 EPA believes that the Work will be properly and promptly
3 conducted by the Settling Defendants if conducted in accordance
4 with the requirements of this Consent Decree and its attachments.

5 R. Solely for the purposes of Section 113(j) of CERCLA,
6 42 U.S.C. § 9613(j), the Remedial Action and the Work to be
7 performed by the Settling Defendants shall constitute a response
8 action taken or ordered by the President.

9 S. Except as otherwise provided in this Consent Decree,
10 in signing this Decree the Settling Defendants deny any and all
11 legal and equitable liability and reserve all defenses under any
12 federal, state, local or tribal statute, regulation, or common
13 law for any claim, endangerment, nuisance, response, removal,
14 remedial or other costs or damages incurred or to be incurred by
15 the United States, the State, or other entities or persons or any
16 natural resource damages as a result of the release or threat of
17 release of hazardous substances to, at, from or near the Site.
18 Pursuant to 42 U.S.C. § 9622(d)(1)(B), entry of this Consent
19 Decree is not an acknowledgment by Settling Defendants that any
20 release or threatened release of a hazardous substance
21 constituting an imminent and substantial endangerment to human
22 health or the environment has occurred or exists at the Site.
23 Settling Defendants do not admit and retain the right to
24 controvert any of the factual or legal statements or
25 determinations made herein in any judicial or administrative
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1 proceeding except in an action to enforce this Consent Decree or
2 as provided in Paragraph 100. Settling Defendants do agree,
3 however, to the Court's jurisdiction over this matter. This
4 Consent Decree shall not be admissible in any judicial or
5 administrative proceeding against any Settling Defendant, over
6 its objection, as proof of liability or an admission of any fact
7 dealt with herein, but it shall be admissible in an action to
8 enforce this Consent Decree. This Consent Decree shall not be
9 admissible in any judicial or administrative proceeding brought
10 by or on behalf of any Natural Resource Trustee for natural
11 resource damages, or in any judicial or administrative proceeding
12 brought against any Natural Resource Trustee, over the objection
13 of any Natural Resource Trustee, as proof of or a defense to
14 liability or as an admission of any fact dealt with herein.

15 T. The Parties recognize, and the Court by entering
16 this Consent Decree finds, that this Consent Decree has been
17 negotiated by the Parties in good faith and implementation of
18 this Consent Decree will expedite the cleanup of the Site and
19 will avoid prolonged and complicated litigation between the
20 Parties, and that this Consent Decree is fair, reasonable, and in
21 the public interest.

22 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:
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II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. Notwithstanding any provision of this Consent Decree, nothing in this Consent Decree shall be construed to create any obligation on or right of action against the United States or the State for the performance of any response actions.

3. This Consent Decree applies to and is binding upon the United States and the State and upon Settling Defendants and their heirs, successors, and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendants' responsibilities under this Consent Decree.

1 attachments attached hereto and incorporated hereunder, the
2 following definitions shall apply:

3 A. "Administrative Record" means all documents,
4 including any attachments, enclosures, or other supporting
5 materials thereto, compiled, indexed by EPA or the State of Idaho
6 and maintained by EPA as the Administrative Records in support of
7 the 1991 ROD or the 1992 ROD;

8 B. "CERCLA" means the Comprehensive Environmental
9 Response, Compensation, and Liability Act of 1980, as amended,
10 42 U.S.C. §§ 9601, et seq;

11 C. "Consent Decree" shall mean this Decree and all
12 attachments hereto which are listed in Section XXX (Attachments).
13 In the event of conflict between this Decree and any Attachment,
14 this Decree shall control;

15 D. "Contractor" or "subcontractor" means the company or
16 companies retained by or on behalf of the Settling Defendants to
17 undertake and accomplish the Work and associated activities
18 required by this Consent Decree;

19 E. "Day" means a calendar day unless expressly stated
20 to be a working day. "Working day" shall mean a day other than a
21 Saturday, Sunday, or State or Federal holiday. In computing any
22 period of time under this Consent Decree, where the last day
23 would fall on a Saturday, Sunday, or State or Federal holiday,
24 the period shall run until the close of business of the next
25 working day;

1 F. "EPA" means the United States Environmental
2 Protection Agency and any successor departments or agencies;

3 G. "Future Response Costs" shall mean all costs,
4 including, but not limited to, direct and indirect costs, that
5 the United States and the State incur on or after the lodging of
6 this Consent Decree in reviewing or developing plans, reports,
7 and other items pursuant to this Consent Decree, verifying the
8 Work, or otherwise implementing, overseeing, or enforcing this
9 Consent Decree, including, but not limited to, payroll costs,
10 contractor costs, travel costs, laboratory costs, the costs
11 incurred pursuant to Section VII (Additional Response Actions),
12 Section VIII (Periodic Review), Section X (Access) (including,
13 but not limited to, attorneys fees and the amount of just
14 compensation), Section XVI (Emergency Response Costs), and
15 Paragraph 92 of Section XXII (Covenants Not To Sue by
16 Plaintiffs). Future Response Costs shall also include all costs,
17 including direct and indirect costs, paid by the United States
18 and the State in connection with the Consent Decree between the
19 date of lodging of this Consent Decree and the effective date of
20 the Consent Decree;

21 H. "ICP" means the Institutional Control Program which
22 provides a regulatory framework to ensure that activities
23 involving excavations, building, development, construction and
24 renovation and grading within the Bunker Hill Superfund Site
25 provide for the installation and maintenance of Barriers and
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1 implementation of other contaminant management standards to
2 preclude the migration of, and particularly, human exposure to
3 contaminants within the Site as necessary to protect the public
4 health and environment;

5 I. "National Contingency Plan" or "NCP" means the
6 National Oil and Hazardous Substances Pollution Contingency Plan
7 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605,
8 codified at 40 C.F.R. Part 300, including, but not limited to,
9 any amendments thereto;

10 J. "NIPC Area" means the North Idaho Phosphate Company
11 Area delineated in the map attached as Attachment C which
12 includes the Phosphoric Acid/Fertilizer Plant subarea and the A-4
13 Gypsum subarea encompassing portions of Magnet Gulch. Within
14 this Area the "Phosphoric Acid/Fertilizer Plant" subarea or "PAFP
15 subarea" shall mean the subarea designated as such and delineated
16 in the map attached as Attachment C. Also within this Area, the
17 "A-4 Gypsum subarea" shall mean the subarea designated as such
18 and delineated in the map attached as Attachment C;

19 K. "Operation and Maintenance" or "O & M" means all
20 activities required by the Statement of Work ("SOW") to maintain
21 the effectiveness of the Remedial Action;

22 L. "Paragraph" means a portion of this Consent Decree
23 identified by an Arabic numeral or an upper case letter;

24 M. "Parties" means the United States, the State of
25 Idaho, and the Settling Defendants;

1 N. "Past Response Costs" shall mean all costs,
2 including, but not limited to, direct and indirect costs and
3 interest, that the United States and the State incurred and paid
4 with regard to the Site prior to lodging of the Consent Decree;

5 O. "Performance Standards" means those cleanup
6 standards, standards of control, and other substantive
7 requirements, criteria, or limitations set forth in the RODs, as
8 clarified by the respective SOWs, except that "To Be Considered"
9 criteria referenced in the RODs shall only be deemed Performance
10 Standards if so specified in a SOW;

11 P. "Phosphoric Acid/Fertilizer Plant Remedial Action"
12 or "PAFP Remedial Action" means the remedial design and remedial
13 action that the Governments will undertake for the PAFP subarea.

14 Q. "Plaintiffs" means the United States and the State
15 of Idaho;

16 R. "RCRA" means the Solid Waste Disposal Act, as
17 amended, 42 U.S.C. §§ 6901, et seq. (also known as the Resource
18 Conservation and Recovery Act);

19 S. "Record(s) of Decision" or "ROD(s)" means both the
20 1991 ROD and the 1992 ROD, relating to the Site, and all
21 attachments thereto. These RODs are attached hereto as
22 Attachment A and incorporated herein by reference;

23 T. "Remedial Action" means those activities, except for
24 O & M, to be undertaken separately by the Settling Defendants to
25 implement the final plans and specifications submitted separately

1 by the Settling Defendants pursuant to the Scope of Work and Work
2 Plans approved by EPA for their Respective Areas;

3 U. "Remedial Design Report" (or "RDR") means the
4 document submitted by the Stauffer Entities to implement the
5 Work in the A-4 Gypsum subarea required under this Consent
6 Decree. The draft Stauffer Entities RDR is attached hereto as
7 Attachment G;

8 V. "Remedial Action Work Plans" or "RAWP" means the
9 documents submitted separately by the Settling Defendants
10 pursuant to this Consent Decree and described more fully in the
11 SOW;

12 W. "Respective Areas" means with respect to Union
13 Pacific, the "Union Pacific Area" and with respect to the
14 Stauffer Entities, the "NIPC Area";

15 X. "Rhone-Poulenc, Inc." means the New York corporation
16 of said name, which is the successor in interest by merger to
17 Stauffer Chemical Company;

18 Y. "Section" means a portion of this Consent Decree
19 identified by a Roman numeral;

20 Z. "Settling Defendants" means each company, the
21 Stauffer Entities (Stauffer Management Company and Rhone-Poulenc,
22 Inc.) and Union Pacific, separately, so that each applicable
23 provision applies separately (not jointly) to Union Pacific or
24 the Stauffer Entities;

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27 BUNKER HILL STAUFFER/UNION PACIFIC RAILROAD
28 CONSENT DECREE - Page 16

December 15, 1994

1 AA. The "Bunker Hill Superfund Site" or "Site" means an
2 approximately twenty-one (21) square mile area in Shoshone
3 County, Idaho, running approximately seven (7) miles in the
4 east-west direction and approximately three (3) miles in the
5 north-south direction as more accurately delineated on Attachment
6 B, the Bunker Hill Superfund Site Allocation Map, excluding any
7 hazardous substances in the South Fork of the Coeur d'Alene River
8 which flow into the Site;

9 BB. "State" means the State of Idaho;

10 CC. "Statement of Work" or "SOW" means the documents
11 setting forth the Work to be performed by each Settling Defendant
12 for its Respective Area, as set forth in Attachments E and F to
13 this Consent Decree, and any modifications made in accordance
14 with this Consent Decree;

15 DD. "Stauffer Management Company" means the Delaware
16 corporation of said name, which is the indemnitor of certain
17 environmental liabilities of Stauffer Chemical Company, including
18 liabilities of Stauffer Chemical Company that relate to the Site;

19 EE. "Stauffer Entities" means Stauffer Management
20 Company and Rhone-Poulenc, Inc.;

21 FF. "Supervising Contractors" means the Settling
22 Defendants or the principal contractors retained by the Settling
23 Defendants to supervise and direct the implementation of the Work
24 under this Consent Decree;

1 GG. "Union Pacific Railroad Company" or "Union Pacific"
2 means the Utah Corporation of that name;

3 HH. "Union Pacific Area" means the area delineated as
4 such on the map attached as Attachment D, including, but not
5 limited to, the railroad Right-Of-Way;

6 II. "United States" means the United States of America;

7 JJ. "Waste Material" shall mean (1) any "hazardous
8 substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14);
9 (2) any pollutant or contaminant under Section 101(33) of CERCLA,
10 42 U.S.C. § 9601(33); (3) any "solid waste" under Section
11 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous
12 waste" under Idaho Code § 39-4403(8); and

13 KK. The "Work" shall mean all activities Settling
14 Defendants are required to perform separately under this Consent
15 Decree for their Respective Areas, except those required by
16 Section XXVI (Retention of Records).

17
18 V. GENERAL PROVISIONS

19 6. Objectives of the Parties

20 The objectives of the Parties in entering into this
21 Consent Decree are to protect public health or welfare or the
22 environment at the Site by the design and implementation of
23 response actions at the Site by the Settling Defendants and to
24 reimburse response costs of the Plaintiffs. By entering into

1 this Consent Decree, the Parties also intend to resolve claims
2 and liabilities as set forth in this Consent Decree.

3 7. Approval of SOWs

4 The United States and the State have reviewed and
5 approved the SOWs attached hereto, and have found them consistent
6 with the RODs, the NCP, and the requirements of relevant EPA
7 remedial design guidance documents. The United States and State
8 have reviewed the draft RDR, specified in the SOW, which
9 establishes the conceptual design for the development of the
10 final draft RDR. Union Pacific has submitted a draft RAWP which
11 is attached hereto and which will be reviewed and finalized in
12 accordance with the Consent Decree.

13 8. Commitments by the Stauffer Entities

14 a. The Stauffer Entities shall finance and perform the
15 Work as it relates to the NIPC Area in accordance with this
16 Consent Decree and all plans, standards, specifications, and
17 schedules set forth in or developed and approved by EPA pursuant
18 to this Consent Decree. The Stauffer Entities shall also
19 reimburse the United States and the State for Future Response
20 Costs as provided in and limited by this Consent Decree.

21 b. The Stauffer Entities shall finance and perform the
22 activities required by the RODs as set forth in the relevant SOW
23 (Attachment E) and the RDR (Attachment G) for the A-4 Gypsum
24 subarea. This includes Remedial Design and Remedial Action for
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1 the A-4 Gypsum subarea and long-term Operation and Maintenance
2 for the A-4 Gypsum subarea.

3 c. Within sixty (60) days of entry of this Consent
4 Decree, the Stauffer Entities shall pay one hundred fifty
5 thousand dollars (\$ 150,000) to finance their portion of an
6 Institutional Controls Program for the Site. This payment shall
7 be paid to the State of Idaho which will place this money in a
8 trust fund for use in implementing aspects of the Institutional
9 Controls Program. This payment shall constitute full
10 satisfaction of the Stauffer Entities' obligations for the ICP.

11 d. Within thirty (30) days of entry of this Consent
12 Decree, the Stauffer Entities shall pay a premium of five hundred
13 thousand dollars (\$ 500,000) to EPA, and five hundred thousand
14 dollars (\$ 500,000) to the State of Idaho. The Plaintiffs shall
15 utilize the premium for remedial action and operation and
16 maintenance activities within the Site. The provision of such
17 remedial action shall not require the assurances of Section
18 104(c)(3) of CERCLA, 42 U.S.C. § 9604(c)(3).

19 e. Within thirty (30) days of entry of this Consent
20 Decree, the Stauffer Entities shall pay EPA eight hundred and
21 fifty thousand dollars (\$ 850,000) to finance the Remedial Design
22 and Remedial Action, and any Operation and Maintenance for the
23 Phosphoric Acid/Fertilizer Plant. The Governments will perform
24 the PAFP Remedial Action in a manner fully consistent with RODs.
25 Within a reasonable time after the completion of the PAFP

1 Remedial Action, EPA will provide notice to the Stauffer Entities
2 that the remediation is completed.

3 f. The obligations of the Stauffer Entities to finance
4 and perform their obligations and to pay amounts owed the United
5 States and the State under this Consent Decree are solely the
6 obligations of the Stauffer Entities and are not joint or several
7 obligations of Union Pacific.

8 9. Commitments by Union Pacific

9 a. Union Pacific shall finance and perform the Work as
10 it relates to the Union Pacific Area in accordance with this
11 Consent Decree and all plans, standards, specifications, and
12 schedules set forth in or developed and approved by EPA pursuant
13 to this Consent Decree. Union Pacific shall also reimburse the
14 United States and the State for Future Response Costs as provided
15 in this Consent Decree.

16 b. Union Pacific shall finance and perform the
17 activities required by the RODs as set forth in the Union Pacific
18 Statement of Work and the Union Pacific RAWP for the Union
19 Pacific Area. Union Pacific's obligations include the Remedial
20 Design and the Remedial Action for the Union Pacific Right-Of-Way
21 and the long term Operation and Maintenance of the Right-Of-Way.
22 Union Pacific will have access to a repository at the Site for
23 disposal of Waste Materials, including treated Waste Materials,
24 from the Union Pacific Area prior to certification of completion
25 of the Remedial Action at no cost to Union Pacific, except that
26

1 Union Pacific will be responsible for costs associated with
2 treatment of Waste Materials exceeding principal threat levels.
3 After certification of completion of the Remedial Action, Union
4 Pacific shall provide for disposal of Waste Materials from the
5 Union Pacific Area at its own cost.

6 c. Within sixty (60) days of entry of this Consent
7 Decree, Union Pacific shall pay one hundred fifty thousand
8 dollars (\$ 150,000) to finance its portion of an Institutional
9 Controls Program for the Site. This payment shall be paid to the
10 State of Idaho which will place this money in a trust fund for
11 use in implementing aspects of the Institutional Controls
12 Program. This payment shall constitute full satisfaction of
13 Union Pacific's obligations for the ICP.

14 d. Within thirty (30) days of entry of this Consent
15 Decree, Union Pacific shall pay a premium of four hundred
16 twenty-five thousand dollars (\$ 425,000) to EPA and four hundred
17 twenty-five thousand dollars (\$ 425,000) to the State of Idaho.
18 The Plaintiffs shall utilize the premium for remedial action and
19 operation and maintenance activities within the Site. The
20 provision of such remedial action shall not require the
21 assurances of Section 104(c)(3) of CERCLA, 42 U.S.C.
22 § 9604(c)(3).

23 e. The obligations of Union Pacific to finance and
24 perform its obligations and to pay amounts owed the United States
25 and the State under this Consent Decree are solely the
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1 obligations of Union Pacific and are not joint or several
2 obligations of the Stauffer Entities.

3 10. Termination of Administrative Orders

4 Upon entry of this Consent Decree, any and all
5 Administrative Orders relating to the Site existing prior to the
6 date of lodging, including the following Administrative Orders,
7 shall be deemed satisfied and withdrawn as to the Settling
8 Defendants: Administrative Order and Settlement Agreement for
9 1990 Residential Removal Action at the Bunker Hill Superfund
10 Site, EPA Docket No. 1090-05-35-106; Bunker Hill Superfund Site
11 Administrative Order on Consent: Hillsides Revegetation/
12 Stabilization and Removal Action, EPA Docket No. 1090-10-01-106;
13 Administrative Order on Consent for 1991 Removal Action at the
14 Bunker Hill Superfund Site, EPA Docket No. 1091-06-17-106(A);
15 Administrative Order on Consent for 1992 Removal Action at the
16 Bunker Hill Superfund Site, EPA Docket No. 1092-04-14-106; and
17 Unilateral Administrative Order for Portion of the Bunker Hill
18 Residential Soils Remedial Design and Remedial Action
19 No. 1093-08-14-106 (August 24, 1993).

20 11. Compliance With Applicable Law

21 All activities undertaken by Settling Defendants pursuant
22 to this Consent Decree shall be performed in accordance with the
23 requirements of all applicable Federal and State laws and
24 regulations. Settling Defendants must also comply with all
25 applicable or relevant and appropriate requirements of all
26

1 Federal and State environmental laws as set forth in the RODs as
2 clarified by the respective SOWs, except that "To Be Considered"
3 criteria referenced in the RODs shall only be considered
4 applicable or relevant and appropriate requirements if so
5 specified in an SOW. The activities conducted pursuant to this
6 Consent Decree, if approved by EPA, shall be considered to be
7 consistent with the NCP.

8 12. Permits

9 a. As provided in Section 121(e) of CERCLA,
10 42 U.S.C. § 9621(e), and § 300.5 of the NCP, no permit shall be
11 required for any portion of the Work conducted entirely on-Site.
12 Where any portion of the Work requires a federal or state permit
13 or approval, Settling Defendants shall submit timely and complete
14 applications and take all other actions necessary to obtain all
15 such permits or approvals.

16 b. The Settling Defendants may seek relief under the
17 provisions of Section XIX (Force Majeure) of this Consent Decree
18 for any delay in the performance of the Work resulting from a
19 failure to obtain, or a delay in obtaining, any permit required
20 for the Work.

21 c. This Consent Decree is not, and shall not be
22 construed to be, a permit issued pursuant to any federal or state
23 statute or regulation, nor shall any releases at or from the Site
24 subsequent to entry of this Consent Decree constitute federally
25 permitted releases unless such releases are made in compliance
26

1 with a federal or state permit specifically authorizing such
2 releases.

3 13. Notice of Obligations to Successors-in-Title

4 a. Within thirty (30) days after entry of this Consent
5 Decree, any Settling Defendant who owns property within the Site
6 shall record a certified copy of this Consent Decree with the
7 Recorder's Office in Shoshone County, State of Idaho.
8 Alternatively, within thirty (30) days after entry of this
9 Consent Decree, any Settling Defendant who owns property within
10 the Site shall submit for EPA approval under Section XII
11 (Submissions Requiring Agency Approval), a listing of the county
12 assessor's parcel number for the property owned by such Settling
13 Defendant within the Site and a summary of the terms of this
14 Consent Decree. This summary shall include a description of
15 where the full Consent Decree can be found. Upon approval of its
16 summary, the Settling Defendant shall have fifteen (15) days to
17 submit for recording by the appropriate recorder's office in
18 Shoshone County, State of Idaho, the summary of the terms of this
19 Consent Decree as approved by EPA.

20 b. Thereafter, each deed, title, or other instrument
21 conveying an interest in the property of such Settling Defendants
22 included in the Site shall contain a notice stating that the
23 property is subject to this Consent Decree and any lien retained
24 by the United States, and shall reference the recorded location
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1 of the Consent Decree and any restrictions applicable to the
2 property under this Consent Decree.

3 c. The obligations of each Settling Defendant with
4 respect to the provision of access under Section X (Access) and
5 the implementation of any applicable institutional controls shall
6 be binding upon such Settling Defendants and any and all persons
7 who subsequently acquire any such interest or portion thereof
8 (hereinafter "Successors-in-Title"). Within thirty (30) days
9 after the entry of this Consent Decree, each Settling Defendant
10 who owns property within the Site shall record at the appropriate
11 Recorder's Office a notice of obligation to provide access under
12 Section X (Access) and related covenants. Each subsequent
13 instrument conveying an interest to any such property included in
14 the Site shall reference the recorded location of such notice and
15 covenants applicable to the property.

16 d. Any Settling Defendant and any Successor-in-Title
17 shall, at least thirty (30) days prior to the conveyance of any
18 such interest, give written notice of this Consent Decree to the
19 grantee and written notice to EPA and the State of the proposed
20 conveyance, including the name and address of the grantee, and
21 the date on which notice of the Consent Decree was given to the
22 grantee. In the event of any such conveyance, the Settling
23 Defendants' obligations under this Consent Decree, including
24 their obligations to provide or secure access pursuant to Section
25 X (Access), shall continue to be met by the Settling Defendants.
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1 In addition, if the United States and the State approve, the
2 grantee may perform some or all of the Work under this Consent
3 Decree; provided, however, the grantee may, upon notice by the
4 Settling Defendants to the United States and State, perform the
5 Operation and Maintenance without prior approval by the United
6 States and the State. In no event shall the conveyance of an
7 interest in property that includes, or is a portion of, the Site
8 release or otherwise affect the liability of the Settling
9 Defendants to comply with the Consent Decree.

10
11 VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

12 14. Selection of Supervising Contractor.

13 a. All aspects of the Work to be performed by Settling
14 Defendants pursuant to Sections VI (Performance of the Work by
15 Settling Defendants), VII (Additional Response Actions), VIII
16 (EPA Periodic Review), and IX (Quality Assurance, Sampling and
17 Data Analysis) of this Consent Decree shall be under the
18 direction and supervision of the Supervising Contractor, the
19 selection of which shall be subject to disapproval by EPA after a
20 reasonable opportunity for review and comment by the State.
21 Within thirty (30) days after the lodging of this Consent Decree,
22 Settling Defendants shall notify EPA and the State, in writing,
23 of the name, title, and qualifications of any contractor proposed
24 to be a Supervising Contractor. EPA will issue a notice of
25 disapproval or an authorization to proceed. If at any time

1 thereafter Settling Defendants propose to change a Supervising
2 Contractor, Settling Defendants shall give such notice to EPA and
3 the State and must obtain an authorization to proceed from EPA,
4 after a reasonable opportunity for review and comment by the
5 State, before the new Supervising Contractor performs, directs,
6 or supervises any Work under this Consent Decree.

7 b. If EPA disapproves a proposed Supervising
8 Contractor, EPA will notify Settling Defendants, in writing.
9 Settling Defendants shall submit to EPA and the State a list of
10 contractors, including the qualifications of each contractor,
11 that would be acceptable to them within thirty (30) days of
12 receipt of EPA's disapproval of the contractor previously
13 proposed. EPA will provide written notice of the names of any
14 contractor(s) that it disapproves and an authorization to proceed
15 with respect to any of the other contractors. Settling
16 Defendants may select any contractor from that list that is not
17 disapproved and shall notify EPA and the State of the name of the
18 contractor selected within twenty-one (21) days of EPA's
19 authorization to proceed.

20 c. If EPA fails to provide written notice of its
21 authorization to proceed or disapproval as provided in this
22 paragraph and this failure prevents the Settling Defendants from
23 meeting one or more deadlines in a plan approved by the EPA
24 pursuant to this Consent Decree, Settling Defendants may seek
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1 relief under the provisions of Section XIX (Force Majeure)
2 hereof.

3 15. Remedial Design and Remedial Action

4 a. All Work under this Consent Decree is subject to
5 approval by EPA. Settling Defendants shall, in accordance with
6 their respective SOWs, prepare and submit required deliverables
7 for approval by EPA pursuant to Section XII (Submissions
8 Requiring Agency Approval). Settling Defendants shall implement
9 the Work upon approval by EPA, in consultation with the State, of
10 the deliverables required by the SOWs, including the Health and
11 Safety Plans, the Quality Assurance Project Plans, the Sampling
12 Plan, or other plans, designs or reports.

13 b. Settling Defendants shall submit deliverables and
14 perform the Work, required under their respective SOWs, RDR and
15 RAWPs, in accordance with the schedules set forth and referred to
16 therein. Once deliverables are approved pursuant to Section XII
17 (Submissions Requiring Agency Approval), they shall be deemed
18 incorporated into and be enforceable under this Consent Decree by
19 this reference.

20 16. Settling Defendants shall only commence on-Site
21 physical activities required to implement the Work with EPA's
22 approval.

23 17. The Work performed by the Settling Defendants
24 pursuant to this Consent Decree shall include the obligation to
25 achieve the Performance Standards.

1 18. Settling Defendants acknowledge and agree that
2 nothing in this Consent Decree, the SOWs or any deliverable
3 required by this Consent Decree constitutes a warranty or
4 representation of any kind by Plaintiffs that compliance with the
5 work requirements set forth in the SOWs will achieve the
6 Performance Standards. Settling Defendants' compliance with the
7 work requirements shall not foreclose Plaintiffs from seeking
8 compliance with all terms and conditions of this Consent Decree,
9 including, but not limited to, the applicable Performance
10 Standards.

11 19. Settling Defendants shall, prior to any off-Site
12 shipment of Waste Material to an out-of-state waste management
13 facility or any intra-state off-site shipment of hazardous waste,
14 provide written notification to the appropriate state
15 environmental official in the receiving facility's state and to
16 the EPA Project Coordinator of such shipment. However, this
17 notification requirement shall not apply to any off-Site
18 shipments when the total volume of all such shipments will not
19 exceed ten (10) cubic yards.

20 a. The Settling Defendants shall include in the written
21 notification the following information, where available: (1) the
22 name and location of the facility to which the Waste Material is
23 to be shipped; (2) the type and quantity of the Waste Material to
24 be shipped; (3) the expected schedule for the shipment of the
25 Waste Material; and (4) the method of transportation. The
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1 Settling Defendants shall notify the state in which the planned
2 receiving facility is located of major changes in the shipment
3 plan, such as a decision to ship the Waste Material to another
4 facility within the same state, or to a facility in another
5 state.

6 b. If it is determined that waste will be shipped to a
7 waste management facility, the identity of the receiving facility
8 and state will be determined by the Settling Defendants following
9 the award of the contract for Remedial Action construction. The
10 Settling Defendants shall provide the information required by
11 Paragraph 19(a) as soon as practicable after the award of the
12 contract and before the Waste Material is actually shipped.

13
14 VII. ADDITIONAL RESPONSE ACTIONS

15 20. In the event that prior to Certification of
16 Completion of the Remedial Action pursuant to Paragraph 52.b, EPA
17 determines or a Settling Defendant proposes that additional
18 response actions are necessary in either of the Respective Areas
19 to meet the Performance Standards or to carry out the remedy
20 selected in the ROD as clarified by the SOWs, RDR, and RAWPs,
21 notification of such additional response actions shall be
22 provided to the appropriate Project Coordinator for the other
23 parties.

24 21. Within thirty (30) days of receipt of notice from
25 EPA pursuant to Paragraph 20 that additional response actions are

1 necessary (or such longer time as may be specified by EPA), the
2 Settling Defendant for the Area shall submit for approval by EPA,
3 after reasonable opportunity for review and comment by the State,
4 a work plan for the additional response actions. Upon approval
5 of the plan pursuant to Section XII (Submissions Requiring Agency
6 Approval), the Settling Defendant shall implement the plan for
7 additional response actions in accordance with the schedule
8 contained therein.

9 22. Any additional response actions that the Settling
10 Defendants propose are necessary to meet the Performance
11 Standards or to carry out the remedy selected in the ROD, as
12 clarified by the SOWs, RDR, and RAWPs, shall be subject to
13 approval by EPA, after reasonable opportunity for review and
14 comment by the State, and, if authorized by EPA, shall be
15 completed by the Settling Defendants in accordance with plans,
16 specifications, and schedules approved or established by EPA
17 pursuant to Section XII (Submissions Requiring Agency Approval).

18 23. Settling Defendants may invoke the procedures set
19 forth in Section XX (Dispute Resolution) to dispute EPA's
20 determination that additional response actions are necessary to
21 meet the Performance Standards or to carry out the remedy
22 selected in the ROD, as clarified by the SOWs, RDR and RAWPs.
23 Such a dispute shall be resolved pursuant to Paragraphs 67-70 of
24 this Consent Decree.

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1 VIII. EPA PERIODIC REVIEW

2 24. Settling Defendants shall conduct any studies and
3 investigations as requested by EPA in order to permit EPA to
4 conduct reviews of the Remedial Action at least every five (5)
5 years as required by Section 121(c) of CERCLA, 42 U.S.C.
6 § 9621(c), and any applicable regulations to assure that human
7 health and the environment are being protected by the Remedial
8 Action.

9 25. If required by Sections 113(k)(2) or 117 of CERCLA,
10 42 U.S.C. §§ 9613(k)(2) or 9617, Settling Defendants and the
11 public will be provided with an opportunity to comment on any
12 further response actions proposed by EPA as a result of the
13 review conducted pursuant to Section 121(c) of CERCLA, 42 U.S.C.
14 § 9621(c), and to submit written comments for the record during
15 the public comment period. After the period for submission of
16 written comments is closed, the Regional Administrator, EPA
17 Region 10, or his/her delegate will determine in writing whether
18 further response actions are appropriate.

19 26. If the Regional Administrator, EPA Region 10, or
20 his/her delegate determines that information received, in whole
21 or in part, during the review conducted pursuant to Section
22 121(c) of CERCLA, 42 U.S.C. § 9621(c), indicates that the
23 Remedial Action is not protective of human health and the
24 environment, the Settling Defendants shall undertake any further
25 response actions for their Respective Areas EPA has determined
26

1 are appropriate, unless their liability for such further response
2 actions is barred by the Covenants Not to Sue set forth in
3 Section XXII (Covenants Not To Sue By Plaintiff). The Settling
4 Defendants shall submit a plan for such work to EPA for approval
5 in accordance with the procedures set forth in Section VI
6 (Performance of the Work by Settling Defendants) and shall
7 implement the plan approved by EPA. The Settling Defendants may
8 invoke the procedures set forth in Section XX (Dispute
9 Resolution) to dispute (1) EPA's determination that the Remedial
10 Action is not protective of human health and the environment,
11 (2) EPA's selection of the further response actions ordered as
12 arbitrary and capricious or otherwise not in accordance with law,
13 or (3) EPA's determination that the Settling Defendants'
14 liability for the further response actions requested is reserved
15 in Paragraphs 86, 87, or 91 or otherwise not barred by the
16 Covenants Not to Sue set forth in Section XXII (Covenants Not To
17 Sue By Plaintiff).

18
19 IX. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

20 27. Settling Defendants shall use quality assurance,
21 quality control, and chain-of-custody procedures for all samples
22 in accordance with EPA's "Interim Guidelines and Specifications
23 For Preparing Quality Assurance Project Plans," December 1980,
24 (QAMS-005/80); "Data Quality Objective Guidance,"
25 (EPA/540/G87/003 and 004); "EPA NEIC Policies and Procedures

1 Manual," May 1978, revised November 1984, (EPA 330/9-78-001-R);
2 and subsequent amendments to such guidelines upon written
3 notification by EPA to Settling Defendants of such amendment.
4 Amended guidelines shall apply only to procedures conducted after
5 such notification. Prior to the commencement of any monitoring
6 project under this Consent Decree, Settling Defendants shall
7 submit to EPA for approval, after a reasonable opportunity for
8 review and comment by the State, Quality Assurance Project Plans
9 ("QAPP") that are consistent with the SOW, the NCP, and
10 applicable guidance documents. If relevant to the proceeding,
11 the Parties agree that validated sampling data generated in
12 accordance with the QAPP(s) and reviewed and approved by EPA
13 shall be admissible as evidence, without objection, in any
14 proceeding under this Decree. Settling Defendants shall ensure
15 that EPA and State personnel and their authorized representatives
16 are allowed access at reasonable times to all laboratories
17 utilized by Settling Defendants in implementing this Consent
18 Decree. In addition, Settling Defendants shall ensure that such
19 laboratories shall analyze all samples submitted by EPA pursuant
20 to the QAPP for quality assurance monitoring. Settling
21 Defendants shall ensure that the laboratories they utilize for
22 the analysis of samples taken pursuant to this Decree perform all
23 analyses according to accepted or approved EPA methods. Settling
24 Defendants shall ensure that all laboratories they use for
25
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1 analysis of samples taken pursuant to this Consent Decree
2 participate in an EPA or EPA-equivalent QA/QC program.

3 28. Upon request, the Settling Defendants shall allow
4 split or duplicate samples to be taken by EPA and the State or
5 their authorized representatives. Settling Defendants shall
6 notify EPA and the State not less than fourteen (14) days in
7 advance of any sample collection activity unless shorter notice
8 is agreed to by EPA. In addition, EPA and the State shall have
9 the right to take any additional samples related to performance
10 of the Work or implementation of the Consent Decree that EPA or
11 the State deems necessary. EPA and the State shall provide
12 reasonable notice to the Settling Defendants whenever such
13 samples will be taken. Upon request, EPA and the State shall
14 allow the Settling Defendants to take split or duplicate samples
15 of any samples they take as part of the Plaintiffs' oversight of
16 the Settling Defendants' implementation of the Work.

17 29. Settling Defendants shall submit to EPA and the
18 State four (4) copies of the results of all sampling and/or tests
19 or other data obtained or generated by or on behalf of Settling
20 Defendants with respect to the Work or the implementation of this
21 Consent Decree unless EPA agrees otherwise.

22 30. Notwithstanding any provision of this Consent
23 Decree, the United States and the State hereby retain all of
24 their information gathering and inspection authorities and
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1 rights, including enforcement actions related thereto, under
2 CERCLA, RCRA, and any other applicable statutes or regulations.

3 X. ACCESS

4 31. Commencing upon the date of lodging of this Consent
5 Decree, the Settling Defendants agree to provide the United
6 States, the State, and their representatives, including EPA and
7 its contractors, access at all reasonable times to the Site and
8 any other property to which access is required for the
9 implementation of this Consent Decree, to the extent access to
10 such property is controlled by Settling Defendants, for the
11 purposes of conducting any activity related to this Consent
12 Decree including, but not limited to:

- 13 a. Monitoring the Work;
- 14 b. Verifying any data or information submitted to the
15 United States;
- 16 c. Conducting investigations relating to contamination
17 at or near the Site;
- 18 d. Obtaining samples;
- 19 e. Assessing the need for, planning, or implementing
20 additional response actions at or near the Site;
- 21 f. Inspecting and copying records, operating logs,
22 contracts, or other documents maintained or
23 generated by Settling Defendants or their agents in
24 accordance with Section XXV (Access To Information);
25 and
- 26 g. Assessing Settling Defendants' compliance with this
27 Consent Decree.

28 32. To the extent that the Site or any other property to
which access is required for the implementation of this Consent

1 Decree is owned or controlled by persons other than Settling
2 Defendants, Settling Defendants shall use best efforts to secure
3 from such persons access for Settling Defendants, as well as for
4 the United States and the State and their representatives,
5 including, but not limited to, their contractors, as necessary to
6 effectuate this Consent Decree. For the purposes of this
7 paragraph "best efforts" includes the payment of reasonable sums
8 of money in consideration of access. To the extent property is
9 owned by a Potentially Responsible Party (PRP) identified by EPA,
10 "best efforts" will not require payment. If any access required
11 to complete the Work is not obtained within forty-five days of
12 the date of lodging of this Consent Decree, or within forty-five
13 (45) days of the date EPA notifies the Settling Defendants, in
14 writing, that additional access beyond that previously secured is
15 necessary, Settling Defendants shall promptly notify the United
16 States, and shall include in that notification a summary of the
17 steps Settling Defendants have taken to attempt to obtain access.
18 The United States or the State may, as it deems appropriate,
19 assist Settling Defendants in obtaining access. Settling
20 Defendants shall reimburse the United States or the State, in
21 accordance with the procedures in Section XVII (Reimbursement of
22 Response Costs), for all costs incurred in obtaining access.

23 33. Notwithstanding any provision of this Consent
24 Decree, the United States and the State retain all of their
25 access authorities and rights, including enforcement authorities
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1 related thereto, under CERCLA, RCRA, and any other applicable
2 statute or regulations.

3
4 XI. REPORTING REQUIREMENTS

5 34. In addition to any other requirement of this Consent
6 Decree, the Settling Defendants shall submit four (4) copies to
7 EPA and two (2) copies to the State of written monthly progress
8 reports that: (a) describe the actions taken toward achieving
9 compliance with this Consent Decree during the previous month;
10 (b) include a summary of all results of sampling and tests and
11 all other data received or generated by the Settling Defendants
12 or their contractors or agents in connection with implementation
13 of this Consent Decree in the previous month unless such
14 information has already been submitted to EPA and the State;
15 (c) identify all deliverables required by this Consent Decree
16 completed and submitted during the previous month; (d) describe
17 all actions, including, but not limited to, data collection and
18 implementation of the SOWs, which are scheduled for the next
19 month, and provide other information relating to the progress of
20 activities, including, but not limited to, as relevant, critical
21 path diagrams, Gantt charts and Pert charts; (e) include
22 information regarding percentage of completion, unresolved delays
23 encountered or anticipated that may affect the future schedule
24 for implementation of the Work, and a description of efforts made
25 to mitigate those delays or anticipated delays; (f) include any

1 modifications to any work plans, or schedules that Settling
2 Defendants have proposed to EPA and the State or that have been
3 approved by EPA; and (g) describe all activities undertaken in
4 support of the Community Relations Plan during the previous month
5 and those to be undertaken in the next month. Settling
6 Defendants shall submit these progress reports to EPA and the
7 State by the tenth (10th) day of every month following the
8 lodging of this Consent Decree until EPA notifies the Settling
9 Defendants pursuant to Paragraph 53(b) of Section XV
10 (Certification of Completion). If requested by EPA or the State,
11 Settling Defendants shall also provide briefings for EPA or the
12 State to discuss the progress of the Work.

13 35. The Settling Defendants shall notify EPA and the
14 State of any change in the schedule described in the monthly
15 progress report for the performance of any activity, including,
16 but not limited to, data collection and implementation of the
17 SOWs and any work plans, no later than seven (7) days prior to
18 the performance of the activity.

19 36. Upon the occurrence of any event during performance
20 of the Work that Settling Defendants are required to report
21 pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section
22 304 of the Emergency Planning and Community Right-to-know Act
23 (EPCRA), 42 U.S.C. § 11004, Settling Defendants shall within
24 twenty-four (24) hours of the onset of such event orally notify
25 the EPA Project Coordinator or the Alternate EPA Project
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1 Coordinator (in the event of the unavailability of the EPA
2 Project Coordinator), or, in the event that neither the EPA
3 Project Coordinator or Alternate EPA Project Coordinator is
4 available, the Emergency Response Section, Region 10, United
5 States Environmental Protection Agency. Settling Defendants
6 shall also notify the Project Coordinator for the State. These
7 reporting requirements are in addition to the reporting required
8 by CERCLA Section 103 or EPCRA Section 304.

9 37. Within twenty (20) days of the onset of such an
10 event, Settling Defendants shall furnish to Plaintiffs a written
11 report, signed by the Settling Defendants' Project Coordinator,
12 setting forth the events which occurred and the measures taken,
13 and to be taken, in response thereto. Within thirty (30) days of
14 the conclusion of such an event, the Settling Defendants' Project
15 Coordinator shall submit a report setting forth all actions taken
16 in response thereto.

17 38. The Settling Defendants shall submit four (4) copies
18 to EPA of all plans, reports, and data required by the SOWs or
19 any other approved work plans in accordance with the schedules
20 set forth in such plans. The Settling Defendants shall submit
21 two (2) copies of all such plans, reports, and data to the State.

22 39. All reports and other documents submitted by
23 Settling Defendants to EPA and the State, other than the monthly
24 progress reports referred to above, which purport to document
25 Settling Defendants' compliance with the terms of this Consent
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1 Decree shall be signed and submitted by the Settling Defendants'
2 Project Coordinator.

4 XII. SUBMISSIONS REQUIRING AGENCY APPROVAL

5 40. After review of any plan, report, or other item
6 which is required to be submitted for approval pursuant to this
7 Consent Decree, EPA, after reasonable opportunity for review and
8 comment by the State, shall: (a) approve, in whole or in part,
9 the submission; (b) approve the submission upon specified
10 conditions; (c) modify the submission to cure the deficiencies;
11 (d) disapprove, in whole or in part, the submission, directing
12 that the Settling Defendants modify the submission; or (e) any
13 combination of the above.

14 41. In the event of approval, approval upon conditions,
15 or modification by EPA, pursuant to Subparagraph 40(a), (b), or
16 (c), Settling Defendants shall proceed to take any action
17 required by the plan, report, or other item, as approved or
18 modified by EPA subject only to their right to invoke the Dispute
19 Resolution procedures set forth in Section XX (Dispute
20 Resolution) with respect to the modifications or conditions made
21 by EPA. In the event that EPA modifies the submission to cure
22 the deficiencies pursuant to Paragraph 40(c) and the submission
23 has a material defect, EPA retains its right to seek stipulated
24 penalties, as provided in Section XXI (Stipulated Penalties).

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1 42. a. Upon receipt of a notice of disapproval
2 pursuant to Paragraph 40(d), Settling Defendants shall, within
3 fourteen (14) days or such other time as specified by EPA in such
4 notice, correct the deficiencies and resubmit the plan, report,
5 or other item for approval. Any stipulated penalties applicable
6 to the submission, as provided in Section XXI (Stipulated
7 Penalties), shall continue to accrue during the fourteen (14) day
8 period or otherwise specified period but shall not be payable
9 unless the resubmission is disapproved or modified due to a
10 material defect as provided in Paragraphs 43 and 44.

11 b. Notwithstanding the receipt of a notice of
12 disapproval pursuant to Paragraph 40(d), Settling Defendants
13 shall proceed, at the direction of EPA, to take any action
14 required by any non-deficient portion of the submission.
15 Implementation of any non-deficient portion of a submission shall
16 not relieve Settling Defendants of any liability for stipulated
17 penalties under Section XXI (Stipulated Penalties) as to any
18 deficient portion.

19 43. In the event that a resubmitted plan, report or
20 other item, or portion thereof, is disapproved by EPA, EPA may
21 again require the Settling Defendants to correct the
22 deficiencies, or may itself address the deficiencies, in
23 accordance with the preceding paragraphs. EPA also retains the
24 right to amend or develop the plan, report or other item.
25 Settling Defendants shall implement any such plan, report, or
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1 item as amended or developed by EPA, subject only to their right
2 to invoke the procedures set forth in Section XX (Dispute
3 Resolution).

4 44. If upon resubmission, a plan, report, or item is
5 disapproved or modified by EPA due to a material defect, Settling
6 Defendants shall be deemed to have failed to submit such plan,
7 report, or item timely and adequately unless the Settling
8 Defendants invoke the dispute resolution procedures set forth in
9 Section XX (Dispute Resolution) and EPA's action is overturned
10 pursuant to that Section. The provisions of Section XX (Dispute
11 Resolution) and Section XXI (Stipulated Penalties) shall govern
12 the implementation of the Work and accrual and payment of any
13 stipulated penalties during Dispute Resolution. If EPA's
14 disapproval or modification is upheld, stipulated penalties shall
15 accrue for such violation from the date on which the initial
16 submission was originally required, as provided in Section XXI
17 (Stipulated Penalties), and shall continue to accrue for thirty
18 (30) days after the due date of the resubmission after which date
19 stipulated penalties shall stop accruing unless and until EPA
20 notifies Settling Defendants that it has modified or disapproved
21 the resubmittal because it contains a material defect, upon which
22 date accrual of stipulated penalties shall resume and shall
23 continue to accrue through the final day of the correction of the
24 noncompliance or completion of the activity.

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1 45. All plans, reports, and other items required to be
2 submitted to EPA under this Consent Decree shall, upon approval
3 or modification by EPA, be enforceable under this Consent Decree.
4 In the event EPA approves or modifies a portion of a plan,
5 report, or other item required to be submitted to EPA under this
6 Consent Decree, the approved or modified portion shall be
7 enforceable under this Consent Decree.

8
9 XIII. PROJECT COORDINATORS

10 46. Within twenty (20) days of lodging this Consent
11 Decree, the Settling Defendants, the State, and EPA will notify
12 each other, in writing, of the name, address, and telephone
13 number of their designated Project Coordinators and Alternate
14 Project Coordinators. If a Project Coordinator or Alternate
15 Project Coordinator initially designated is changed, the identity
16 of the successor will be given to the other parties at least
17 five (5) working days before the changes occur, unless
18 impracticable, but in no event later than the actual day the
19 change is made. The Settling Defendants' Project Coordinators
20 shall be subject to disapproval by EPA, which disapproval shall
21 not be unreasonably invoked, and shall have the technical
22 expertise sufficient to adequately oversee all aspects of the
23 Work. The Settling Defendants' Project Coordinators shall not be
24 an attorney for any of the Settling Defendants in this matter.
25 The Settling Defendants' Project Coordinators may assign other
26

1 representatives, including other contractors, to serve as a Site
2 representative for oversight of performance of daily operations
3 during remedial activities.

4 47. Plaintiffs may designate other representatives,
5 including, but not limited to, EPA and State employees, and
6 federal and State contractors and consultants, to observe and
7 monitor the progress of any activity undertaken pursuant to this
8 Consent Decree. EPA's Project Coordinator and Alternate Project
9 Coordinator shall have the authority lawfully vested in a
10 Remedial Project Manager ("RPM") and an On-Scene Coordinator
11 ("OSC") by the NCP, 40 C.F.R. Part 300. In addition, the EPA
12 Project Coordinator, his/her alternate or, to the extent
13 consistent with the Memorandum of Agreement between EPA and the
14 State, the State Project Coordinator or his/her alternate shall
15 have authority, consistent with the NCP, to halt any Work
16 required by this Consent Decree and to take any necessary
17 response action when s/he determines that conditions at the Site
18 constitute an emergency situation or may present an immediate
19 threat to public health or welfare or the environment due to
20 release or threatened release of Waste Material.

21 48. The respective Project Coordinators will meet with
22 EPA and the State, at a minimum, on a monthly basis unless
23 otherwise determined by EPA. This meeting may be held by
24 telephone conference.

25

26

1 49. EPA and the State have entered into a Memorandum of
2 Agreement ("MOA") which defines the respective roles of EPA and
3 the State and is attached hereto as Attachment I. Pursuant to
4 this MOA, the State will have significant oversight
5 responsibilities.

6
7 XIV. ASSURANCE OF ABILITY TO COMPLETE WORK

8 50. Within sixty (60) days of entry of this Consent
9 Decree, Settling Defendants shall establish and maintain
10 sufficient financial assurance for performance of their
11 Respective Work in one of the following forms:

- 12 (a) A surety bond guaranteeing performance of their
13 Respective Work;
- 14 (b) One or more irrevocable letters of credit equalling
15 the total estimated cost of their Respective Work;
- 16 (c) A trust fund;
- 17 (d) A guarantee to perform their Respective Work by one
18 or more parent corporations or subsidiaries, or by
19 one or more unrelated corporations that have a
20 substantial business relationship with at least one
21 of the Settling Defendants; or
- 22 (e) A demonstration that the Settling Defendant
23 satisfies the requirements of 40 C.F.R. Part
24 264.143(f).

25 51. If the Settling Defendants seek to demonstrate the
26 ability to complete their Respective Work through a guarantee by
27 a third party pursuant to Paragraph 50(d) of this Consent Decree,
28 Settling Defendants shall demonstrate that the guarantor
satisfies the requirements of 40 C.F.R. Part 264.143(f). If

1 Settling Defendants seek to demonstrate their ability to complete
2 their Respective Work by means of the financial test or the
3 corporate guarantee pursuant to Paragraph 50(d) or (e), they
4 shall resubmit sworn statements conveying the information
5 required by 40 C.F.R. Part 264.143(f) annually, on or before the
6 end of the first quarter of each calendar year. In the event
7 that EPA, after a reasonable opportunity for review and comment
8 by the State, determines at any time that the financial
9 assurances provided pursuant to this Section are inadequate,
10 Settling Defendants shall, within thirty (30) days of receipt of
11 notice of EPA's determination, obtain and present to EPA for
12 approval one of the other forms of financial assurance listed in
13 Paragraph 50 of this Consent Decree. Settling Defendants'
14 inability to demonstrate financial ability to complete their
15 Respective Work shall not excuse performance of any activities
16 required under this Consent Decree.

17
18 XV. CERTIFICATION OF COMPLETION

19 52. Completion of a Remedial Action

20 a. Within ninety (90) days after either Settling
21 Defendant concludes that its respective Remedial Action has been
22 fully performed and the Performance Standards have been attained
23 in accordance with the RODs as clarified by the applicable SOWs,
24 the Settling Defendant shall schedule and conduct a pre-
25 certification inspection to be attended by Settling Defendant,
26

1 EPA, and the State. If, after the pre-certification inspection,
2 the Settling Defendant still believes that the Remedial Action
3 has been fully performed and the Performance Standards have been
4 attained in accordance with the RODs as clarified by the SOWs, it
5 shall submit a written report requesting certification to EPA for
6 approval, with a copy to the State, pursuant to Section XII
7 (Submissions Requiring Agency Approval) within thirty (30) days
8 of the inspection. In the report, a registered professional
9 engineer shall state that the Remedial Action has been completed
10 in full satisfaction of the requirements of the applicable SOW,
11 RDR and RAWP. In the report, the Settling Defendant's Project
12 Coordinator shall state that the Remedial Action has been
13 completed in full satisfaction of the requirements of this
14 Consent Decree. The written report shall include as-built
15 drawings signed and stamped by a professional engineer. The
16 report shall contain the following statement, signed by a
17 responsible corporate official of the Settling Defendant or the
18 Settling Defendant's Project Coordinator:

19 "To the best of my knowledge, after thorough investigation,
20 I certify that the information contained in or accompanying
21 this submission is true, accurate and complete. I am aware
22 that there are significant penalties for submitting false
information, including the possibility of fine and
imprisonment for knowing violations."

23 If, after completion of the pre-certification inspection and
24 receipt and review of the written report, EPA, after reasonable
25 opportunity to review and comment by the State, determines that
26 the Remedial Action has not been completed in accordance with

1 this Consent Decree or that the Performance Standards have not
2 been achieved, EPA will notify the Settling Defendant, in
3 writing, of the activities that must be undertaken to complete
4 the Remedial Action and achieve the Performance Standards and
5 require the Settling Defendant to submit a schedule to EPA for
6 approval pursuant to Section XII (Submissions Requiring Agency
7 Approval). The Settling Defendant shall perform all activities
8 described in the notice in accordance with the specifications and
9 schedules established pursuant to this paragraph, subject to its
10 right to invoke the dispute resolution procedures set forth in
11 Section XX (Dispute Resolution).

12 b. If EPA concludes, based on the initial or any
13 subsequent report requesting Certification of Completion and
14 after a reasonable opportunity for review and comment by the
15 State, that the Remedial Action is fully performed and the
16 Performance Standards have been achieved in accordance with the
17 RODs as clarified by the SOWs, EPA will so certify in writing to
18 the Settling Defendant. This certification shall constitute the
19 Certification of Completion of the Remedial Action for purposes
20 of this Consent Decree, including, but not limited to,
21 Section XXII (Covenants Not to Sue by Plaintiffs). Certification
22 of Completion of the Remedial Action shall not affect the
23 Settling Defendant's obligations under this Consent Decree that
24 continue beyond the Certification of Completion.

1 53. Completion of the Work

2 a. Within ninety (90) days after either Settling
3 Defendant concludes that all phases of its respective Work
4 (including O & M) have been fully performed, the Settling
5 Defendant shall schedule and conduct a pre-certification
6 inspection to be attended by EPA and the State. If, after the
7 pre-certification inspection, the Settling Defendant still
8 believes that the Work has been fully performed, the Settling
9 Defendant shall submit a written report by a registered
10 professional engineer stating that the Work has been completed in
11 full satisfaction of the requirements of the applicable SOWs, RDR
12 and RAWPs. In the report, the Settling Defendant's Project
13 Coordinator shall state that the Remedial Action has been
14 completed in full satisfaction of the requirements of this
15 Consent Decree. The report shall contain the following statement,
16 signed by a responsible corporate official of the Settling
17 Defendant or the Settling Defendant's Project Coordinator:

18 "To the best of my knowledge, after thorough investigation,
19 I certify that the information contained in or accompanying
20 this submission is true, accurate and complete. I am aware
21 that there are significant penalties for submitting false
information, including the possibility of fine and
imprisonment for knowing violations."

22 If, after review of the written report, EPA, after reasonable
23 opportunity to review and comment by the State, determines that
24 any portion of the Work has not been completed in accordance with
25 this Consent Decree, EPA will notify Settling Defendant in
26 writing of the activities that must be undertaken to complete the

1 Work. EPA will set forth in the notice a schedule for
2 performance of such activities consistent with the Consent Decree
3 or require the Settling Defendant to submit a schedule to EPA for
4 approval pursuant to Section XII (Submissions Requiring Agency
5 Approval). The Settling Defendant shall perform all activities
6 described in the notice in accordance with the specifications and
7 schedules established therein, subject to their right to invoke
8 the dispute resolution procedures set forth in Section XX
9 (Dispute Resolution).

10 b. If EPA concludes, based on the initial or any
11 subsequent request for Certification of Completion by the
12 Settling Defendant and after a reasonable opportunity for review
13 and comment by the State, that the Work has been fully performed
14 in accordance with this Consent Decree, EPA will so notify the
15 Settling Defendant, in writing.

16
17 XVI. EMERGENCY RESPONSE

18 54. In the event of any action or occurrence arising in
19 connection with the performance of the Work which causes or
20 threatens a release of Waste Material at or from the Site that
21 constitutes an emergency situation or may present an immediate
22 threat to public health or welfare or the environment, the
23 Settling Defendants shall, subject to Paragraph 55, immediately
24 take all appropriate action to prevent, abate, or minimize such
25 release or threat of release, and shall immediately notify the
26

1 Project Coordinators for EPA and the State, or, if they are
2 unavailable, their alternates. If none of these persons is
3 available, the Settling Defendants shall notify the EPA Emergency
4 Response Unit, Region 10. Settling Defendants shall take such
5 actions in consultation with the EPA Project Coordinator, his/her
6 alternate and to the extent consistent with the Memorandum of
7 Agreement between EPA and the State, the State Project
8 Coordinator or his/her alternate or other available authorized
9 representatives and in accordance with all applicable provisions
10 of the Health and Safety Plans, the Contingency Plans, and any
11 other applicable deliverables developed pursuant to the SOWs. In
12 the event that Settling Defendants fail to take appropriate
13 response action as required by this Section, and EPA or, as
14 appropriate, the State take such action instead, Settling
15 Defendants shall reimburse EPA and the State all costs of the
16 response action not inconsistent with the NCP pursuant to Section
17 XVII (Reimbursement of Response Costs).

18 55. Nothing in the preceding paragraph or in this
19 Consent Decree shall be deemed to limit any authority of the
20 United States, or the State, to take, direct, or order all
21 appropriate action or to seek an order from the Court to protect
22 human health and the environment or to prevent, abate, respond
23 to, or minimize an actual or threatened release of Waste Material
24 on, at, or from the Site.

1 XVII. PAYMENTS AND REIMBURSEMENT OF RESPONSE COSTS

2 56. a. Within thirty (30) days of the effective date
3 of this Consent Decree, Settling Defendants shall pay the United
4 States the following amounts in the manner set forth below in
5 Paragraph 56.a.4.:

6 1. Stauffer Entities shall remit to the United
7 States the amount of five hundred thousand dollars
8 (\$500,000) required by paragraph 8.d. of this
Consent Decree.

9 2. Stauffer Entities shall remit to the United
10 States the amount of eight hundred fifty thousand
dollars (\$850,000.) required by paragraph 8.e. of
11 this Consent Decree.

12 3. Union Pacific shall remit to the United States
the amount of four hundred twenty five thousand
13 dollars (\$425,000.) required by paragraph 9.d. of
this Consent Decree.

14 4. These payments to the United States shall be
15 made in the form of a certified check made payable
to the "EPA Hazardous Substance Superfund" and
16 referencing the U.S.A.O. file number N-95-V-0105,
the EPA Region and the Site/Spill # 1020 DOJ case
17 number 90-11-3-128I with copies sent to the United
States as specified in Section XXVII (Notices and
18 Submissions). The Settling Defendants shall forward
the certified check to:

19 U.S. Environmental Protection Agency
20 EPA Hazardous Substance Superfund
21 P.O. Box 360903M
 Pittsburgh, Pennsylvania 15251

*208-234-1211
Cecilia Miller*

22 b. Within thirty (30) days of the effective date of this
23 Consent Decree, Settling Defendants shall pay the State the
24 following amounts in the manner set forth below in
25 Paragraph 56.b.5.:

1 1. Stauffer Entities shall remit to the State the
2 amount of one hundred fifty thousand dollars
3 (\$150,000) required by paragraph 8.c. of this
4 Consent Decree.

5 2. Stauffer Entities shall remit to the State the
6 amount of five hundred thousand dollars (\$500,000)
7 required by paragraph 8.d. of this Consent Decree.

8 3. Union Pacific shall remit to the State the
9 amount of one hundred fifty thousand dollars
10 (\$150,000) required by paragraph 9.c. of this
11 Consent Decree.

12 4. Union Pacific shall remit to the State the
13 amount of four hundred twenty-five thousand dollars
14 (\$425,000) required by paragraph 9.d. of this
15 Consent Decree.

16 5. These payments to the State shall be made in the
17 form of certified checks made payable to the "State
18 of Idaho" and shall be placed by the State in the
19 Bunker Hill Cleanup Trust Fund established by the
20 Trust Fund Declaration of the State of Idaho dated
21 May 2, 1994 (Attachment M, Consent Decree, United
22 States of America v. Asarco, Inc., No. CV 94-0207-N-
23 HLR (D. Idaho). Such money shall be utilized by the
24 Trustee for the purposes specified in paragraphs 8.c
25 and 8.d. and 9.c. and 9.d of this Consent Decree.

26 57. Union Pacific shall reimburse the United States and
27 the State for all Future Response Costs for the Union Pacific
28 Area not inconsistent with the NCP incurred by the United States
and the State. The Stauffer Entities shall reimburse the United
States and the State for all Future Response Costs for the A-4
Gypsum subarea not inconsistent with the NCP incurred by the
United States and the State.

a. The United States will send Settling Defendants a
bill requiring payment that includes a Superfund Cost
Organization Recovery Enhancement System Report on a periodic

1 basis. Settling Defendants shall make all payments within thirty
2 (30) days of Settling Defendants' receipt of each bill requiring
3 payment, except as otherwise provided in Paragraph 58. The
4 Settling Defendants shall make all payments required by this
5 paragraph in the form of a certified check or checks made payable
6 to "EPA Hazardous Substance Superfund" and referencing the
7 U.S.A.O. file number _____, the EPA Region and
8 Site/Spill # 1020 DOJ case number 90-11-3-128I. The Settling
9 Defendants shall forward the certified check(s) to:

10 U.S. Environmental Protection Agency
11 EPA Hazardous Substance Superfund
12 P. O. Box 360903M
13 Pittsburgh, Pennsylvania 15251

14 and shall send copies of the check(s) to the United States as
15 specified in Section XXVII (Notices and Submissions).

16 b. Projected State response costs shall be paid by
17 Settling Defendants in advance. Each year, no later than April
18 1, the State shall provide Settling Defendants a detailed written
19 budget for the following budget year. No later than thirty (30)
20 days prior to the beginning of each budget year (July 1), the
21 Settling Defendants shall fund the first two quarters of the
22 estimated budget. No later than thirty (30) days after the end
23 of each quarter, the State shall provide Settling Defendants with
24 an accounting of actual response costs incurred in such quarter.
25 Payments by Settling Defendants of the third and fourth quarter
26 estimated budget shall be made no later than thirty (30) days
27 prior to such quarter and shall be reconciled against actual

1 response costs incurred in the preceding quarters. Settling
2 Defendants shall pay only those costs actually incurred in
3 implementing oversight activities. Payments required by this
4 paragraph shall be made by certified check made payable to "Idaho
5 Department of Health and Welfare" and shall reference this
6 Consent Decree.

7 58. a. A Settling Defendant may contest payment of any
8 Future Response Costs under Paragraph 57(a) if it determines that
9 the United States has made an accounting error or if it alleges
10 that a cost item that is included represents costs that are
11 inconsistent with the NCP or does not relate to the Union Pacific
12 Area or the A-4 Gypsum subarea. Such objection shall be made, in
13 writing, within thirty (30) days of receipt of the bill and must
14 be sent to the United States pursuant to Section XXVII (Notices
15 and Submissions). Any such objection shall specifically identify
16 the contested Future Response Costs and the basis for objection.
17 In the event of an objection, the Settling Defendant shall within
18 the thirty (30) day period pay all uncontested Future Response
19 Costs to the United States in the manner described in Paragraph
20 57. Simultaneously, the Settling Defendant shall establish an
21 interest bearing escrow account in a federally-insured bank duly
22 chartered in the State of Idaho and remit to that escrow account
23 funds equivalent to the amount of the contested Future Response
24 Costs. The Settling Defendant shall send to the United States,
25 as provided in Section XXVII (Notices and Submissions), a copy of
26

1 the transmittal letter and check paying the uncontested Future
2 Response Costs, and a copy of the correspondence that establishes
3 and funds the escrow account, including, but not limited to,
4 information containing the identity of the bank and bank account
5 under which the escrow account is established as well as a bank
6 statement showing the initial balance of the escrow account.
7 Simultaneously with establishment of the escrow account, the
8 Settling Defendant shall initiate the Dispute Resolution
9 procedures in Section XX (Dispute Resolution). If the United
10 States prevails in the dispute, within five (5) days of the
11 resolution of the dispute, the Settling Defendant shall pay the
12 sums due (with accrued interest) to the United States in the
13 manner described in Paragraph 57. If the Settling Defendant
14 prevails concerning any aspect of the contested costs, the
15 Settling Defendant shall pay that portion of the costs (plus
16 associated accrued interest) for which it did not prevail to the
17 United States in the manner described in Paragraph 57(a);
18 Settling Defendant shall be disbursed any balance of the escrow
19 account. The dispute resolution procedures set forth in this
20 paragraph in conjunction with the procedures set forth in Section
21 XX (Dispute Resolution) shall be the exclusive mechanisms for
22 resolving disputes regarding the Settling Defendant's obligation
23 to reimburse the United States for its Future Response Costs.

24 b. In the event a Settling Defendant contends that
25 payment of estimated response costs to the State in accordance
26

1 with Paragraph 57(b) would include costs inconsistent with the
2 NCP, costs resulting from an accounting error or costs not
3 relating to the Union Pacific Area or the A-4 Gypsum subarea, the
4 Settling Defendant shall make timely payment of undisputed
5 estimated response costs and, at the same time, specifically
6 identify the disputed costs. The Settling Defendant and the
7 State agree to attempt informal resolution of the dispute during
8 the fourteen (14) day period following notification by the
9 Settling Defendant of its objection. At the end of the fourteen
10 (14) day informal dispute resolution period, Settling Defendant
11 shall either pay the disputed costs or notify the State that
12 Settling Defendant will seek judicial review of the disputed
13 costs on the basis that such costs are either inconsistent with
14 the NCP or the result of an accounting error.

15 59. In the event that the payments required by
16 Paragraph 56 are not made within thirty (30) days of the
17 effective date of this Consent Decree or the payments required by
18 Paragraph 57(a) are not made within thirty (30) days of the
19 Settling Defendants' receipt of the bill, Settling Defendants
20 shall pay interest on the unpaid balance at the rate established
21 pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607. The
22 interest on Future Response Costs shall begin to accrue
23 forty-five (45) days after the Settling Defendants' receipt of
24 the bill. Interest shall accrue at the rate specified through
25 the date of the Settling Defendant's payment. Payments of

1 interest made under this paragraph shall be in addition to such
2 other remedies or sanctions available to Plaintiffs by virtue of
3 Settling Defendants' failure to make timely payments under this
4 Section.

5 XVIII. INDEMNIFICATION AND INSURANCE

6 60. The United States and the State do not assume any
7 liability by entering into this Consent Decree or by virtue of
8 any designation of Settling Defendants as EPA's authorized
9 representatives under Section 104(e) of CERCLA,
10 42 U.S.C. § 9604(e). Each of the Settling Defendants shall
11 indemnify, save and hold harmless the United States, the State,
12 and their officials, agents, employees, contractors,
13 subcontractors, or representatives for or from any and all claims
14 or causes of action arising from, or on account of, the acts or
15 omissions of that Settling Defendant, and its respective
16 officers, directors, employees, agents, contractors,
17 subcontractors, and any persons acting on its behalf or under its
18 control, in carrying out activities pursuant to this Consent
19 Decree, including, but not limited to, any claims arising from
20 any designation of that Settling Defendant as EPA's authorized
21 representatives under Section 104(e) of CERCLA, 42 U.S.C.
22 § 9604(e). Further, each Settling Defendant agrees to pay the
23 United States and the State all costs it incurs, including, but
24 not limited to, attorneys fees and other expenses of litigation
25 and settlement arising from, or on account of, claims made
26

1 against the United States and the State based on acts or
2 omissions of that Settling Defendant, its officers, directors,
3 employees, agents, contractors, subcontractors, and any persons
4 acting on its behalf or under its control, in carrying out
5 activities pursuant to this Consent Decree. Neither the United
6 States nor the State shall be held out as a party to any contract
7 entered into by or on behalf of Settling Defendants in carrying
8 out activities pursuant to this Consent Decree. Neither the
9 Settling Defendants nor any such contractor shall be considered
0 an agent of the United States or the State.

1 61. Each Settling Defendant waives all claims against
2 the United States and the State for damages or reimbursement or
3 for set-off of any payments made or to be made to the United
4 States or the State, arising from or on account of any contract,
5 agreement, or arrangement between that Settling Defendant and any
5 person for performance of Work on or relating to the Site,
7 including, but not limited to, claims on account of construction
8 delays. In addition, each of the Settling Defendants shall
9 indemnify and hold harmless the United States and the State with
0 respect to any and all claims for damages or reimbursement
1 arising from or on account of any contract, agreement, or
2 arrangement between that Settling Defendant, and any person for
3 performance of Work on or relating to the Site, including, but
4 not limited to, claims on account of construction delays.

1 62. No later than fifteen (15) days before commencing
2 any on-Site Work, the Settling Defendants shall secure, and each
3 shall maintain until the first anniversary of EPA's Certification
4 of Completion of the Remedial Actions pursuant to Paragraph 52(b)
5 of Section XV (Certification of Completion) comprehensive general
6 liability insurance and automobile insurance with limits of ten
7 million dollars, combined single limit naming the United States
8 and the State as additional insured, unless the Settling
9 Defendant can provide EPA with written documentation that the
10 Settling Defendant is self-insured at least up to ten million
11 dollars and, in addition, provides EPA with written documentation
12 of the Settling Defendant's financial assurance which satisfies
13 the requirements of 40 C.F.R. Part 264.143(f). The self-
14 insurance and financial assurance documentation must be submitted
15 to EPA annually on or before the end of the first quarter of each
16 calendar year. In addition, for the duration of this Consent
17 Decree, the Settling Defendants shall satisfy, or shall ensure
18 that their contractors or subcontractors satisfy, all applicable
19 laws and regulations regarding the provision of worker's
20 compensation insurance for all persons performing the Work on
21 behalf of Settling Defendants in furtherance of this Consent
22 Decree. Prior to commencement of the Work under this Consent
23 Decree, Settling Defendants shall provide to EPA and the State
24 certificates of such insurance and a copy of each insurance
25 policy. Settling Defendants shall resubmit such certificates and
26

1 copies of policies each year on the anniversary of the effective
2 date of this Consent Decree. If Settling Defendants demonstrate
3 by evidence satisfactory to EPA and the State that any contractor
4 or subcontractor maintains insurance equivalent to that described
5 above, or insurance covering the same risks but in a lesser
6 amount, then, with respect to that contractor or subcontractor,
7 Settling Defendants need provide only that portion of the
8 insurance described above which is not maintained by the
9 contractor or subcontractor.
0

1 XIX. FORCE MAJEURE

2 63. "Force Majeure", for purposes of this Consent
3 Decree, is defined as any event arising from causes beyond the
4 control of the Settling Defendants or of any entity controlled by
5 Settling Defendants, including, but not limited to, their
6 contractors and subcontractors, that delays or prevents the
7 performance of any obligation under this Consent Decree despite
8 Settling Defendants' best efforts to fulfill the obligation. The
9 requirement that the Settling Defendants exercise "best efforts
0 to fulfill the obligation" includes using best efforts to
1 anticipate any potential Force Majeure event and best efforts to
2 address the effects of any potential Force Majeure event (1) as
3 it is occurring and (2) following the potential Force Majeure
4 event, such that the delay is minimized to the greatest extent
5 possible. "Force Majeure" does not include financial inability

1 to complete the Work or a failure to attain the Performance
2 Standards.

3 64. If any event occurs or has occurred that may delay
4 the performance of any obligation under this Consent Decree,
5 whether or not caused by a Force Majeure event, the Settling
6 Defendants shall notify orally the EPA and State Project
7 Coordinators or, in their absence, their alternates or, in the
8 event these representatives are unavailable, the Director of the
9 Hazardous Waste Division, EPA Region 10, within forty-eight (48)
10 hours of when Settling Defendants first knew or should have known
11 that the event might cause a delay. Within five (5) days
12 thereafter, Settling Defendants shall provide in writing to EPA
13 and the State an explanation and description of the reasons for
14 the delay; the anticipated duration of the delay; all actions
15 taken or to be taken to prevent or minimize the delay; a schedule
16 for implementation of any measures to be taken to prevent or
17 mitigate the delay or the effect of the delay; the Settling
18 Defendants' rationale for attributing such delay to a Force
19 Majeure event if they intend to assert such a claim; and a
20 statement as to whether, in the opinion of the Settling
21 Defendants, such event may cause or contribute to an endangerment
22 to public health, welfare or the environment. The Settling
23 Defendants shall include with any notice all available
24 documentation supporting their claim that the delay was
25 attributable to a Force Majeure. Failure to comply with the
26

1 above requirements shall preclude Settling Defendants from
2 asserting any claim of Force Majeure for that event. Settling
3 Defendants shall be deemed to have notice of any circumstance of
4 which their contractors or subcontractors had or should have had
5 notice.

6 65. If EPA, after a reasonable opportunity for review
7 and comment by the State, agrees that the delay or anticipated
8 delay is attributable to a Force Majeure event, the time for
9 performance of the obligations under this Consent Decree that are
0 affected by the Force Majeure event will be extended by EPA,
1 after a reasonable opportunity for review and comment by the
2 State, for such time as is necessary to complete those
3 obligations. An extension of the time for performance of the
4 obligations affected by the Force Majeure event shall not, of
5 itself, extend the time for performance of any other obligation.
6 If EPA, after a reasonable opportunity for review and comment by
7 the State, does not agree that the delay or anticipated delay has
8 been or will be caused by a Force Majeure event, EPA will notify
9 the Settling Defendants, in writing, of its decision. If EPA,
0 after a reasonable opportunity for review and comment by the
1 State, agrees that the delay is attributable to a Force Majeure
2 event, EPA will notify the Settling Defendants in writing of the
3 length of the extension, if any, for performance of the
4 obligations affected by the Force Majeure event.

1 66. If the Settling Defendants elect to invoke the
2 dispute resolution procedures set forth in Section XX (Dispute
3 Resolution), the Settling Defendants shall do so no later than
4 fifteen (15) days after receipt of EPA's notice. In any such
5 proceeding, the Settling Defendants shall have the burden of
6 demonstrating by a preponderance of the evidence that the delay
7 or anticipated delay has been or will be caused by a Force
8 Majeure event, that the duration of the delay or the extension
9 sought was or will be warranted under the circumstances, that
10 best efforts were exercised to avoid and mitigate the effects of
11 the delay, and that Settling Defendants complied with the
12 requirements of Paragraphs 63 and 64, above. If the Settling
13 Defendants carry this burden, the delay at issue shall be deemed
14 not to be a violation by Settling Defendants of the affected
15 obligation of this Consent Decree identified to EPA and the
16 Court.

17
18 XX. DISPUTE RESOLUTION

19 67. Unless otherwise expressly provided for in this
20 Consent Decree, the dispute resolution procedures of this Section
21 shall be the exclusive mechanism to resolve disputes arising
22 under or with respect to this Consent Decree. However, the
23 procedures set forth in this Section shall not apply to actions
24 by the United States or the State to enforce obligations of the
25
26

1 Settling Defendants that have not been disputed in accordance
2 with this Section.

3 68. Any dispute which arises under or with respect to
4 this Consent Decree shall in the first instance be the subject of
5 informal negotiations between the parties to the dispute. The
6 period for informal negotiations shall be twenty (20) days from
7 the time the dispute arises, unless it is modified by written
8 agreement of the parties to the dispute. The dispute shall be
9 considered to have arisen when one party sends the other parties
0 a written Notice of Dispute.

1 69. a. In the event that the parties to the dispute
2 cannot resolve a dispute by informal negotiations under the
3 preceding paragraph, then the position advanced by EPA shall be
4 considered binding unless, within ten (10) days after the
5 conclusion of the informal negotiation period, the Settling
6 Defendant who is a party to the dispute invokes the formal
7 dispute resolution procedures of this Section by serving on the
8 United States, the State and the other Settling Defendant a
9 written Statement of Position on the matter in dispute,
0 including, but not limited to, any factual data, analysis or
1 opinion supporting that position and any supporting documentation
2 relied upon by the Settling Defendant. The Statement of Position
3 shall specify the Settling Defendant's position as to whether
4 formal dispute resolution should proceed under Paragraph 70 or
5 71.

1 b. Within fourteen (14) days after receipt of
2 Settling Defendant's Statement of Position, EPA will serve on the
3 State and the Settling Defendant who is a party to the dispute,
4 its Statement of Position, including, but not limited to, any
5 factual data, analysis, or opinion supporting that position and
6 all supporting documentation relied upon by EPA. EPA's Statement
7 of Position shall include a statement as to whether formal
8 dispute resolution should proceed under Paragraph 70 or 71.

9 c. If there is disagreement between EPA and the
10 Settling Defendant who is a party to the dispute, as to whether
11 dispute resolution should proceed under Paragraph 70 or 71, the
12 parties to the dispute shall follow the procedures set forth in
13 the paragraph determined by EPA to be applicable. However, if
14 the Settling Defendant ultimately appeals to the court to resolve
15 the dispute, the Court shall determine which paragraph is
16 applicable in accordance with the standards of applicability set
17 forth in Paragraphs 70 and 71.

18 70. Formal dispute resolution for disputes pertaining to
19 the selection or adequacy of any response action and all other
20 disputes that are accorded review on the administrative record
21 under applicable principles of administrative law shall be
22 conducted pursuant to the procedures set forth in this paragraph.
23 For purposes of this paragraph, the adequacy of any response
24 action includes, without limitation: (1) the adequacy or
25 appropriateness of plans, procedures to implement plans, or any
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other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the RODs' provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this paragraph. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Hazardous Waste Division, EPA Region 10, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 70(a). This decision shall be binding upon the Settling Defendant who is a party to the dispute, subject only to the right to seek judicial review pursuant to Paragraph 70(c) and (d).

c. Any administrative decision made by EPA pursuant to Paragraph 70(b) shall be reviewable by this Court, provided that a notice of judicial appeal is filed with the Court by the Settling Defendant who is the party to the dispute and served on the United States, the State, and the other Settling Defendant within ten (10) days of receipt of EPA's decision. The notice of judicial appeal shall include a description of the matter in

1 dispute, the efforts made by the parties to resolve it, the
2 relief requested, and the schedule, if any, within which the
3 dispute must be resolved to ensure orderly implementation of this
4 Consent Decree. The United States may file a response to
5 Settling Defendant's notice of judicial appeal.

6 d. In proceedings on any dispute governed by this
7 paragraph, Settling Defendants shall have the burden of
8 demonstrating that the decision of the Hazardous Waste Division
9 Director is arbitrary and capricious or otherwise not in
10 accordance with law. Judicial review of EPA's decision shall be
11 on the administrative record compiled pursuant to Paragraph
12 70(a).

13 71. Formal dispute resolution for disputes that neither
14 pertain to the selection or adequacy of any response action nor
15 are otherwise accorded review on the administrative record under
16 applicable principles of administrative law shall be governed by
17 this paragraph.

18 a. Following receipt of Settling Defendant's
19 Statement of Position submitted pursuant to Paragraph 69, the
20 Director of the Hazardous Waste Division, EPA Region 10, will
21 issue a final decision resolving the dispute. The Hazardous
22 Waste Division Director's decision shall be binding on the
23 Settling Defendant unless, within ten (10) days of receipt of the
24 decision, the Settling Defendant who is a party to the dispute
25 files with the Court and serves on the United States, the State

1 and the other Settling Defendant a notice of judicial appeal
2 setting forth the matter in dispute, the efforts made by the
3 parties to resolve it, the relief requested, and the schedule, if
4 any, within which the dispute must be resolved to ensure orderly
5 implementation of the Consent Decree. The United States may file
6 a response to Settling Defendant's notice of judicial appeal.

7 b. Notwithstanding Paragraph R of Section I
8 (Background) of this Consent Decree, judicial review of any
9 dispute governed by this paragraph shall be governed by
10 applicable provisions of law.

1 72. The invocation of formal dispute resolution
2 procedures under this Section shall not extend, postpone, or
3 affect in any way any obligation of the Settling Defendants under
4 this Consent Decree not directly in dispute, unless EPA or the
5 Court agrees otherwise. Stipulated penalties with respect to the
6 disputed matter shall continue to accrue but payment shall be
7 stayed pending resolution of the dispute as provided in Paragraph
8 82. Notwithstanding the stay of payment, stipulated penalties
9 shall accrue from the first day of noncompliance with any
10 applicable provision of this Consent Decree. In the event that
11 the Settling Defendant does not prevail on the disputed issue,
12 stipulated penalties shall be assessed and paid as provided in
13 Section XXI (Stipulated Penalties).

XXI. STIPULATED PENALTIES

73. The Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 74 and 75 to the United States for failure to comply with the requirements of this Consent Decree specified below which pertain to them, unless excused under Section XIX (Force Majeure).

"Compliance" by the Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOWs, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

74. a. The following stipulated penalties shall be payable per violation per day to the United States for any noncompliance identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st - 14th day
\$5,000	15th - 30th day
\$10,000	31st day and beyond

b. Activities/Deliverables

-Submission of Work Plan(s) in compliance with the SOWs.

-Initiation of remediation construction activities in compliance with the SOWs and approved Work Plans.

-Completion of the Remedial Action in compliance with the SOWs and the approved Work Plans.

1 75. For all other requirements of this Consent Decree,
2 stipulated penalties shall accrue in the following amounts:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500.00	1st - 14th day
\$1,000.00	15th - 30th day
\$5,0000.00	31st day and beyond

7 76. In the event that EPA assumes performance of a
8 portion or all of the Work pursuant to Paragraph 92 of
9 Section XXII (Covenants Not to Sue by Plaintiffs), Settling
0 Defendants shall be liable for an additional stipulated penalty
1 in the amount of three (3) times the cost incurred by EPA to
2 perform the Work or \$100,000.00, whichever is less.

3 77. Except as provided in Paragraph 44, all penalties
4 shall begin to accrue on the day after the complete performance
5 is due or the day a violation occurs, and shall continue to
6 accrue through the final day of the correction of the
7 noncompliance or completion of the activity. Nothing herein
8 shall prevent the simultaneous accrual of separate penalties for
9 separate violations of this Consent Decree.

0 78. In its sole, unreviewable discretion, EPA may waive
1 all or a portion of the stipulated penalties due under this
2 Section.

3 79. Following EPA's determination that Settling
4 Defendants have failed to comply with a requirement of this
5 Consent Decree, EPA may give Settling Defendants written.

1 notification of the same and describe the noncompliance. EPA may
2 send the Settling Defendants a written demand for the payment of
3 the penalties. However, penalties shall accrue as provided in
4 Paragraph 77 regardless of whether EPA has notified the Settling
5 Defendants of a violation.

6 80. All penalties owed to the United States under this
7 section shall be due and payable within thirty (30) days of the
8 Settling Defendants' receipt of a demand for payment of
9 penalties, unless Settling Defendants invoke the Dispute
10 Resolution procedures under Section XX (Dispute Resolution). All
11 payments under this Section shall be paid by certified check made
12 payable to "EPA Hazardous Substances Superfund," shall be mailed
13 to US Environmental Protection Agency, EPA Hazardous Substance
14 Superfund, P.O. Box 360903M, Pittsburgh, PA 15251 and shall
15 reference the U.S.A.O file number _____, the EPA
16 Region and Site/Spill ID #1020, and DOJ case number 90-11-3-128I.
17 Copies of check(s) paid pursuant to this Section, and any
18 accompanying transmittal letter(s), shall be sent to the United
19 States as provided in Section XXVII (Notices and Submissions).

20 81. The payment of penalties shall not alter in any way
1 Settling Defendants' obligation to complete the performance of
2 the Work required under this Consent Decree.

3 82. Penalties shall continue to accrue as provided in
4 Paragraph 77 during any dispute resolution period, but need not
5 be paid until the following:

1 a. If the dispute is resolved by agreement or by a
2 decision of EPA that is not appealed to this Court, accrued
3 penalties determined to be owing shall be paid to EPA within
4 fifteen (15) days of the agreement or the receipt of EPA's
5 decision or order;

6 b. If the dispute is appealed to this Court and
7 the United States prevails in whole or in part, Settling
8 Defendants shall pay all accrued penalties determined by the
9 Court to be owed to EPA within sixty (60) days of receipt of the
0 Court's decision or order, except as provided in Subparagraph c
1 below;

2 c. If the District Court's decision is appealed by
3 any Party, Settling Defendants shall pay all accrued penalties
4 determined by the District Court to be owing to the United States
5 into an interest-bearing escrow account within sixty (60) days of
6 receipt of the Court's decision or order. Penalties shall be
7 paid into this account as they continue to accrue, at least every
8 sixty (60) days. Within fifteen (15) days of receipt of the
9 final appellate court decision, the escrow agent shall pay the
0 balance of the account to EPA or to Settling Defendants to the
1 extent that they prevail.

2 83. a. If Settling Defendants fail to pay stipulated
3 penalties when due, the United States may institute proceedings
4 to collect the penalties, as well as interest. Settling
5 Defendants shall pay interest on the unpaid balance, which shall

1 begin to accrue on the date of demand made pursuant to Paragraph
2 80 at the rate established pursuant to Section 107(a) of CERCLA,
3 42 U.S.C. § 9607.

4 b. Nothing in this Consent Decree shall be
5 construed as prohibiting, altering, or in any way limiting the
6 ability of the United States or the State to seek any other
7 remedies or sanctions available by virtue of Settling Defendants'
8 violation of this Decree or of the statutes and regulations upon
9 which it is based, including, but not limited to, penalties
10 pursuant to Section 122(1) of CERCLA, 42 U.S.C. § 9622(1).

11 84. No payments made under this Section shall be tax
12 deductible for Federal or State tax purposes.

13
14 XXII. COVENANTS NOT TO SUE BY PLAINTIFFS

15 85. a. In consideration of the actions that will be
16 performed and payments that will be made by the Stauffer Entities
17 under the terms of the Consent Decree, and except as specifically
18 provided in Paragraphs 86, 87, and 91 of this Section, the United
19 States covenants not to sue or to take administrative action
20 against the Stauffer Entities pursuant to Sections 106 and 107(a)
21 of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and Section 7003 of
22 RCRA, 42 U.S.C. § 6973, relating to the Site. In consideration
23 of the actions that will be performed and payments that will be
24 made by the Stauffer Entities under the terms of the Consent
25 Decree, and except as specifically provided in Paragraphs 88, 89,
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1 and 91 of this Section, the State covenants not to sue or to take
2 action against the Stauffer Entities pursuant to Section 107(a)
3 of CERCLA, 42 U.S.C. § 9607(a), the Hazardous Waste Management
4 Act, Idaho Code Section § 39-4401, et. seq., and the
5 Environmental Protection and Health Act, Idaho Code Section
6 § 39-101, et. seq., relating to the Site. With respect to all
7 past costs at the Site, and past and future liability at the Site
8 in areas outside the NIPC Area, the covenant not to sue shall
9 take effect upon payment of the amounts set forth in Paragraph
0 8(d) of the Consent Decree. With respect to the ICP, the
1 covenant not to sue shall take effect upon payment of the amounts
2 set forth in Paragraph 8(c). With respect to the Stauffer
3 Entities' future liability for the Phosphoric Acid/Fertilizer
4 Plant subarea, the covenant not to sue shall be effective upon
5 payment of the amount in Paragraph 8(e). With respect to the
6 Stauffer Entities future liability for the A-4 Gypsum subarea,
7 the covenant not to sue shall take effect for the Remedial Action
8 upon Certification of Completion by EPA pursuant to Paragraph
9 52(b) of Section XV (Certification of Completion) of the Remedial
0 Action. These covenants not to sue are conditioned upon the
1 complete and satisfactory performance by the Stauffer Entities of
2 their obligations under this Consent Decree. The covenants not
3 to sue extend only to the Stauffer Entities and, with respect to
4 liability derived from the Stauffer Entities, to its successors
5 and assigns, and do not extend to any other person.

1 b. In consideration of the actions that will be
2 performed and payments that will be made by Union Pacific under
3 the terms of the Consent Decree, and except as specifically
4 provided in Paragraphs 86, 87, and 91 of this Section, the United
5 States covenants not to sue or to take administrative action
6 against Union Pacific pursuant to Sections 106 and 107(a) of
7 CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and Section 7003 of RCRA,
8 42 U.S.C. § 6973, relating to the Site. In consideration of the
9 actions that will be performed and payments that will be made by
10 Union Pacific under the terms of the Consent Decree, and except
11 as specifically provided in Paragraphs 88, 89, and 91 of this
12 Section, the State covenants not to sue or to take action against
13 Union Pacific pursuant to Section 107(a) of CERCLA, 42 U.S.C.
14 § 9607(a), the Hazardous Waste Management Act, Idaho Code Section
15 § 39-4401, et. seq., and the Environmental Protection and Health
16 Act, Idaho Code Section § 39-101, et. seq., relating to the
17 Site. With respect to all past costs at the Site, and past and
18 future liability at the Site in areas outside the Union Pacific
19 Area, the covenant not to sue shall take effect upon payment of
20 the amounts set forth in Paragraph 9(d) of the Consent Decree.
21 With respect to the ICP, the covenant not to sue shall take
22 effect upon payment of the amounts set forth in Paragraph 9(c).
23 With respect to Union Pacific's future liability for the Union
24 Pacific Area, the covenant not to sue shall take effect for the
25 Remedial Action upon Certification of Completion by EPA pursuant

1 to Paragraph 52(b) of Section XV (Certification of Completion) of
2 the Remedial Action. These covenants not to sue are conditioned
3 upon the complete and satisfactory performance by Union Pacific
4 of its obligations under this Consent Decree. These covenants
5 not to sue extend only to Union Pacific and, with respect to
6 liability derived from Union Pacific, to its successors and
7 assigns, and do not extend to any other person.

8 86. United States' Pre-Certification Reservations

9 Notwithstanding any other provision of this Consent
0 Decree, the United States reserves, and this Consent Decree is
1 without prejudice to any right to institute proceedings in this
2 action or in a new action, or issue an administrative order
3 seeking to compel the Settling Defendants (1) to perform further
4 response actions relating to their Respective Area; or (2) to
5 reimburse the United States for additional costs of response
6 attributable to their Respective Area, if, prior to Certification
7 of Completion of the Remedial Action or prior to issuance of a
8 notice by EPA that the Phosphoric Acid/Fertilizer Plant subarea
9 remediation is completed,

0 (i) conditions within the Respective Area, previously
1 unknown to EPA, are discovered, or

2 (ii) information, previously unknown to EPA, is received
3 in whole or in part,

4 and these previously unknown conditions or information together
5 with any other relevant information indicate that the Remedial
6

1 Action or the Phosphoric Acid/Fertilizer Plant subarea
2 remediation is not protective of human health and the
3 environment.

4 87. United States Post-Certification Reservations

5 Notwithstanding any other provision of this Consent
6 Decree, the United States reserves, and this Consent Decree is
7 without prejudice to any right to institute proceedings in this
8 action or in a new action, or issue an administrative order
9 seeking to compel the Settling Defendants (1) to perform further
10 response actions relating to their Respective Area; or (2) to
11 reimburse the United States for additional costs of response
12 attributable to their Respective Area, if, subsequent to
13 Certification of Completion of a Remedial Action or subsequent to
14 issuance of a notice by EPA that the Phosphoric Acid/Fertilizer
15 Plant subarea remediation is completed,

16 (i) conditions within the Respective Area, previously
17 unknown to EPA, are discovered, or

18 (ii) information, previously unknown to EPA, is received
19 in whole or in part,

20 and these previously unknown conditions or information together
21 with any other relevant information indicate that the Remedial
22 Action or the Phosphoric Acid/Fertilizer Plant subarea
23 remediation is not protective of human health and the
24 environment.

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88. State of Idaho's Pre-Certification Reservations

Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to any right it may have, jointly with, or separately from the United States, to institute proceedings in this action or in a new action pursuant to the State's authorities under Section 107 of CERCLA or applicable State law, including the Hazardous Waste Management Act, Idaho Code Section § 39-4401, et seq., and, the Environmental Protection and Health Act, Idaho Code Section § 39-101, et seq., seeking (1) to compel Settling Defendants to perform further response actions relating to their Respective Area, or (2) to compel Settling Defendants to reimburse the State for additional costs of response attributable to their Respective Area, if, prior to Certification of Completion of the Remedial Action or prior to issuance of a notice by EPA that the Phosphoric Acid/Fertilizer Plant subarea remediation is completed,

- (i) conditions within the Respective Area, previously unknown to the State, are discovered, or
- (ii) information, previously unknown to the State, is received in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicate that the Remedial Action or the Phosphoric Acid/Fertilizer Plant subarea

1 remediation is not protective of human health and the
2 environment.

3 89. State of Idaho's Post-Certification Reservations

4 Notwithstanding any other provision of this Consent
5 Decree, the State reserves, and this Consent Decree is without
6 prejudice to any right it may have, jointly with, or separately
7 from the United States, to institute proceedings in this action
8 or in a new action pursuant to the State's authorities under
9 Section 107 of CERCLA or applicable State law, including the
10 Hazardous Waste Management Act, Idaho Code Section § 39-4401,
11 et seq., and, the Environmental Protection and Health Act, Idaho
12 Code Section § 39-101 et seq., seeking (1) to compel Settling
13 Defendants to perform further response actions relating to their
14 Respective Area, or (2) to compel Settling Defendants to
15 reimburse the State for additional costs of response attributable
16 to their Respective Area, if subsequent to Certification of
17 Completion of a Remedial Action or subsequent to issuance of a
18 notice by EPA that the Phosphoric Acid/Fertilizer Plant subarea
19 remediation is completed,:

20 (i) conditions within the Respective Area, previously
21 unknown to the State, are discovered, or

22 (ii) information, previously unknown to the State, is
23 received in whole or in part,

24 and these previously unknown conditions or information together
25 with any other relevant information indicate that the Remedial
26

1 Action or the Phosphoric Acid/Fertilizer Plant subarea
2 remediation is not protective of human health and the
3 environment.

4 90. For purposes of Paragraphs 86 and 88, the
5 information and the conditions known to EPA and the State shall
6 include only that information and those conditions set forth in
7 the RODs for the Site and the Administrative Record supporting
8 the RODs. For purposes of Paragraph 87 and 89, the information
9 and the conditions known to EPA and the State shall include only
0 that information and those conditions set forth in the RODs, the
1 Administrative Record supporting the RODs, and any information
2 received by EPA pursuant to the requirements of this Consent
3 Decree prior to Certification of Completion of the Remedial
4 Action, or, as to the PAFP subarea, prior to issuance of notice
5 by EPA that the PAFP Remedial Action is completed.

6 91. General reservations of rights. Notwithstanding
7 any other provision of this Consent Decree, the covenants not to
8 sue set forth above do not pertain to any matters other than
9 those expressly specified in Paragraph 85. The United States and
0 the State reserve, and this Consent Decree is without prejudice
1 to, all rights against Settling Defendants with respect to all
2 other matters, including but not limited to, the following:

- (1) claims based on a failure by Settling Defendants to meet a requirement under this Consent Decree;
- (2) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;

- 1 (3) liability for damages for injury to, destruction
2 of, or loss of natural resources, including the
3 reasonable costs of assessing such injury,
4 destruction, or loss resulting from such a release;
- 5 (4) liability for response costs that have been or may
6 be incurred by any natural resource trustees;
- 7 (5) criminal liability;
- 8 (6) liability for violations of federal or state law
9 which occur during or after implementation of the
10 Remedial Action;
- 11 (7) liability for response costs incurred and/or
12 response actions taken outside of the Site;
- 13 (8) liability for releases or threatened releases of
14 hazardous substances resulting from activities of
15 the Settling Defendants in or affecting the Site
16 after entry of the Consent Decree.

17 92. In the event EPA, after consultation with the State,
18 determines that Settling Defendants have failed to implement any
19 provisions of their Work in an adequate or timely manner, EPA or,
20 upon request by EPA, the State, may perform any and all portions
21 of the Work as EPA determines necessary. Settling Defendants may
22 invoke the procedures set forth in Section XX (Dispute
23 Resolution) to dispute EPA's determination that the Settling
24 Defendants failed to implement a provision of the Work in an
25 adequate or timely manner as arbitrary and capricious or
26 otherwise not in accordance with law. Such dispute shall be
27 resolved on the administrative record. Costs incurred by the
28 United States or the State in performing the Work pursuant to
this paragraph shall be considered Future Response Costs that

1 Settling Defendants shall pay pursuant to Section XVII
2 (Reimbursement of Response Costs).

3 93. Notwithstanding any other provisions of this Consent
4 Decree, the United States and the State retain all authority and
5 reserve all rights to take any and all response actions
6 authorized by law.
7

8 XXIII. COVENANTS BY SETTLING DEFENDANTS

9 94. Except as limited in this paragraph, Settling
0 Defendants hereby covenant not to sue and agree not to assert any
1 claims or causes of action against the United States, the State
2 or any Idaho county, city, or local governmental entity with
3 respect to the Site or this Consent Decree, including, but not
4 limited to, any direct or indirect claim for reimbursement from
5 the Hazardous Substance Superfund (established pursuant to the
6 Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections
7 106(b)(2), 111, 112, 113, 42 U.S.C. §§ 9606(b)(2), 9611, 9612,
8 9613 or any other provision of law, any claim against the United
9 States, including any department, agency or instrumentality of
0 the United States under CERCLA Section 107 or 113 related to the
1 Site, any claim against the State or any Idaho county, city or
2 local governmental entity under CERCLA Section 107 or 113 related
3 to the Site or any claims arising out of response activities at
4 the Site. However, the Settling Defendants reserve, and this
5 Consent Decree is without prejudice to, actions against the
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1 United States, the State or any Idaho county, city or local
2 government entity based on negligent actions taken directly by
3 such entities (not including oversight of or approval of the
4 Settling Defendants' plans or activities) that are brought
5 pursuant to any statute other than CERCLA and for which the
6 waiver of sovereign immunity is found in a statute other than
7 CERCLA to the extent such claim exists or may exist in the
8 future. In addition, the Settling Defendants reserve, and this
9 Consent Decree is without prejudice to, contribution actions
0 against the United States or the State or any department, agency
1 or instrumentality thereof, or any Idaho county, city or local
2 government entity whether or not still in existence; under CERCLA
3 Sections 107(a) and 113(f)(1), 42 U.S.C. §§ 9607(a) and
4 9613(f)(1), for natural resource damages. The Settling
5 Defendants also reserve and this Consent Decree is without
6 prejudice to, actions or claims against the State or any Idaho
7 county, city, or local government entity under Section 107(a) and
8 133(f)(1) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(f)(1), for
9 response costs incurred by Settling Defendants unrelated to
0 implementation of the RODs as a result of activities at the Site
1 taken by such government entity after the effective date of this
2 Consent Decree (not including the activities of any such
3 government entity pursuant to this Consent Decree). Nothing in
4 this Consent Decree shall be deemed to constitute

1 preauthorization of a claim within the meaning of Section 111 of
2 CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

3 95. Each Settling Defendant hereby expressly covenants
4 not to sue any other Settling Defendant and its officers,
5 directors, parents, successors, assigns, subsidiaries, employees
6 or agents with respect to matters covered by this Consent Decree,
7 except for claims premised on the failure of a Settling Defendant
8 to perform its obligations under this Consent Decree or under any
9 agreement among some or all Settling Defendants which addresses
0 responsibilities pertaining to this Consent Decree.

1
2 XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

3 96. Nothing in this Consent Decree shall be construed to
4 create any rights in, or grant any cause of action to, any person
5 not a party to this Consent Decree. The preceding sentence shall
6 not be construed to waive or nullify any rights that any person
7 not a signatory to this Consent Decree may have under applicable
8 law. Each of the Parties expressly reserves any and all rights
9 (including, but not limited to, any right to contribution),
0 defenses, claims, demands, and causes of action which each party
1 may have with respect to any matter, transaction, or occurrence
2 relating in any way to the Site against any person not a party
3 hereto. Nothing in this paragraph shall negate Settling
4 Defendants' covenant not to sue any Idaho county, city, or local
5 government entity as provided in Paragraph 94.

1 97. With regard to claims for contribution against
2 Settling Defendants for matters addressed in this Consent Decree,
3 the Parties hereto agree that the Settling Defendants are
4 entitled to such protection from contribution actions or claims
5 as is provided by CERCLA Section 113(f)(2), 42 U.S.C.
6 § 9613(f)(2).

7 98. The Settling Defendants agree that with respect to
8 any suit or claim for contribution brought by them for matters
9 related to the Site or this Consent Decree they will notify the
10 United States and the State, in writing, no later than sixty (60)
11 days prior to the initiation of such suit or claim.

12 99. The Settling Defendants also agree that with respect
13 to any suit or claim for contribution brought against them for
14 matters related to the Site or this Consent Decree they will
15 notify, in writing, the United States and the State within ten
16 (10) days of service of the complaint on them. In addition,
17 Settling Defendants shall notify the United States and the State
18 within ten (10) days of service or receipt of any Motion for
19 Summary Judgment and within ten (10) days of receipt of any order
20 from a court setting a case for trial.

21 100. In any subsequent administrative or judicial
22 proceeding initiated by the United States or the State for
23 injunctive relief, recovery of response costs, or other
24 appropriate relief relating to the Site, Settling Defendants
25 shall not assert, and may not maintain, any defense or claim
26

based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this paragraph affects the enforceability of the covenants not to sue set forth in Section XXII (Covenants Not to Sue by Plaintiffs).

XXV. ACCESS TO INFORMATION

101. Except as provided by Paragraph 102(b), Settling Defendants shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to the Work or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, relating to the Work or implementation of the Consent Decree their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

1 102. a. Settling Defendants may assert business
2 confidentiality claims covering part or all of the documents or
3 information submitted to Plaintiffs under this Consent Decree to
4 the extent permitted by and in accordance with Section 104(e)(7)
5 of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b).
6 Documents or information determined to be confidential by EPA
7 will be afforded the protection specified in 40 C.F.R. Part 2,
8 Subpart B. If no claim of confidentiality accompanies documents
9 or information when they are submitted to EPA and the State, or
10 if EPA has notified Settling Defendants that the documents or
11 information are not confidential under the standards of Section
12 104(e)(7) of CERCLA, 42 U.S.C. § 9607(e)(7) the public may be
13 given access to such documents or information without further
14 notice to Settling Defendants.

15 b. The Settling Defendants may assert that certain
16 documents, records and other information are privileged under the
17 attorney-client privilege or any other privilege recognized by
18 federal law. If the Settling Defendants assert such a privilege
19 in lieu of providing documents, they shall provide the Plaintiffs
20 with the following: (1) the title of the document, record, or
21 information; (2) the date of the document, record, or
22 information; (3) the name and title of the author of the
23 document, record, or information; (4) the name and title of each
24 addressee and recipient; (5) a description of the contents of the
25 document, record, or information; and (6) the privilege asserted
26

1 by Settling Defendants. The Plaintiffs retain the right to
2 challenge any such claim of privilege. No documents, reports, or
3 other information created or generated pursuant to the
4 requirements of the Consent Decree shall be withheld on the
5 grounds that they are privileged.

6 103. No claim of confidentiality shall be made with
7 respect to any data, including, but not limited to, all sampling,
8 analytical, monitoring, hydrogeologic, scientific, chemical, or
9 engineering data, or any data or factual information evidencing
0 conditions related to the Work or implementation of the Consent
1 Decree contained in otherwise privileged documents.

2
3 XXVI. RETENTION OF RECORDS

4 104. Unless otherwise approved by EPA, until ten (10)
5 years after the Settling Defendants' receipt of EPA's
6 notification pursuant to Paragraph 52(b) of Section XV
7 (Certification of Completion of the Remedial Action), each
8 Settling Defendant shall preserve and retain all records and
9 documents now in its possession or control or which come into its
0 possession or control that relate in any manner to the
1 performance of the Work or that relate to the liability of any
2 person for response actions conducted and to be conducted at the
3 Site, regardless of any corporate retention policy to the
4 contrary. Until ten (10) years after the Settling Defendants'
5 receipt of EPA's notification pursuant to Paragraph 52(b) of
6

1 Section XV (Certification of Completion), Settling Defendants
2 shall also instruct their contractors and agents to preserve all
3 documents, records, and information of whatever kind, nature or
4 description relating to the performance of the Work.

5 105. At the conclusion of this document retention period,
6 Settling Defendants shall notify the United States and the State
7 at least ninety (90) days prior to the destruction of any such
8 records or documents, and, upon request by the United States or
9 the State, Settling Defendants shall deliver any such records or
10 documents to EPA or the State. The Settling Defendants may
11 assert that certain documents, records and other information are
12 privileged under the attorney-client privilege or any other
13 privilege recognized by federal law. If the Settling Defendants
14 assert such a privilege, they shall provide the Plaintiffs with
15 the following: (1) the title of the document, record, or
16 information; (2) the date of the document, record, or
17 information; (3) the name and title of the author of the
18 document, record, or information; (4) the name and title of each
19 addressee and recipient; (5) a description of the subject of the
20 document, record, or information: and (6) the privilege asserted
21 by Settling Defendants. The Plaintiffs retain the right to
22 challenge any such claim of privilege. No documents, reports, or
23 other information created or generated pursuant to the
24 requirements of the Consent Decree shall be withheld on the
25 grounds that they are privileged.

1 106. Each Settling Defendant hereby certifies,
2 individually, that it has not altered, mutilated, discarded,
3 destroyed or otherwise disposed of any records, documents, or
4 other information relating to its potential liability regarding
5 the Site since notification of potential liability by the United
6 States or the State or the filing of suit against it regarding
7 the Site and that it has fully complied with any and all EPA
8 requests for information pursuant to Section 104(e) and 122(e) of
9 CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

0
1 XXVII. NOTICES AND SUBMISSIONS

2 107. Whenever, under the terms of this Consent Decree,
3 written notice is required to be given or a report or other
4 document is required to be sent by one party to another, it shall
5 be directed to the individuals at the addresses specified below,
6 unless those individuals or their successors give notice of a
7 change to the other parties in writing. All notices and
8 submissions shall be considered effective upon receipt, unless
9 otherwise provided. Written notice as specified herein shall
0 constitute complete satisfaction of any written notice
1 requirement of the Consent Decree with respect to the United
2 States, EPA, the State, and the Settling Defendants,
3 respectively.

1 As to the United States:

2 Chief, Environmental Enforcement Section
3 Environment and Natural Resources Division
4 U.S. Department of Justice
5 P.O. Box 7611
6 Ben Franklin Station
7 Washington, D.C. 20044
8 Re: DJ #90-11-3-128I

9 and

10 Director, Waste Management Division
11 United States Environmental Protection Agency
12 Region 10
13 1200 Sixth Avenue, HW-113
14 Seattle, Washington 98101

15 As to EPA:

16 Director, Waste Management Division
17 United States Environmental Protection Agency
18 Region 10
19 1200 Sixth Avenue, HW-113
20 Seattle, Washington 98101

21 Regional Counsel
22 EPA Office of Regional Counsel
23 United States Environmental Protection Agency
24 Region 10
25 1200 Sixth Avenue, HW-113
26 Seattle, Washington 98101

27 Nick Ceto
28 EPA Project Coordinator
29 United States Environmental Protection Agency
30 Region 10
31 1200 Sixth Avenue, HW-113
32 Seattle, Washington 98101

33 As to the State:

34 Curt Fransen
35 Office of Attorney General
36 State of Idaho
37 1410 N. Hilton
38 2nd Floor
39 Boise, Idaho 83706

40 BUNKER HILL STAUFFER/UNION PACIFIC RAILROAD
41 CONSENT DECREE - Page 94

December 15, 1994

1 State Project Coordinator
2 Idaho Department of Health & Welfare
3 Division of Environmental Quality
4 1410 North Hilton
Boise, Idaho 83720-9000

5 As to the Settling Defendants:

6 Union Pacific
7 Nancy A. Roberts
8 Environmental Counsel
9 1416 Dodge Street, Room 830
Omaha, NE 68179-0830
(402) 271-4752
(402) 271-5610 (FAX)

0 Union Pacific
1 Robert D. Markworth
2 Manager, Environmental Site Remediation
3 1416 Dodge Street, Room 930
4 Omaha, NE 68179-0930
(402) 271-4054
(402) 271-4461 (FAX)

5 Rhone-Poulenc, Inc.
6 George S. Goodridge
7 Senior Environmental Attorney
8 Rhone-Poulenc, Inc.
9 CN 5266
Princeton, New Jersey 08543-5266
(908) 821-3533
(908) 821-2787

0 Stauffer Management Company
1 Brian A. Spiller
2 President
3 Stauffer Management Company
4 1800 Concord Pike
5 Wilmington, Delaware 19897
6 (302) 886-5501
7 (302) 886-2952 (FAX)

1 As to EPA Project Coordinator:

2 Nick Ceto
3 EPA Project Coordinator
4 United States Environmental Protection Agency
5 Region 10
6 1200 Sixth Avenue, HW-113
7 Seattle, Washington 98101
8 (206) 553-8659
9 (206) 553-0124 (FAX)

7 As to State Project Coordinator:

8 State Project Coordinator
9 Idaho Department of Health & Welfare
10 Division of Environmental Quality
11 1410 North Hilton
12 Boise, Idaho 83720-9000
13 (208) 334-5860
14 (208) 334-0576 (FAX)

12 As to Settling Defendants' Project Coordinators

13 Union Pacific Project Coordinator
14 Robert D. Markworth
15 Manager, Environmental Site Remediation
16 1416 Dodge Street, Room 930
17 Omaha, NE 68179-0930
18 (402) 271-4054
19 (402) 271-4461 (FAX)
20 Rhone-Poulenc, Inc. and Stauffer Management Company
21 Carol A. Dickerson
22 Project Coordinator
23 ZENECA Inc.
24 Environmental Services & Operations
25 1800 Concord Pike
26 Wilmington, Delaware 19897
27 Telephone: (302) 886-5123
28 Facsimile: (302) 886-5933

22 XXVIII. EFFECTIVE DATE

23 108. The effective date of this Consent Decree shall be
24 the date upon which this Consent Decree is entered by the Court,
25 except as otherwise provided herein.
26

1 XXXI. COMMUNITY RELATIONS

2 111. Settling Defendants shall cooperate with EPA and the
3 State in providing information regarding the Work to the public.
4 As requested by EPA or the State, Settling Defendants shall
5 participate in the preparation of such information for
6 dissemination to the public and in public meetings which may be
7 held or sponsored by EPA or the State to explain activities at or
8 relating to the Site.

9
10 XXXII. MODIFICATION

11 112. Schedules specified in the SOWs and other
12 deliverables for completion of the Work may be modified by
13 agreement of EPA, in consultation with the State, and the
14 Settling Defendants. All such modifications shall be made in
15 writing.

16 113. No material modifications shall be made to the SOWs
17 without written notification to and written approval of the
18 United States, the Settling Defendants and the Court. Prior to
19 providing its approval to any modification, the United States
20 will provide the State with a reasonable opportunity to review
21 and comment on the proposed modification. Modifications to the
22 SOWs that do not materially alter those documents may be made by
23 written agreement between EPA, after providing the State with a
24 reasonable opportunity to review and comment on the proposed
25 modification, and the Settling Defendants.

1 114. Nothing in this Decree shall be deemed to alter the
2 Court's power to enforce, supervise, or approve modifications to
3 this Consent Decree.
4

5 XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

6 115. This Consent Decree shall be lodged with the Court
7 for a period of not less than thirty (30) days for public notice
8 and comment in accordance with Section 122(d)(2) of CERCLA,
9 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States
0 and the State reserve the right to withdraw or withhold their
1 consent if the comments regarding the Consent Decree disclose
2 facts or considerations which indicate that the Consent Decree is
3 inappropriate, improper, or inadequate. Settling Defendants
4 consent to the entry of this Consent Decree in the form presented
5 without further notice.

6 116. If for any reason the Court should decline to
7 approve this Consent Decree in the form presented, this agreement
8 is voidable at the sole discretion of any Party and the terms of
9 the agreement may not be used as evidence in any litigation
0 between the Parties.

1 XXXIV. SIGNATORIES/SERVICE

2 117. Each undersigned representative of a Settling
3 Defendant to this Consent Decree and the Assistant Attorney
4 General for Environment and Natural Resources of the Department

1 of Justice and the State signatory certifies that he or she is
2 fully authorized to enter into the terms and conditions of this
3 Consent Decree and to execute and legally bind such party to this
4 document.

5 118. Each Settling Defendant hereby agrees not to oppose
6 entry of this Consent Decree by this Court or to challenge any
7 provision of this Consent Decree unless the United States has
8 notified the Settling Defendants, in writing, that it no longer
9 supports entry of the Consent Decree.

10 119. Each Settling Defendant shall identify, on the
11 attached signature page, the name, address and telephone number
12 of an agent who is authorized to accept service of process by
13 mail on behalf of that party with respect to all matters arising
14 under or relating to this Consent Decree. Settling Defendants
15 hereby agree to accept service in that manner and to waive the
16 formal service requirements set forth in Rule 4 of the Federal
17 Rules of Civil Procedure and any applicable local rules of this
18 Court, including, but not limited to, service of a summons.

19 SO ORDERED THIS _____ DAY OF _____, 19__.

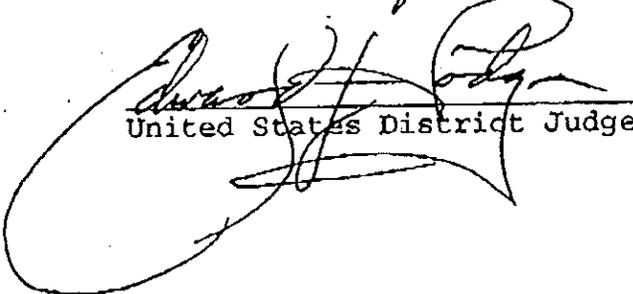
20
21 _____
22 United States District Judge
23
24
25
26

1 of Justice and the State signatory certifies that he or she is
2 fully authorized to enter into the terms and conditions of this
3 Consent Decree and to execute and legally bind such party to this
4 document.

5 118. Each Settling Defendant hereby agrees not to oppose
6 entry of this Consent Decree by this Court or to challenge any
7 provision of this Consent Decree unless the United States has
8 notified the Settling Defendants, in writing, that it no longer
9 supports entry of the Consent Decree.

10 119. Each Settling Defendant shall identify, on the
11 attached signature page, the name, address and telephone number
12 of an agent who is authorized to accept service of process by
13 mail on behalf of that party with respect to all matters arising
14 under or relating to this Consent Decree. Settling Defendants
15 hereby agree to accept service in that manner and to waive the
16 formal service requirements set forth in Rule 4 of the Federal
17 Rules of Civil Procedure and any applicable local rules of this
18 Court, including, but not limited to, service of a summons.

19 SO ORDERED THIS 12th DAY OF September, 1995.

20
21 
22 United States District Judge
23
24
25
26

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Stauffer Management Company; Rhone-Poulenc, Inc. and Union Pacific Railroad Company, relating to the Bunker Hill Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: _____

Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Peter Mounsey and Thomas Swegle
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

Assistant United States Attorney
District of Idaho
U.S. Department of Justice

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. Stauffer Management Company; Rhone-
3 Poulenc, Inc. and Union Pacific Railroad Company, relating to the
4 Bunker Hill Superfund Site.

5
6
7 FOR THE UNITED STATES
8 ENVIRONMENTAL PROTECTION AGENCY

9
10
11 Steven A. Herman
12 Assistant Administrator for
13 Enforcement and Compliance Assurance
14 U.S. Environmental Protection
15 Agency
16 401 M Street, S.W.
17 Washington, D.C. 20460

18
19
20 Chuck Clarke
21
22 Chuck Clarke
23 Regional Administrator, Region 10
24 U.S. Environmental Protection Agency
25 1200 Sixth Avenue
26 Seattle, Washington 98101

27
28 Cynthia L. Mackey
Cynthia L. Mackey
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, SO-155
Seattle, Washington 98101

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the
2 matter of United States v. Stauffer Management Company; Rhone-
3 Poulenc, Inc. and Union Pacific Railroad Company relating to the
4 Bunker Hill Superfund Site.

6 FOR UNION PACIFIC RAILROAD

7
8 Date: 12/17/94

James V. Dolan
James V. Dolan
Vice-President-Law
1416 Dodge Street
Omaha, NE 68179

11
12 Agent Authorized to Accept Service on Behalf of Above-signed
13 Party:

14 James V. Dolan
15 Vice-President-Law
16 1416 Dodge Street
17 Omaha, NE 68179

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. Stauffer Management Company; Rhone-
3 Poulenc, Inc. and Union Pacific Railroad Company, relating to the
4 Bunker Hill Superfund Site.

FOR STAUFFER MANAGEMENT COMPANY

5
6
7
8 Date: 12/23/94

9 
10 Brian A. Spiller
11 President
12 Stauffer Management Company
13 1800 Concord Pike
14 Wilmington, Delaware 19897

15 Agent Authorized to Accept Service on Behalf of Above-signed
16 Party:

17 Brian A. Spiller
18 President
19 Stauffer Management Company
20 1800 Concord Pike
21 Wilmington, Delaware 19897

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the
2 matter of United States v. Stauffer Management Company; Rhone-
3 Poulenc, Inc and Union Pacific Railroad, relating to the Bunker
4 Hill Superfund Site.

5
6 FOR RHONE-POULENC, INC

7
8 Date: _____

George S. Goodridge
George S. Goodridge
Senior Environmental Attorney
Rhone-Poulenc, Inc.
CN 5266
Princeton, New Jersey 08543-5266

9
10
11
12 Agent Authorized to Accept Service on Behalf of Above-signed
13 Party:

George S. Goodridge
Senior Environmental Attorney
Rhone-Poulenc, Inc.
CN 5266
Princeton, New Jersey 08543-5266

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Lodged 12/23/99

CLERK
U.S. COURTS
DISTRICT OF IDAHO

AUG 25 2000

5:22 PM REC'D
LODGED FILED

CV 99-0606-N-EJL ✓

CASE NO. _____

UNITED STATES OF AMERICA and
STATE OF IDAHO,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

COEUR D'ALENE TRIBE,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, et al.,

Defendants.

CASE NO. CV 91-0342-N-EJL

CONSENT DECREE

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I. BACKGROUND

1. The United States of America (“United States”), State of Idaho (“State”), Coeur d’Alene Tribe (“Tribe”) (collectively “Plaintiffs”) and the Union Pacific Railroad Company (“Union Pacific” or “Settling Defendant”) are the parties to this Consent Decree settling claims relating to the Union Pacific Wallace and Mullan Branches in northern Idaho.

2. The Project Area, as more specifically defined in Section IV (Definitions) herein, generally includes the approximately 71.5-mile long right-of-way for the main line and related sidings of Union Pacific’s Wallace Branch and Mullan Branch between Mullan and Plummer, Idaho. In general, the Project Area does not include the following: the active rail line within certain areas of Plummer Junction and between Plummer Junction and Spokane, Washington, and the abandoned line within certain areas of Plummer Junction and between Plummer Junction and Tekoa, Washington, both of which are located in the Coeur d’Alene Indian Reservation; any spurs or connecting branch lines outside of the Wallace and Mullan Branches right-of-way; the Wallace Yard; and possible encroachments on the right-of-way from the Lucky Friday Mine haul road, the Hecla tailings impoundment, the Morning Mine rock dump, the Lucky Friday Mine waste impoundment, and the Burns Yaak Mine dump. The United States and the State have previously settled claims for response actions by Union Pacific within the 7.9 mile section of the right-of-way within the Bunker Hill Superfund Site, and Union Pacific has been implementing remedial actions in that area pursuant to a prior consent decree in United States v. Union Pacific, (D. Idaho), Case No. 95-0152-N-HLR.

3. The United States, on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”) and the Secretaries of the Departments of the Interior and Agriculture, filed a complaint in this matter against Union Pacific pursuant to Sections 106

and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607, and Section 311(f)(4) and (5) of the Clean Water Act, 33 U.S.C. § 1321(f)(4) and (5).

4. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred and to be incurred by EPA, the Department of Justice, and other federal agencies and departments for response actions in connection with the Project Area in the Coeur d'Alene Basin in northern Idaho, together with accrued interest; (2) performance of studies and response work by Settling Defendant in the Project Area consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended); and (3) damages, including assessment costs, for injury to natural resources under the trusteeship of the United States in the Coeur d'Alene Basin Environment.

5. On September 29, 1995, the United States, the State and the Tribe proposed that Settling Defendant and other defendants submit a good faith offer to settle potential claims for Natural Resource Damages.

6. The State has joined in the complaint filed by the United States against Union Pacific in this Court alleging that Union Pacific is liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, Idaho Code Sections 39-108, 4413, 4414, and relevant state law.

7. On July 31, 1991 and October 22, 1996, the Tribe filed its Complaint and First Amended Complaint, respectively, against Union Pacific pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, to recover damages, including assessment costs, for injuries to natural resources under the trusteeship of the Coeur d'Alene Tribe in the Coeur d'Alene Basin Environment.

8. Except as otherwise provided in this Consent Decree, in signing this Decree the Settling Defendant denies any and all legal and equitable liability and reserves all defenses under any federal, state, local or tribal statute, regulation, or common law for any claim, endangerment, nuisance, response, removal, remedial or other costs or damages incurred or to be incurred by the United States, the State, the Tribe or other entities or persons as a result of the release or threatened release of hazardous substances at, in, from, on, or under the Project Area or any Natural Resource Damages in the Coeur d'Alene Basin Environment. Pursuant to 42 U.S.C. § 9622(d)(1)(B), entry of this Consent Decree is not an acknowledgment by Settling Defendant that any release or threatened release of a hazardous substance constituting an imminent and substantial endangerment to human health or the environment has occurred or exists in the Coeur d'Alene Basin Environment. Settling Defendant does not admit and retains the right to controvert any of the factual or legal statements or determinations made herein in any judicial or administrative proceeding except in an action to enforce this Consent Decree or as provided in Paragraph 137. Settling Defendant does agree, however, to the Court's jurisdiction to enter and enforce this Consent Decree. In any such proceedings to enter or enforce this Consent Decree, the Settling Defendant shall not challenge the terms of this Consent Decree. This Consent Decree shall not be admissible in any judicial or administrative proceeding against the Settling Defendant, over its objection, as proof of liability or as an admission of any fact dealt with herein, but it shall be admissible in an action to enforce this Consent Decree. This Consent Decree shall not be admissible in any judicial or administrative proceeding brought by or on behalf of any Natural Resource Trustee for Natural Resource Damages, or in any judicial or administrative proceeding brought against any Natural Resource Trustee, over the objection of any Natural Resource Trustee, as proof of or a defense to liability or as an admission of any fact dealt with herein.

9. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Bunker Hill Facility on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658.

10. In response to a release or a threat of a release of hazardous substances at or from areas of the Project Area currently or formerly owned or operated by Union Pacific, EPA, the Departments of the Interior and Agriculture, the Tribe and the State, with the assistance of Union Pacific, prepared an Engineering Evaluation/Cost Analysis ("EE/CA") proposing response actions to be implemented at the Project Area to address those releases or threats of release. On January 22, 1999, the EE/CA was made available for public review and comment for a forty-five (45) day period. EPA, with the participation of the Federal Trustees, the Tribe and the State, considered and responded to those public comments. On October 13, 1999, EPA, the State, and the Tribe signed an Action Memorandum approving the response actions identified in the EE/CA for the Project Area.

11. Concurrently with the negotiation of this Consent Decree, Union Pacific and the Plaintiffs have negotiated a Statement of Work ("SOW") to implement the response actions identified by the EE/CA for the Project Area. The SOW is attached to and incorporated into this Consent Decree.

12. Since 1992, the Departments of the Interior and Agriculture and the Coeur d'Alene Tribe, as federal and tribal trustees for Natural Resources in the Coeur d'Alene Basin, have been conducting a Natural Resource Damages Assessment. The area covered by the Natural Resource Damages Assessment begins at the uppermost reaches of the creeks and streams that serve as tributaries to the South Fork of the Coeur d'Alene River near the Idaho/Montana border, and extends through Lake Coeur d'Alene. The area includes a vast wetlands complex adjacent to

more than 12 lateral lakes near the mouth of the Coeur d'Alene River, extensive habitat for wildlife and aquatic resources, and an extensive variety of water, geological, and cultural resources.

13. Union Pacific commenced proceedings to abandon the Wallace and Mullan Branches in 1991. The Interstate Commerce Commission, by its initial decision, 9 I.C.C. 2d 325 (Oct. 15, 1992), as clarified in State of Idaho et al. v. ICC, 35 F.3d 585 (D.C. Cir. 1994), and its subsequent decision of November 28, 1994, 1994 WL 670117 (I.C.C.), authorized the cessation of rail service and imposed six environmental conditions which must be met before Union Pacific may begin salvage of the Wallace and Mullan Branch rail lines. Since that time, the Surface Transportation Board ("STB") has succeeded the Interstate Commerce Commission as the agency with jurisdiction over these abandonment proceedings.

14. In response to this series of decisions, on May 26, 1999, Union Pacific filed a Notice of Intent to Complete Abandonment Proceedings for the Wallace and Mullan Branches with the STB, STB Docket No. AB-33 (Sub-No. 70). In that Notice, Union Pacific stated that on or about June 18, 1999, Union Pacific intended to file with the STB the environmental information required to complete the environmental compliance process and receive final approval to salvage the Wallace and Mullan Branch rail lines. Among other things, the Notice provides background with respect to the extensive efforts Union Pacific has undertaken to respond to the six environmental conditions imposed by the ICC which are described in the Notice. On June 18, 1999, Union Pacific filed with the STB the environmental information required to complete the environmental compliance process and to receive final approval to salvage the Wallace and Mullan Branch rail lines. The actions described in the SOW, when implemented, along with

certain other actions, are intended to satisfy the six environmental conditions originally imposed by the ICC.

15. On July 29, 1999, the State and the Tribe filed with the STB an application for issuance of a Certificate of Interim Trail Use ("CITU") for the Wallace and Mullan Branches right-of-way. A copy of the application is appended hereto as Appendix A. Union Pacific has filed a statement with the STB that it will accept a trail use condition and that it will negotiate an agreement with the State and Tribe relating thereto. A copy of that statement is appended hereto as Appendix B.

16. Concurrently with the negotiation of this Consent Decree, Union Pacific and the Tribe negotiated a consent decree to settle Coeur d'Alene Tribe v. Union Pacific Railroad Co., et al., (D. Idaho) Case No. CV 91-0342-N-EJL (the "UP-Tribe Consent Decree"). The UP-Tribe Consent Decree was lodged with the Court on September 27, 1999. The UP-Tribe Consent Decree is contingent upon agreement by the Plaintiffs and Union Pacific on this Consent Decree and the Court's approval and entry of this Consent Decree.

17. Although the federal and tribal Natural Resource Trustees have not yet completed a natural resource damages assessment for the Coeur d'Alene Basin Environment, the federal and tribal Natural Resource Trustees have performed extensive studies of natural resource injuries in the Coeur d'Alene Basin Environment and have carefully considered the extent to which such injuries have resulted from releases at, in, from, on, or under the Coeur d'Alene Basin Environment. The federal, state and tribal Natural Resource Trustees have concluded that the settlement with the Settling Defendant set forth in this Consent Decree is reasonable and in the public interest, and constitutes appropriate action necessary to protect and restore injured natural resources.

18. Based on the information presently available to EPA, the State and the Tribe, EPA, the State and the Tribe believe that the Work will be properly and promptly conducted by the Settling Defendant if conducted in accordance with the requirements of this Consent Decree and the SOW and its attachments.

19. Solely for the purposes of Section 113(j) of CERCLA, the Work (as defined below) to be performed by the Settling Defendant shall constitute a response action taken or ordered by the President.

20. This Consent Decree is entered into by the Parties to resolve in their entirety the claims and defenses asserted by the Parties against one another in these actions, subject to the reservations set forth herein.

21. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, implementation of this Consent Decree will expedite the cleanup of the Project Area and protection and restoration of injured natural resources in the Coeur d'Alene Basin Environment and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

22. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District.

III. PARTIES BOUND

23. This Consent Decree applies to and is binding upon the United States, the State and the Tribe and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate status of Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Decree. The Parties agree that STB issuance of a CITU for the Wallace and Mullan Branches rights-of way and STB final approval of salvage of the Wallace and Mullan Branches rail lines are necessary prerequisites and conditions precedent to performance of the SOW pursuant to this Consent Decree. These necessary prerequisites and conditions precedent shall be satisfied as set forth in Paragraph 27.a. below.

24. Settling Defendant shall make a copy of this Consent Decree available to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing Settling Defendant with respect to the Project Area or the Work and shall require any such contractors to perform applicable work in conformity with the terms of this Consent Decree. Settling Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor of Settling Defendant shall be deemed to be in a contractual relationship with the Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

IV. DEFINITIONS

25. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“Action Memo” or “Action Memorandum” shall mean the Action Memorandum relating to the EE/CA which was signed on October 13, 1999 by the Director, Environmental Cleanup Office, EPA Region 10, the State and the Tribe.

“Best efforts”, for purposes of Paragraph 46 of this Decree, may include the payment of reasonable sums of money as consideration.

“Bunker Hill Superfund Site” shall mean that area subject to the prior consent decree entered by the Court on September 12, 1995 in United States v. Union Pacific, (D. Idaho), Case No. 95-0152-N-HLR.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq.

“CITU” shall mean that Certificate of Interim Trail Use to be issued to the ROW Trail Owner(s) by the STB for the Wallace and Mullan Branches.

“Coeur d’Alene Basin Environment” shall mean: (1) the watershed of the South Fork and the North Fork of the Coeur d’Alene River, the main stem of the Coeur d’Alene River and its floodplain, including the lateral lakes and associated wetlands, and Lake Coeur d’Alene; (2) the ROW and all current or historical branches, sidings, spur tracks, bridges and structures thereon or

connected thereto that are within or adjacent to the area described in subpart (1) of this definition, with the exception of the Excluded Rail Lines; and (3) all staging areas, Waste Material handling, storage or disposal areas, and other areas to be used by Settling Defendant in connection with performance of the Work as described in the SOW.

“Consent Decree” or “Decree” shall mean this decree and all appendices attached hereto (listed in Section XXX). In the event of conflict between this decree and any appendix, this decree shall control.

“Consultation” shall mean effective notice and collaboration in a significant attempt to reach a common position among the United States, the State and the Tribe in decision making.

“Day” shall mean a calendar day unless expressly stated to be a Working Day. “Working Day” shall mean a day other than a Saturday, Sunday, or federal, state or tribal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal, state or tribal holiday, the period shall run until the close of business of the next Working Day.

“Elements and Components of Work” shall mean the elements of work and their respective components as set forth in the SOW.

“Engineering Evaluation/Cost Analysis” or “EE/CA” shall mean the EPA engineering evaluation/cost analysis report for the response action under CERCLA for the Project Area issued on January 15, 1999 by the United States Environmental Protection Agency, Region 10, and for which the Action Memorandum was signed on October 13, 1999, and all attachments thereto. The EE/CA and the Action Memorandum are appended hereto as Appendices C and D, respectively.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“Escrow Account” shall mean that account established pursuant to the Escrow Agreement appended hereto as Appendix E.

“Excluded Rail Lines” shall mean that portion of the railroad right-of-way for: (i) the active rail line within certain areas of Plummer Junction and between Plummer Junction and Spokane, Washington that is located on the Reservation, and (ii) the abandoned line within certain areas of Plummer Junction and between Plummer Junction and Tekoa, Washington that is located on the Reservation. The precise location of the Excluded Rail Lines is set forth in the map appended hereto as Appendix F.

“Future Response Costs” shall mean all response costs including, but not limited to, direct and indirect costs, that the United States, the State or the Tribe incurs on or after September 1, 1999, July 1, 2000, and January 1, 2000, respectively, in reviewing or developing plans, reports, the State/Tribe Agreement, and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII (Response Action Review), IX (Access and Institutional Controls) (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation, except as otherwise provided in Paragraph 88), XV (Emergency Response), and Paragraph 126 of Section XXII (Work Takeover). Future Response Costs shall also include all response costs, including direct and indirect costs, paid in connection with this Consent Decree by the United States, the State and the Tribe between September 1, 1999, July 1, 2000 and

January 1, 2000, respectively, and the effective date of this Consent Decree, and all Interest on the Past Response Costs of the United States, the State and the Tribe that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from September 1, 1999, July 1, 2000 and January 1, 2000, respectively, to the date of entry of this Consent Decree.

“Governments” shall mean the United States, the State of Idaho and the Coeur d’Alene Tribe.

“Governments’ Project Coordinator” shall mean the Project Coordinator selected by the Plaintiffs that shall consult, coordinate and collaborate with and report to the EPA, State and the Tribe’s Project Coordinators.

“IDEQ” shall mean the Idaho Department of Health and Welfare, Division of Environmental Quality, and any successor departments or agencies of the State.

“Interest” shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

“Maintenance and Repair” shall mean all maintenance and repair activities which are to be performed or funded by Union Pacific as specified in the Maintenance and Repair Plan attached to the SOW as Attachment E.

“Matters Addressed” in this Consent Decree shall mean all Work under this Consent Decree, all response actions taken or to be taken and all response costs incurred or to be incurred by the United States, the State, the Tribe or any other person or entity relating to the presence of Waste Materials at, or the release or threatened release of Waste Materials from: (i) the ROW and those portions of Plummer Junction which are identified in the SOW as being a part of the Work, including the inactive rail lines within Plummer Junction that are owned or controlled by

Union Pacific as well as the portion of the ROW in the Plummer Junction that was abandoned in 1955; (ii) all staging areas and other areas to be used by Settling Defendant in connection with Performance of the Work as described in the SOW; and (iii) all handling, storage or disposal areas for Waste Materials approved under this Consent Decree. The term “Matters Addressed” also includes all Natural Resource Damages within the Coeur d’Alene Basin Environment. “Matters Addressed” in this Consent Decree do not include those response costs or response actions as to which the Plaintiffs have reserved their rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that a Plaintiff asserts rights against Union Pacific coming within the scope of such reservations.

“Mine Waste” shall include jig and flotation tailings, mine waste rock, ores, and ore concentrates, all of which are derived from mining activities.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Natural Resource” shall mean any and all of those resources within the scope of Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

“Natural Resource Damages” shall mean any and all damages recoverable under Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), or Section 311 of the Clean Water Act, 33 U.S.C. § 1321, for injury to, destruction of, or loss of Natural Resources and includes without limitation any and all damages for restoration, replacement or acquisition of the equivalent injured, destroyed or lost natural resources, assessment costs, and compensable value damages and any other damages.

“Natural Resource Trustees” shall mean the U.S. Department of the Interior and the U.S. Department of Agriculture (the “Federal Natural Resource Trustees”), the Coeur d’Alene Tribe, and the State of Idaho.

“Operation and Maintenance - Trail” or “O&M-Trail” shall mean all operation, maintenance and repair activities to be performed or funded by the State and/or the Tribe in connection with the ROW Trail. “O&M-Trail” encompasses all activities in connection with the ROW Trail which are not specifically identified as “Maintenance and Repair.” “O&M Trail” therefore includes but is not necessarily limited to: (i) service activities including: litter control, toilet cleaning and supply, miscellaneous cleaning, and trail sweeping; (ii) routine bridge inspections after conveyance of the ROW Trail to the ROW Trail Owner(s); (iii) preventive maintenance of the Chatcolet Bridge; (iv) maintenance and repair of bridge deck and guard rails, painting of buildings and amenities, and repair of amenities and other facilities; (v) other activities including: trail surface regrading within the Coeur d’Alene Indian Reservation, washing of steel bridges, and bridge deck replacement; and (vi) trail use management, including periodic patrols.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

“Parties” shall mean the United States, the State of Idaho, the Coeur d’Alene Tribe, and the Settling Defendant.

“Past Response Costs” shall mean all response costs, including, but not limited to, direct and indirect costs, that the United States, the State, or the Tribe paid at or in connection with the Project Area through August 31, 1999, June 30, 2000, and December 31, 1999, respectively, for which Union Pacific has not previously reimbursed them, plus Interest on all such unreimbursed costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

“Performance Standards” shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations specified in the SOW to be achieved by Settling Defendant in implementing the Work.

“Plaintiffs” shall mean the United States, the State of Idaho and the Coeur d’Alene Tribe.

“Project Area” shall mean the main line and related sidings of the ROW except as noted below. Project Area shall also include those portions of Plummer Junction which are identified in the SOW as being a part of the Work, including the inactive rail lines within Plummer Junction that are owned or controlled by Union Pacific as well as the portion of the ROW in the Plummer Junction that was abandoned in 1955. The 7.9 mile section of the ROW within the Bunker Hill Superfund Site has been addressed as part of the Bunker Hill Superfund Site Record of Decision (EPA, 1992), and except as otherwise specified in the SOW and its attachments is excluded from this definition. Project Area does not include: (1) the Excluded Rail Lines; (2) the spurs or connecting branch lines outside of the ROW; (3) the Wallace Yard between mile marker 78.5 and 79.8; (4) that portion of the Mullan Branch between mile marker 7.15 and 7.6 that may include encroachments on the ROW from the Lucky Friday Mine haul road; and (5) the areas identified on the RAD Drawings as possible encroachments on the ROW by the Hecla tailings impoundment, the Morning Mine rock dump, the Lucky Friday Mine waste impoundment and the Burns Yaak Mine dump. The Project Area also includes all staging areas, Waste Material handling, storage and disposal areas within the Coeur d’Alene Basin Environment, and other areas to be used by Settling Defendant in connection with performance of the Work as described in the SOW.

“RAD Drawings” shall mean Response Action Design drawings which are Attachment D to the SOW.

“Response Action” shall mean those activities, except for Maintenance and Repair, to be undertaken by the Settling Defendant to implement the response action identified in the EE/CA and specified in the SOW.

“Reservation” shall mean the Coeur d’Alene Indian Reservation situated within Northern Idaho.

“Right-of-Way” or “ROW” shall mean: (1) the Wallace Branch right-of-way which extends for 63.8 miles from mile marker 16.6 at Plummer Junction to mile marker 80.4 in Wallace; (2) the Mullan Branch right-of-way which extends 7.6 miles from mile marker 0 at Wallace to the east side of Mullan at mile marker 7.6; and (3) all sidings, bridges and structures thereon or connected thereto. The geographic scope of the ROW is shown on the RAD Drawings which are based on railroad valuation maps. In the event the ROW as depicted in the RAD Drawings is unclear, the railroad valuation maps shall determine the ROW.

“ROW Trail” shall mean the rights associated with the ROW to be managed under the State/Tribe Agreement for which the State and Tribe have applied to the STB for a CITU.

“ROW Trail Owner(s)” shall mean the State, the Tribe and/or any entities they jointly create pursuant to the State/Tribe Agreement for purposes of owning the ROW Trail and conducting Operation and Maintenance-Trail.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendant” shall mean Union Pacific Railroad Company.

“Slag Pile Area” or “SPA” shall mean an area of approximately 12-15 acres located on the west end of the Central Impoundment Area within the Bunker Hill Superfund Site, as more fully depicted in Attachment H to the SOW.

“State” shall mean the State of Idaho, its departments and agencies thereto.

“State/Tribe Agreement” shall mean that agreement between the Tribe and the State that describes the long-term cooperative partnership between the State and the Tribe with respect to ownership and management of the ROW Trail.

“Statement of Work” or “SOW” shall mean the written specification of the work to be performed pursuant to this Consent Decree together with all of its attachments, as set forth in Appendix G to this Consent Decree, and any modifications thereto made in accordance with this Consent Decree.

“Surface Transportation Board” or “STB” shall mean the board created within the federal Department of Transportation pursuant to 49 U.S.C. § 701 and any successor agency.

“Supervising Contractor” shall mean the principal contractor retained by the Settling Defendant to supervise and direct the implementation of the Work under this Consent Decree.

“Tribe” or “Tribal” shall mean the Coeur d’Alene Tribe of the Coeur d’Alene Indian Reservation situated within Northern Idaho.

“Union Pacific Railroad Company” or “Union Pacific” shall mean the Delaware corporation of that name.

“UP-Tribe Consent Decree” shall mean the consent decree lodged in Coeur d’Alene Tribe v. Union Pacific Railroad Co., et al., (D. Idaho) Case No. CV 91-0342-N-EJL on September 27, 1999.

“United States” shall mean the United States of America, including all of its departments, agencies and instrumentalities.

“Wallace Yard” shall mean that area located between milepost 78.5 and 79.8 of the ROW.

“Waste Material” shall mean (1) Mine Waste; (2) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (3) any pollutant or contaminant under

Section 101(33), 42 U.S.C. § 9601(33); (4) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (5) any “hazardous waste” under Section 1004(5) of RCRA, 42 U.S. § 6904(5), or hazardous constituent as defined at 40 C.F.R. § 260.10 pursuant to RCRA; and (6) any “hazardous waste,” “solid waste” or “toxic” material under applicable Federal, State or Tribal law.

“Work” shall mean all activities Settling Defendant is required to perform under the Consent Decree as set forth in the SOW, except those required by Section XVI (Reimbursement of Response Costs and Payments in Settlement of Natural Resource Damages Claims) and Section XXVI (Retention of Records).

V. GENERAL PROVISIONS

26. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment in the Coeur d’Alene Basin by the performance of the response action identified in the EE/CA and specified in the SOW by the Settling Defendant, to contribute to restoration of habitat and natural resources, to resolve Settling Defendant’s liability for Natural Resource Damages within the Coeur d’Alene Basin Environment, to reimburse response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendant as provided in this Consent Decree.

27. Commitments by the Parties

a. Settling Defendant shall comply with this Consent Decree and finance and perform the Work in accordance with this Consent Decree, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendant and approved by EPA, the State and the Tribe pursuant to this Consent Decree. Settling Defendant shall pay the United States, the State and the Tribe Natural Resource Damages

as provided in this Consent Decree and pay the State and the Tribe certain additional sums as provided in this Consent Decree in connection with the ROW Trail. Settling Defendant shall also reimburse the United States, the State and the Tribe for Past Response Costs and Future Response Costs as provided in this Consent Decree. The Parties agree that STB issuance of a CITU for the Wallace and Mullan Branches rights-of way and STB final approval of salvage of the Wallace and Mullan Branches rail lines are necessary prerequisites and conditions precedent to performance of the SOW pursuant to this Consent Decree. For purposes of the preceding sentence, the necessary prerequisites and conditions precedent shall be satisfied by:

(1) a final decision by the STB that the six environmental conditions referenced in Paragraph 13 of this Decree are satisfied. However, if, after such a final decision of the STB, there is a court order or any other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree, this condition precedent will not be met until such court order or other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree is vacated, reversed, overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated; and

(2) STB issuance of a CITU to the ROW Trail Owner(s). However, if, after such STB issuance of a CITU to the ROW Trail Owner(s) there is a court order or any other administrative or judicial decision overturning the STB decision or enjoining or otherwise preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree, this condition precedent will not be met until such court order or other administrative or judicial decision overturning the STB decision or enjoining or otherwise

preventing Union Pacific from commencing salvage or otherwise performing Work in the Project Area under this Decree is vacated, reversed, overruled or otherwise overturned and the STB decision is affirmed or otherwise reinstated.

In the event that either or both of the two conditions precedent identified in this Paragraph 27 has not been satisfied, the Parties recognize that the failure of satisfying the condition precedent will constitute a Force Majeure event to the extent that it prevents Union Pacific from commencing salvage or otherwise performing Work in the Project Area and therefore agree to extend all deadlines under this Consent Decree for the length of time Union Pacific is prevented from commencing salvage or otherwise performing Work in the Project Area. In the event that there is a court order or other judicial or administrative decision overturning either or both of the STB decisions identified in the two conditions precedent, and all rights of appeal have been exhausted or a deadline for appeal of such decision has expired, and Union Pacific is thus permanently enjoined or prevented from commencing salvage or otherwise performing Work in the Project Area under the Decree, then this Consent Decree will automatically be null and void and without any effect and the Parties will notify the Court of this fact and request a conference to discuss further proceedings in this action.

b. As provided in Paragraph 78 of this Decree, Settling Defendant will pay \$2,600,000 to the ROW Trail Owner(s). The ROW Trail Owner(s) shall use such funds and any interest or investment proceeds therefrom to perform or fund Operation and Maintenance - Trail pursuant to the State/Tribe Agreement. The ROW Trail Owner(s) have agreed to perform or fund Operation and Maintenance - Trail, and Settling Defendant shall have no further obligations to perform or fund Operation and Maintenance - Trail under this Decree.

c. The Plaintiffs shall allow Settling Defendant to place material removed from the Project Area pursuant to the SOW in the Slag Pile Area within the Bunker Hill Superfund Site through October 1, 2001. In addition, if this location is generally made available by Plaintiffs for the placement of materials from the Coeur d'Alene Basin after this date, or if other locations are made generally available by Plaintiffs for such placement of materials, they will also be made available to Settling Defendant. Settling Defendant will be responsible for any additional incremental costs, i.e., costs in addition to those which would otherwise have been incurred, associated with placement of Project Area materials at these locations as specified in the SOW. The conditions for Settling Defendant's use of the Slag Pile Area for disposal are set forth in the SOW.

28. Compliance With Applicable Law. All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal, state and tribal laws and regulations. To the extent practicable considering the exigencies of the situation, the Work shall attain applicable or relevant and appropriate requirements under federal, state and tribal environmental or facility siting laws as set forth in the EE/CA. The activities conducted pursuant to this Consent Decree, if approved by Plaintiffs, shall be considered to be consistent with the NCP.

29. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no federal, State or Tribal permit shall be required for any portion of the Work conducted entirely On-site as that term is defined in Section 1.2.13 of the SOW. Where any portion of the Work that is not On-site requires a federal, State or Tribal permit or approval, Settling Defendant

shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal, State or Tribal statute or regulation.

30. Notice to Successors-in-Title

a. With respect to any property owned or controlled by the Settling Defendant that is located within the Project Area, within fifteen (15) days after the entry of this Consent Decree, the Settling Defendant shall submit to Plaintiffs for review and approval a notice to be filed with the Recorders' Offices, in Shoshone, Kootenai, and Benewah Counties, State of Idaho, which shall provide notice to all successors-in-title that the property is part of the Project Area, that EPA, the State and the Tribe selected a response action for the Project Area on October 13, 1999, and that Union Pacific has entered into a Consent Decree requiring implementation of the response action. Such notices shall identify the United States District Court in which the Consent Decree was filed, the names and civil action numbers of these cases, and the date the Consent Decree was entered by the Court. The Settling Defendant shall record the notices within ten (10) days of Plaintiffs' approval of the notices. The Settling Defendant shall provide Plaintiffs with a certified copy of the recorded notices within ten (10) days of recording such notices.

b. At least thirty (30) days prior to the conveyance of any interest in property located within the Project Area including, but not limited to, fee interests, leasehold interests, and

mortgage interests, the Settling Defendant conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Project Area (hereinafter referred to as “access easements”) pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as “restrictive easements”) pursuant to Section IX (Access and Institutional Controls). At least thirty (30) days prior to such conveyance, the Settling Defendant conveying the interest shall also give written notice to EPA, the State and the Tribe of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee. Notice shall not be required under this provision as a result of STB approval of the abandonment of the Wallace and Mullan Branches or issuance of a Certificate of Interim Trail Use for the ROW and subsequent transfer of any property interest to the State and Tribe.

c. In the event of any such conveyance, the Settling Defendant’s obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of the Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent of EPA, the State and the Tribe. If the United States, the State and the Tribe approve, the grantee may perform some or all of the Work under this Consent Decree.

31. Upon completion of the Work, Settling Defendant will transfer to the ROW Trail Owner(s) by means of quitclaim deed(s) all of its right, title and interest, if any, to the ROW except for certain encroachments which the Settling Defendant and the ROW Trail Owner(s) agree to exclude. The ROW conveyed will provide a continuous right-of-way between MP 16.5 at Plummer to at least MP 7.15 and no further than MP 7.6 at Mullan of sufficient width to accommodate future reactivation of rail service consistent with the provisions of 16 U.S.C. § 1247(d). The quitclaim deed(s) will be recorded by Settling Defendant in Shoshone, Kootenai or Benewah Counties, State of Idaho, as appropriate.

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANT

32. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work by Settling Defendant), VII (Response Action Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor. McCulley, Frick & Gilman, Inc. has been selected by Settling Defendant and approved by Plaintiffs as Supervising Contractor. If at any time hereafter, Settling Defendant proposes to change its Supervising Contractor, Settling Defendant shall give such notice to Plaintiffs and must obtain an authorization to proceed before the new Supervising Contractor performs, directs or supervises any Work under this Consent Decree.

b. If Plaintiffs disapprove a proposed Supervising Contractor, Plaintiffs will notify Settling Defendant in writing. Settling Defendant shall submit to Plaintiffs a list of contractors, including the qualifications of each contractor, that would be acceptable to it within thirty (30) days of receipt of Plaintiffs' disapproval of the contractor previously proposed.

Plaintiffs will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendant may select any contractor from that list that is not disapproved and shall notify Plaintiffs of the name of the contractor selected within twenty-one (21) days of Plaintiffs' authorization to proceed.

c. If Plaintiffs fail to provide written notice of authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendant from meeting one or more deadlines in a plan approved by Plaintiffs pursuant to this Consent Decree, Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

33. Modification of the SOW or Related Work Plans

a. If Plaintiffs determine that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the Response Action, Plaintiffs may require that such modification be incorporated in the SOW and/or such work plans. Provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the Scope of the Response Action.

b. For the purposes of this Paragraph 33 and Paragraphs 69 and 70 only, the "Scope of the Response Action" identified in the EE/CA and specified in the SOW is:

- (1) Removal and disposal of Mine Waste, including accumulations of mining concentrates, in the Project Area;
- (2) Salvage of track, ties and other track materials from the Project Area;
- (3) Repair of flood damage in the Project Area;

- (4) Removal of contaminated materials and debris, including railroad ties, from the Project Area;
- (5) Placement of asphalt barriers over the former mainline track area and other areas within the Project Area;
- (6) Placement of gravel and/or vegetated barriers over contamination left in place in residential areas, sidings, and other identified areas within the Project Area where people might otherwise come in contact with hazardous substances;
- (7) Placement of access controls within the Project Area;
- (8) Procurement and installation of trail amenities;
- (9) Procurement and installation of advisory and safety signs;
- (10) Modification and renovation of bridges along the Project Area sufficient to have the bridges in good operating condition for use as part of a recreational trail; and
- (11) Maintenance and repair of the protective barriers, access controls or any other items constructed as part of the Response Action to manage exposure and protect barriers prior to Certification of Completion of the Response Action as provided for in Paragraph 69.b.

c. If Settling Defendant objects to any modification determined by Plaintiffs to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XX (Dispute Resolution), Paragraphs 99, 102 and 105, as appropriate. The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendant shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

34. Settling Defendant acknowledges and agrees that nothing in this Consent Decree or the SOW constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW will achieve the Performance Standards. However, the Parties anticipate that compliance with the work requirements set forth in the SOW will achieve the Performance Standards.

35. Settling Defendant shall, prior to any shipment of Waste Material from the Project Area to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material.

a. The Settling Defendant shall include in the written notification, the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendant shall notify the state in which the planned receiving facility is located of major changes in the shipping plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Settling Defendant following the award of the contract for SOW implementation. The Settling

Defendant shall provide the information required by Paragraph 35.a. as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

VII. RESPONSE ACTION REVIEW

36. Periodic Review. Settling Defendant shall conduct any studies and investigations as requested by EPA, in order to permit EPA in Consultation with the State and the Tribe, to conduct reviews as set forth in the SOW of whether the Response Action is protective of human health and the environment at least every five (5) years as required for remedial actions by Section 121(c) of CERCLA and any applicable regulations.

37. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Response Action is not protective of human health and the environment, EPA, after Consultation with the State and the Tribe, may select further response actions for the Project Area in accordance with the requirements of CERCLA and the NCP.

38. Opportunity to Comment. Settling Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Paragraph 36 and to submit written comments for the record during the comment period.

39. Settling Defendant's Obligation to Perform Further Response Actions. If EPA selects further response actions for the Project Area, the Settling Defendant shall undertake such further response actions to the extent that the reopener conditions in Paragraphs 121-122 (Plaintiffs' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendant may invoke the procedures set forth in Section XX (Dispute Resolution) to dispute (1) Plaintiffs' determination that the reopener conditions of Paragraphs 121-122 of

Section XXII (Covenants Not to Sue by Plaintiffs) are satisfied, (2) EPA's determination that the Response Action is not protective of human health and the environment, or (3) EPA's selection of further response actions. Disputes pertaining to whether the Response Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 99.

40. Submissions of Plans. If Settling Defendant is required to perform the further response actions pursuant to Paragraph 39, it shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section XI (Approval of Plans and Other Submissions) and shall implement the plan approved by EPA in accordance with the provisions of this Consent Decree.

VIII. QUALITY ASSURANCE, SAMPLING AND DATA ANALYSIS

41. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with the SOW.

42. Upon request, the Settling Defendant shall allow split or duplicate samples to be taken by Plaintiffs or their authorized representatives. Settling Defendant shall notify Plaintiffs not less than fourteen (14) days in advance of any sample collection activity unless shorter notice is agreed to by the Governments' Project Coordinator. In addition, Plaintiffs shall have the right to take any additional samples that EPA, the State or the Tribe deem necessary. Upon request, Plaintiffs shall allow the Settling Defendant to take split or duplicate samples of any samples they take as part of the Plaintiffs' oversight of the Settling Defendant's implementation of the Work.

43. Settling Defendant shall submit to Plaintiffs copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendant with respect to the implementation of the Work unless Plaintiffs agree otherwise.

44. Notwithstanding any provision of this Consent Decree, Plaintiffs hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, applicable state and tribal law, and any other applicable statutes or regulations.

IX. ACCESS AND INSTITUTIONAL CONTROLS

45. If the Project Area, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree in accordance with the SOW, is owned or controlled by any Party, the Party shall:

a. commencing on the date of lodging of this Consent Decree, provide the Parties and their representatives, including their contractors, with access at all reasonable times to the Project Area, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- (1) Monitoring and performing the Work;
- (2) Verifying any data or information submitted to the United States, the State or the Tribe;
- (3) Conducting investigations relating to contamination at or near the Project Area;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Project Area;
- (6) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XXV (Access to Information); and

(7) Assessing Settling Defendant's compliance with this Consent Decree.

b. commencing on the date of lodging of this Consent Decree, refrain from using the Project Area, or such other property, in any manner that would interfere with or adversely affect the integrity or protectiveness of the Response Action to be implemented pursuant to the SOW and this Consent Decree.

46. If the Project Area, or any other property where access and/or land/water use restrictions are needed to implement the SOW, is owned or controlled by persons other than the Parties to this Decree, then Settling Defendant shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendant and Plaintiffs, as well as for their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 45.a. of this Consent Decree; and

b. an agreement, enforceable by the Settling Defendant and the United States to abide by the obligations and restrictions established by Paragraph 45.b. of this Consent Decree, or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the response action measures to be performed pursuant to this Consent Decree.

47. If any access or land/water use restriction agreements required by Paragraph 46 of this Consent Decree are not obtained within forty-five (45) days of the date of entry of this Consent Decree, Settling Defendant shall promptly notify the Plaintiffs in writing, and shall include in that notification a summary of the steps that Settling Defendant has taken to attempt to comply with Paragraph 46 of this Consent Decree. The Plaintiffs may, as they, individually or collectively, deem appropriate, assist Settling Defendant in obtaining access or land/water use

restrictions, either in the form of contractual agreements or in the form of easements running with the land. Settling Defendant shall reimburse the Plaintiffs in accordance with the procedures in Section XVI (Reimbursement of Response Costs), for costs incurred, direct or indirect, by the Plaintiffs in obtaining such access and/or land/water use restrictions, including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation, except as otherwise provided in Paragraph 88 of this Decree. Plaintiffs shall use best efforts to coordinate their efforts, if any, to obtain access.

48. If Plaintiffs determine that land/water use restrictions in the form of state, tribal, or local laws, regulations, ordinances or other governmental controls are needed to implement the Response Action, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with the Plaintiffs' efforts to secure such governmental controls.

49. Notwithstanding any provision of this Consent Decree, Plaintiffs retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

X. REPORTING REQUIREMENTS

50. In addition to any other requirement of this Consent Decree, Settling Defendant shall submit to Plaintiffs written reports as set forth in the SOW.

51. The Settling Defendant shall notify Plaintiffs of any proposed change in the schedule as set forth in the SOW for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven (7) days prior to the performance of the activity.

52. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), Settling Defendant shall within 24 hours of the onset of such event orally notify the Governments' Project Coordinator or, in the event of the unavailability of the Governments' Project Coordinator, the EPA Project Coordinator, or, in the event that neither the Governments' Project Coordinator nor EPA Project Coordinator is available, the Emergency Response Unit, Region 10, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

53. Within twenty (20) days of the onset of such an event, Settling Defendant shall furnish to Plaintiffs a written report, signed by the Settling Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendant shall submit a report setting forth all actions taken in response thereto.

54. Settling Defendant shall submit fourteen (14) copies of all plans, reports, and data required by the SOW to Plaintiffs.

55. All reports and other documents submitted by Settling Defendant to EPA, the State or the Tribe (other than periodic progress reports under the SOW) which purport to document Settling Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendant, who may be Settling Defendant's Project Coordinator.

XI. APPROVAL OF PLANS AND OTHER SUBMISSIONS

56. After review of any plan, report or other item which is required to be submitted for approval pursuant to the Consent Decree, Plaintiffs shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendant modify the submission; or (e) any combination of the above. However, Plaintiffs shall not modify a submission without first providing Settling Defendant at least one notice of deficiency and an opportunity to cure within fourteen (14) days except where to do so would cause serious disruption to the Work or where previous submissions have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

57. In the event of approval, approval upon conditions, or modification by Plaintiffs, pursuant to Paragraph 56(a),(b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by Plaintiffs subject only to its right to invoke the Dispute Resolution procedures set forth in Section XX (Dispute Resolution) with respect to the modifications or conditions made by Plaintiffs. In the event that Plaintiffs modify the submission to cure the deficiencies pursuant to Paragraph 56(c) and the submission has a material defect, Plaintiffs retain the right to seek stipulated penalties, as provided in Section XXI (Stipulated Penalties).

58. a. Upon receipt of a notice of disapproval pursuant to Paragraph 56(d), Settling Defendant shall, within fourteen (14) days or such longer time as specified by Plaintiffs in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXI, shall accrue

during the fourteen (14)-day period or otherwise specified period. Stipulated penalties shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 59 and 60.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 56(d), Settling Defendant shall proceed, at the direction of Plaintiffs, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendant of any liability for stipulated penalties under Section XXI (Stipulated Penalties) as to any deficient portion.

59. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by Plaintiffs, Plaintiffs may again require the Settling Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. Plaintiffs also retain the right to modify or develop the plan, report or other item to the extent such modification or development is consistent with the response action identified in the EE/CA, specified in the SOW and selected in the Action Memo. Settling Defendant shall implement any such plan, report, or item as modified or developed by Plaintiffs, subject only to its right to invoke the procedures set forth in Section XX (Dispute Resolution).

60. If upon resubmission, a plan, report, or item is disapproved or modified by Plaintiffs due to a material defect, Settling Defendant shall be deemed to have failed to submit such a plan, report, or item timely and adequately unless the Settling Defendant invokes the dispute resolution procedures set forth in Section XX (Dispute Resolution) and Plaintiffs' action is overturned pursuant to that Section. The provisions of Section XX (Dispute Resolution) and Section XXI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If Plaintiffs' disapproval or

modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXI.

61. All plans, reports, and other items required to be submitted to Plaintiffs under the Consent Decree shall, upon approval or modification by Plaintiffs, be enforceable under this Consent Decree. In the event Plaintiffs approve or modify a portion of the plan, report, or other item required to be submitted to Plaintiffs under the Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XII. PROJECT COORDINATORS

62. Within twenty (20) days of lodging this Consent Decree, Settling Defendant, the State, the Tribe and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendant's Project Coordinator shall be subject to disapproval by Plaintiffs and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendant's Project Coordinator shall not be an attorney for the Settling Defendant. He or she may assign other representatives, including other contractors, to serve as a Project Area representative for oversight of performance of daily operations during response activities.

63. Plaintiffs may designate other representatives, including, but not limited to, EPA, State and Tribal employees, and federal, State and Tribal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. The Governments' Project Coordinator shall have the authority lawfully vested in a Remedial Project

Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R., Part 300. In addition, the Governments' Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Project Area constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to the release or threatened release of Waste Material.

64. The Governments' Project Coordinator and the Settling Defendant's Project Coordinator will meet, at a minimum, on a monthly basis. This meeting may be held by telephone conference.

XIII. ASSURANCE OF ABILITY TO COMPLETE WORK

65. Within thirty (30) days of entry of this Consent Decree, Settling Defendant shall establish and maintain financial security in the amount of \$25,356,400 in one or more of the following forms:

- a. a surety bond guaranteeing performance of the Work;
- b. one or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. a trust fund;
- d. a guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Settling Defendant; or
- e. a demonstration that Settling Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f).

66. If the Settling Defendant seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 65.d. of this Consent Decree, Settling Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendant seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 65.d. or 65.e., it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. In the event that Plaintiffs determine at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendant shall, within thirty (30) days of receipt of notice of Plaintiffs' determination, obtain and present to Plaintiffs for approval one of the other forms of financial assurance listed in Paragraph 65 of this Consent Decree. Settling Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

67. If Settling Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 65 above after entry of this Consent Decree, Settling Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Settling Defendant shall submit a proposal for such reduction to Plaintiffs, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by Plaintiffs. In the event of a dispute, Settling Defendant may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

68. Settling Defendant may change the form of financial assurance provided under this Section at any time, upon notice to and approval by Plaintiffs, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

XIV. CERTIFICATION OF COMPLETION

69. Completion of the Response Action

a. Within ninety (90) days after Settling Defendant concludes that all of the Response Action has been fully performed, or a portion of the Response Action as set forth in Section 1.4.17 of the SOW has been fully performed, and the Performance Standards have been attained, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, the State and the Tribe. If, after the pre-certification inspection, the Settling Defendant still believes that all of the Response Action, or the portion of the Response Action for which certification has been requested as provided in Section 1.4.17 of the SOW, has been fully performed and the Performance Standards have been attained, it shall submit a written report requesting certification to Plaintiffs for approval pursuant to Section XI (Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer and the Settling Defendant's Project Coordinator shall state that all of the Response Action, or the portion thereof for which certification has been requested, has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or the Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, Plaintiffs determine that the Response Action, or the portion thereof for which certification has been requested, or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, Plaintiffs will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Response Action or the portion for which certification has been requested and achieve the Performance Standards. Provided, however, that Plaintiffs may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "Scope of the Response Action" as that term is defined in Paragraph 33.b. of this Decree. Plaintiffs will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to Plaintiffs for approval pursuant to Section XI (Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

b. If Plaintiffs conclude, based on the initial or any subsequent report requesting Certification of Completion, that the Response Action, or the portion thereof for which certification has been requested, has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, Plaintiffs will so certify in writing to Settling

Defendant. However, this certification shall constitute the Certification of Completion of the Response Action for purposes of this Consent Decree, including, but not limited to, Section XXII (Covenants Not to Sue by Plaintiffs) only when all portions of the Response Action have been certified by Plaintiffs. Certification of Completion of the Response Action shall not affect Settling Defendant's obligations under this Consent Decree.

70. Completion of the Work

a. Within ninety (90) days after Settling Defendant concludes that all phases of the Work (including M&R) have been fully performed, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, the State and the Tribe. If, after the pre-certification inspection, the Settling Defendant still believes that the Work has been fully performed, Settling Defendant shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or the Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, Plaintiffs determine that any portion of the Work has not been completed in accordance with this Consent Decree, Plaintiffs will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Work. Provided, however, that Plaintiffs may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities

are consistent with the "Scope of the Response Action" as that term is defined in Paragraph 33.b. of this Decree. Plaintiffs will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to Plaintiffs for approval pursuant to Section XI (Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedule established therein, subject to its right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

b. If Plaintiffs conclude, based on the initial or any subsequent request for Certification of Completion by Settling Defendant, that the Work has been performed in accordance with this Consent Decree, Plaintiffs will so notify the Settling Defendant in writing.

XV. EMERGENCY RESPONSE

71. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Project Area that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall, subject to Paragraph 72, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the Governments' Project Coordinator, or, if the Governments' Project Coordinator is unavailable, EPA's Project Coordinator. If neither of these persons is available, the Settling Defendant shall notify the EPA Emergency Response Unit, Region 10, at the 24-hour emergency response phone: 1-800-424-8802. Settling Defendant shall take such actions in consultation with the Governments' Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that

Settling Defendant fails to take appropriate response action as required by this Section, and EPA or, as appropriate, the State or Tribe, take such action instead, Settling Defendant shall reimburse EPA, the State and the Tribe all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response Costs).

72. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, the State, and the Tribe to a) take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Project Area, or b) direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Project Area, subject to Section XXII (Covenants Not to Sue by Plaintiffs).

XVI. REIMBURSEMENT OF RESPONSE COSTS AND PAYMENTS
IN SETTLEMENT OF NATURAL RESOURCE DAMAGES CLAIMS

73. Past Response Costs. Within thirty (30) days of the effective date of this Consent Decree, Settling Defendant shall:

a. Pay to the EPA Hazardous Substance Superfund \$301,509.59 in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number _____, the EPA Region and Site/Spill ID #103D, and DOJ case number 90-11-3-128L. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on

the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to the following:

Regional Financial Management Officer
U.S. EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

b. Pay to the United States Department of the Interior \$58,892.65 in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number _____, the DOI Account Number 14x5198 (NRDAR), Bunker Hill, Coeur d’Alene, Idaho, Union Pacific, and DOJ case number 90-11-3-128L. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney’s Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to the following:

Department of the Interior
National Business Center
Division of Financial Management Services
Branch of Accounting Operations (Mailstop 1313)
1849 C Street, N.W.
Washington, DC 20240

c. Pay to the Department of Agriculture \$13,914.12 in reimbursement of Past Response Costs, by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number _____, and DOJ case number 90-11-3-128-L. Payment

shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to the following:

Bill Putnam
Forest Service-U.S. Department of Agriculture
Northern Region
P.O. Box 7669
Missoula, MT 59807

d. Pay to the United States Treasury \$221,624.92 in reimbursement of Department of Justice Past Response Costs, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number _____, and DOJ case number 90-11-3-128L. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to the following:

Chief Environmental Enforcement Division
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Re: DJ #90-11-3-128L

e. Pay to the State \$259,000 in the form of a check or checks made payable to IDEQ, in reimbursement of State Past Response Costs and projected Future Response Costs through June 30, 2000. The Settling Defendant shall send the check(s) to:

IDEQ, Fiscal Office
1410 N. Hilton
Coeur d'Alene, ID 83706-1253

f. Union Pacific periodically has reimbursed the Tribe for Past Response Costs and on September 21, 1999 provided to the Tribe a check in the amount of \$276,487.00 to reimburse Past Response Costs incurred by the Tribe through August 1999 and projected Future Response Costs through December 31, 1999.

74. Future Response Costs.

a. Settling Defendant shall reimburse the EPA Hazardous Substance Superfund for all Future Response Costs not inconsistent with the National Contingency Plan, including such costs incurred by the Governments' Project Coordinator and its team for construction and long-term oversight. The United States will send Settling Defendant a bill requiring payment that includes a Superfund Cost Organization Recovery Enhancement System report on a periodic basis. Settling Defendant shall make all payments within forty-five (45) days of Settling Defendant's receipt of each bill requiring payment except as otherwise provided in Paragraph 75. The Settling Defendant shall make all payments required by this Paragraph in the form of a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Région and Site/Spill ID #103D, the DOJ case number 90-II-3-128L, and the name and address of the party making payment. The Settling Defendant shall send the check(s) to:

U.S. Environmental Protection Agency
EPA Hazardous Substance Superfund
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

and shall send copies of the check(s) to the United States as specified in Section XXVII (Notices and Submissions) and to:

Regional Financial Management Officer
U.S. EPA Region 10
1200 Sixth Avenue
Seattle, WA 98101

b. Settling Defendant shall pay the State for all State Future Response Costs not inconsistent with the National Contingency Plan, including such costs for construction and long-term oversight. Each year, no later than April 1, the State shall provide Settling Defendant a detailed written budget for the following budget year. No later than forty-five (45) days prior to the beginning of each budget year (July 1), except as otherwise provided in Paragraph 75, the Settling Defendant shall fund the first two quarters of the estimated budget. No later than forty-five (45) days after the end of each quarter, the State shall provide Settling Defendant with an accounting of actual response costs incurred in such quarter. Payments by Settling Defendant of the third and fourth quarter budget shall be made no later than forty-five (45) days prior to each such quarter, except as otherwise provided in Paragraph 75, and shall be reconciled against actual response costs incurred in the preceding quarters. Settling Defendant shall pay only those costs not inconsistent with the National Contingency Plan. Payments required by this Paragraph shall be made by check made payable to "Idaho Division of Environmental Quality" and/or the "Idaho Department of Parks and Recreation," as directed by the State, and shall reference this Consent Decree.

c. Settling Defendant shall reimburse the Tribe for all Tribal Future Response Costs not inconsistent with the National Contingency Plan, including such costs for construction and long-term oversight. Tribal Future Response Costs shall be adjusted for any shortfall or surplus funds provided for the September 1, 1999 through December 31, 1999 projection period referenced in Paragraph 73.f. above. The Tribe will send Settling Defendant a bill requiring payment that includes a Tribally-prepared cost summary, which includes direct and indirect costs incurred by the Tribe and its contractors on a periodic basis. Settling Defendant shall make all payments within forty-five (45) days of Settling Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 75. The Settling Defendant shall make all payments to the Tribe required by this Paragraph by check made payable to "Coeur d'Alene Tribe" and sent to:

Phillip J. Cerner, Project Manager
Natural Resource Damage Assessment
Coeur d'Alene Tribe
424 Sherman Avenue, Suite 306
Coeur d'Alene, ID 83814

and Settling Defendant shall indicate that the payment is for Response Costs and shall reference the Tribe's "NRD Case No. 91-0341" and this Consent Decree. Copies of check(s) sent pursuant to this Paragraph and any accompanying transmittal letter(s) shall be sent to the Tribe as provided in Section XXVII (Notices and Submissions).

d. The Parties acknowledge that in implementing this Decree, each Plaintiff intends to perform independent oversight of Settling Defendant's performance of the Work. In carrying out their oversight responsibilities under this Decree, the Plaintiffs will make good faith efforts to coordinate their oversight activities. By avoiding the unnecessary duplication of

oversight activities, the Plaintiffs intend to reduce the incurrence of Future Response Costs associated with such oversight activities.

75. Settling Defendant may contest payment of any Future Response Costs under Paragraph 74 if it determines that the United States, the State or the Tribe has made an accounting error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within forty-five (45) days of receipt of the bill or budget and must be sent to the United States (if the United States' accounting is being disputed), the State (if the State's accounting is being disputed), or the Tribe (if the Tribe's accounting is being disputed) pursuant to Section XXVII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendant shall within the forty-five (45)-day period pay all uncontested Future Response Costs to the United States, the State or the Tribe in the manner described in Paragraph 74. Simultaneously, the Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Idaho and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendant shall send to the United States, the State and the Tribe, as provided in Section XXVII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendant shall initiate the Dispute Resolution procedures in Section XX (Dispute Resolution). If the United States, the

State or the Tribe prevails in the dispute, within five (5) days of the resolution of the dispute, the Settling Defendant shall pay the sums due (with accrued interest) to the United States, the State or the Tribe (depending on which entity's costs are disputed) in the manner described in Paragraph 74. If the Settling Defendant prevails concerning any aspect of the contested costs, the Settling Defendant shall pay that portion of the costs (plus associated accrued interest) for which it did not prevail to the United States, the State or the Tribe (depending on which entity's costs are disputed) in the manner described in Paragraph 74; Settling Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendant's obligation to reimburse the United States, the State and the Tribe for their Future Response Costs.

76. In the event that the payments required by Paragraph 73 are not made within thirty (30) days of the effective date of this Consent Decree or the payments required by Paragraph 74 are not made within forty-five (45) days of the Settling Defendant's receipt of the bill, Settling Defendant shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue thirty (30) days after the effective date of this Consent Decree. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendant's failure to make timely payments under this Section. The Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 74.

77. In accordance with the UP-Tribe Consent Decree, Settling Defendant will pay the sum of \$2,000,000 in settlement of claims for Natural Resource Damages in the Coeur d'Alene Basin Environment into an Escrow Account (established pursuant to the Escrow Agreement attached as Appendix E) within fourteen days of entry of the UP-Tribe Consent Decree. This \$2,000,000 amount in the Escrow Account shall be paid to the Natural Resource Trustees in settlement of their claims against Settling Defendant for Natural Resource Damages within the Coeur d'Alene Basin Environment. The escrow agent shall make payments from the Escrow Account in accordance with the following instructions below in this Paragraph.

a. Within thirty (30) days of the effective date of this Consent Decree the escrow agent shall pay to the Department of the Interior \$1,000,000, plus the interest accrued on that amount, in reimbursement of the Department's costs of assessing injury to, destruction of, or loss of natural resources in the Coeur d'Alene Basin Environment, by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number _____, the DOI Account Number 14x5198 (NRDAR), Bunker Hill, Coeur d'Alene, Idaho, Union Pacific, and DOJ case number 90-11-3-128L. Payment shall be made in accordance with instructions provided to the Settling Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Settling Defendant shall send notice that such payment has been made to the United States as specified in Section XXVII (Notices and Submissions) and to the following:

Department of the Interior
National Business Center
Division of Financial Management Services
Branch of Accounting Operations (Mailstop 1313)

1849 C Street, N.W.
Washington, DC 20240

b. Within thirty (30) days of the effective date of the Consent Decree the escrow agent shall pay the remaining \$1,000,000, and any interest accrued on that amount (the Settling Defendant's restoration payment), from the Escrow Account into the Registry of the Court in accordance with an Order directing the deposit of Natural Resource Damages into the Registry of the Court to be filed by Plaintiffs for approval by the Court upon entry of the Consent Decree. The Settling Defendant's restoration payment and any interest accrued thereon shall be used to restore, replace, or acquire the equivalent of natural resources injured, destroyed, or lost as a result of releases of hazardous substances in the Coeur d'Alene Basin Environment. If, within two years after the lodging of this Consent Decree, a settlement or judgment is entered by the court in U.S. v. ASARCO Inc., et al., Case No. CV 96-0122-N-EJL, and Coeur d'Alene Tribe v. ASARCO Inc., et al., Case No. CV 91-342-N-EJL, that provides a recovery for natural resource damages, Plaintiffs intend to combine the Settling Defendant's restoration payment with such additional recovery(ies) and to expend them in accordance with a plan to restore, replace, or acquire the equivalent of the injured natural resources. If no settlement or judgment providing for natural resource damage recoveries is entered within two years of the lodging of this Consent Decree in the two suits listed above, the \$1,000,000 deposited in the Court Registry Account, plus any interest that has accrued, shall be used as directed jointly by the plaintiffs in those two suits, the United States and the Coeur d'Alene Tribe, to restore, replace, or acquire the equivalent of natural resources injured, destroyed, or lost as a result of releases of hazardous substances in the Coeur d'Alene Basin Environment

78. Within ninety (90) days after entry of this Consent Decree, Settling Defendant will pay \$2,600,000.00 into an escrow account for the benefit of the ROW Trail Owner(s). The ROW

Trail Owner(s) shall use such sum and any interest or investment proceeds therefrom to perform or fund Operation and Maintenance-Trail as provided in the State/Tribe Agreement. The ROW Trail Owner(s) jointly shall provide escrow and payment instructions.

79. Within ninety (90) days after entry of this Consent Decree, Settling Defendant will pay \$30,000 into an escrow account for the benefit of the ROW Trail Owner(s), which sum and any interest or investment proceeds therefrom is to be used by the ROW Trail Owner(s) for privacy screening as the ROW Trail Owner(s) may determine. The ROW Trail Owner(s) jointly shall provide escrow and payment instructions.

80. Within ninety (90) days after entry of this Consent Decree, Settling Defendant will pay \$100,000 into an escrow account for the benefit of the ROW Trail Owner(s), which sum and any interest or investment proceeds therefrom is to be used by the ROW Trail Owner(s) for upgrade of existing community facilities that will serve as amenities for trail users or other trail uses as the ROW Trail Owner(s) may determine. The ROW Trail Owner(s) jointly shall provide escrow and payment instructions.

81. After entry of this Consent Decree and within thirty (30) days of receiving joint payment instructions from Plaintiffs, Settling Defendant shall pay \$35,000, according to Plaintiffs' payment instructions, for use in funding educational activities as a component of the Response Action. Such funds will be used by Plaintiffs for (a) holding public meetings prior to trail opening; (b) printing brochures for recreational trail users; and (c) publishing a training manual for trail maintenance workers. These educational activities, to be performed by Plaintiffs, are in addition to other educational activities to be performed by Settling Defendant as described in the SOW.

82. On the fifth anniversary of the entry of this Consent Decree, Union Pacific may present to the Governments a proposal under which Union Pacific would be released from all

obligations to perform or fund future Maintenance and Repair in return for payment of an agreed-upon amount to the State and Tribe. If the Parties are unable to reach an agreement to release Union Pacific from all future Maintenance and Repair obligations at that time, Union Pacific may continue to make proposals for release of future Maintenance and Repair obligations every five years thereafter or as otherwise mutually agreed by the Parties.

83. Settling Defendant will provide for appropriate livestock fencing (typical 3-strand barbed wire) to established farmers and ranchers located adjacent to the ROW only in those locations meeting the following criteria: 1) the established use of the adjacent property is commercial livestock grazing; 2) the right of way is accessible to livestock; and 3) there are no existing barricades to livestock such as surface water, current fencing or other natural barricades. Settling Defendant and the ROW Trail Owner(s) shall have no obligation to maintain such fences. Such agricultural fencing shall only be provided upon written request of a person for a location meeting the criteria of this paragraph.

84. At the Tribe's discretion, Union Pacific shall either repair the existing Chatcolet Bridge swingspan or remove such swingspan and replace it with a fixed span bridge in accordance with section 2.6.3.3.f of the SOW. The Tribe shall advise Union Pacific within thirty (30) days of the effective date of this Consent Decree which of these two alternatives it prefers. In the event that the Tribe prefers the fixed span alternative, Union Pacific agrees to implement that alternative in accordance with the SOW, consistent with any requirements imposed by the STB in connection with the abandonment proceeding, STB Docket No. AB-33 (Sub - No. 70).

85. Settling Defendant will reimburse the Tribe for costs the Tribe incurs for operation and maintenance of the Chatcolet Bridge in an amount up to \$25,000 per year (with no carry over from prior years) for a period of ten (10) years beginning with the year the Tribe assumes

ownership as a ROW Trail Owner of the portion of the ROW Trail including the Chatcolet Bridge. In the event that reimbursable costs in any one year are less than \$25,000, then the amount of reimbursement paid shall be the amount of the actual costs.

XVII. INDEMNIFICATION AND INSURANCE

86. a. Plaintiffs do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless Plaintiffs and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action to the extent such claims arise from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, the Settling Defendant agrees to pay the Plaintiffs costs they incur including, but not limited to, attorneys' fees and other expenses of litigation and settlement to the extent such costs arise from, or on account, of claims made against the United States, the State or the Tribe based on negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. No Party shall be held out as a party to any contract entered into by or on behalf of any other Party in carrying out activities pursuant to this Consent Decree. No Party or any of its contractors shall be considered an agent of any other Party to this Consent Decree.

b. The Plaintiffs shall give Settling Defendant notice of any claim for which the United States, the State or the Tribe plans to seek indemnification pursuant to Paragraph 86.a, and shall consult with Settling Defendant prior to settling such claim.

87. Settling Defendant waives all claims against the United States, the State and the Tribe for damages or reimbursement or for set-off of any payments made or to be made to the United States, the State or the Tribe arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Project Area, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant shall indemnify and hold harmless the United States, the State and the Tribe with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Project Area, including, but not limited to, claims on account of construction delays.

88. a. Settling Defendant agrees to indemnify, save and hold harmless the United States, the State and the Tribe for or from any and all claims or causes of actions asserting that the issuance of a Certificate of Interim Trail Use by the STB or the conversion of Settling Defendant's property to a recreational use constitutes a compensable taking of a property interest. Further, the Settling Defendant agrees to pay the United States, the State and the Tribe the costs they incur including, but not limited to, reasonable attorneys' fees and other expenses of litigation and settlement arising from, or on account of, such claims or causes of action.

b. Within fifteen (15) business days after receipt by one or more of the United States, the State or the Tribe of notice of the commencement of, or the threat of commencement of, litigation concerning any such claim or cause of action, the United States, the State or the

Tribe, as appropriate, shall transmit to Settling Defendant a written description of the claim or cause of action and copies of all pleadings and other information relating to the claim or cause of action in its possession. During the course of any such litigation, the United States, the State or the Tribe, as appropriate, shall provide Settling Defendant with copies of all documents filed with the court or served upon or by the parties to that litigation. The United States, the State or the Tribe, as appropriate, shall also support any motion to intervene filed by Settling Defendant in any such litigation. Failure to notify Settling Defendant consistent with this Paragraph 88 does not operate to negate Settling Defendant's obligations as specified in this Paragraph 88 without a showing of actual prejudice to Settling Defendant from the failure to provide such notice.

c. The United States, the State, and the Tribe shall consult with Settling Defendant in the defense of such claim or cause of action or prior to settling such claim or cause of action. Nothing in the preceding sentence shall be construed to require any Party to jeopardize any privilege claim through such consultation.

89. No later than fifteen (15) days before commencing any Work on the Project Area, Settling Defendant's contractors shall secure, and shall maintain until the first anniversary of Plaintiffs' Certification of Completion of the Response Action pursuant to Paragraph 69.b. of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of two million dollars, combined single limit, and automobile liability insurance with limits of two million dollars, combined single limit, naming the United States, the State and the Tribe as additional insureds. In addition, for the duration of this Consent Decree, Settling Defendant shall require that its contractors or subcontractors satisfy all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing Work on behalf of Settling Defendant in furtherance of this Consent Decree. Prior to commencement of Work on

the Project Area under this Consent Decree, Settling Defendant's contractors shall provide to EPA, the State and the Tribe certificates of such insurance and a copy of each insurance policy. Prior to the issuance of the Certificate of Completion of the Response Action, Settling Defendant's contractors shall resubmit such certificates and copies of policies each year on the anniversary of the effective date of this Consent Decree. Settling Defendant is self-insured and shall continue to self-insure for at least \$10 million for general liability until issuance of the Certificate of Completion of the Response Action. Prior to the issuance of the Certificate of Completion of the Response Action, Settling Defendant will provide to EPA, the State and the Tribe appropriate documentation of its self-insured status each year on the anniversary of the effective date of this Consent Decree.

XVIII. FORCE MAJEURE

90. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendant, of any entity controlled by Settling Defendant, or of Settling Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendant's best efforts to fulfill the obligation. The requirement that the Settling Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any potential Force Majeure event (1) as it is occurring and (2) following the potential Force Majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

91. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, the

Settling Defendant shall notify orally the Governments' Project Coordinator or, in his or her absence, the EPA Project Coordinator within forty-eight (48) hours of when Settling Defendant first knew that the event might cause a delay. Within five (5) days thereafter, Settling Defendant shall provide in writing to EPA, the State and the Tribe an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendant's rationale for attributing such delay to a Force Majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a Force Majeure event. Failure to comply with the above requirements shall preclude Settling Defendant from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors knew or should have known.

92. If EPA, after a reasonable opportunity for review and comment by the State and the Tribe, agrees that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State and the Tribe, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable

opportunity for review and comment by the State and the Tribe, does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, EPA will notify the Settling Defendant in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State and the Tribe, agrees that the delay is attributable to a Force Majeure event, EPA will notify the Settling Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

93. If the Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution), it shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 90 and 91, above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XIX. PLAINTIFFS' DECISION-MAKING PROCESS

94. Plaintiffs shall, whenever possible, make decisions by consensus at the Project Coordinator level.

95. Informal Dispute Resolution Between or Among Plaintiffs. In the event a consensus decision cannot be reached by the Plaintiffs' Project Coordinators, a meeting or telephone conference shall be scheduled and held within five (5) days among the Project Coordinators and their immediate supervisors involved in the dispute to reach a consensus

decision. If consensus cannot be reached by the Project Coordinators and their immediate supervisors, the dispute shall be immediately elevated to the EPA Region 10 Director of the Office of Environmental Cleanup, the IDEQ Waste Program Administrator, and the Tribe Natural Resource Director (to the extent that each Plaintiff is involved in the dispute at issue) and a meeting or telephone conference shall be scheduled and held within five (5) days among whomever of these persons have agencies involved in the dispute in an attempt to resolve the dispute through informal dispute resolution. If no consensus can be reached through such informal dispute resolution, the decision of the Plaintiffs applicable to the Settling Defendant shall be as follows:

a. The EPA Region 10 Director of the Office of Environmental Cleanup shall make the final decision where such decision concerns elements of the Response Action identified in the EE/CA, such as, for example, the "Removal, Disposal, and Protective Barriers Element of the Work" in the SOW, or the "Flood Damage Repair Element of the Work" in the SOW to the extent that the Work at issue involves repair of a protective barrier over hazardous substances or otherwise involves a response to a release or threatened release of hazardous substances. The EPA Region 10 Director of the Office of Environmental Cleanup shall also make the final decision where the Plaintiffs disagree regarding the selection of the Project Coordinator pursuant to Paragraph 62 or matters under Section XIII (Assurance of Ability to Complete Work). However, where the position of the Tribe is more protective of human health and the environment with respect to the portion of the ROW which the Tribe will own and operate, the EPA Region 10 Office of Environmental Cleanup Director's decision shall incorporate the Tribe's position. Where the position of the State is more protective of human health and the environment with

respect to the portion of the ROW which the State will own and operate, the EPA Region 10 Office of Environmental Cleanup Director's decision shall incorporate the State's position.

b. The IDEQ Waste Program Administrator shall make the final decision where such decision concerns an Element of the Work within the portion of the ROW which the State will own and operate and which does not directly concern protection of human health and the environment, such as, for example, the "Trail Element of the Work" or the "Flood Damage Repair Element of the Work" in the SOW to the extent that the Work at issue does not involve repair of a protective barrier over hazardous substances or otherwise involves a response to a release or threatened release of hazardous substances. The IDEQ Waste Program Administrator's decision shall be subject to dispute resolution under Section XX (Dispute Resolution), Paragraph 101.

c. The Tribe Natural Resource Director shall make the final decision where such decision concerns an Element of the Work within the portion of the ROW which the Tribe will own and operate and which does not directly concern protection of human health and the environment, such as, for example, the "Trail Element of the Work" or the "Flood Damage Repair Element of the Work" in the SOW to the extent that the Work at issue does not involve repair of a protective barrier over hazardous substances or otherwise involves a response to a release or threatened release of hazardous substances. The Tribe Natural Resource Director's decision shall be subject to dispute resolution under Section XX (Dispute Resolution), Paragraph 104.

d. In the event that the Plaintiffs involved in the dispute cannot agree whether a dispute directly concerns protection of human health and the environment and the EPA Region 10 Director of the Office of Environmental Cleanup believes that the dispute does involve such a concern, the decision regarding such dispute shall be made by the EPA Region 10 Office of

Environmental Cleanup Director according to Paragraph 95.a. above. The EPA Region 10 Office of Environmental Cleanup Director's decision may be submitted to formal dispute resolution pursuant to Section XX (Dispute Resolution) of this Consent Decree.

e. After Plaintiffs have reached a decision according to the process set forth in this Section, Plaintiffs shall immediately inform Settling Defendant of the decision. Settling Defendant's right to dispute such a decision shall be governed by the provisions of Section XX (Dispute Resolution).

XX. DISPUTE RESOLUTION

96. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the Plaintiffs to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section. Notwithstanding the provisions of Paragraphs 98-99, disputes solely concerning the State or Tribe, including payment of Future Response Costs to the State or Tribe or disputes as to which the State or Tribe has final decision-making authority pursuant to Paragraph 95 of Section XIX (Plaintiff's Decision-Making Process), shall follow the provisions set forth in Paragraphs 101-103 (State Formal Dispute Resolution) or 104-106 (Tribe Formal Dispute Resolution) below.

97. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. Disputes between or among Plaintiffs shall in the first instance be the subject of informal dispute resolution pursuant to Section XIX (Plaintiffs' Decision-Making Process). The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is

modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

98. Formal Dispute Resolution.

a. The following procedures shall govern all disputes except those for which the State is primary decisionmaker as described in Paragraphs 101-103, or those for which the Tribe is the primary decisionmaker as described in Paragraphs 104-106. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within ten (10) days after the conclusion of the informal negotiation period, a disputing Party invokes the formal dispute resolution procedures of this Section by serving on the United States and the remaining Parties a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the disputing Party. The Statement of Position shall specify the disputing Party's position as to whether formal dispute resolution should proceed under Paragraph 99 or Paragraph 100.

b. Within fourteen (14) days after receipt of the disputing Party's Statement of Position, EPA will serve on the disputing Party and the remaining Parties its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 99 or 100. Within fourteen (14) days after receipt of EPA's Statement of Position, the disputing Party may submit a Supplemental Statement of Position in reply. Within fourteen (14) days of receipt of the disputing Party's Supplemental Statement of Position, EPA may submit a

Supplemental Statement of Position. Any Supplemental Statements of Position shall be served on all Parties.

c. If there is disagreement between EPA and the disputing Party as to whether dispute resolution should proceed under Paragraph 99 or 100, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the disputing Party ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 99 and 100.

99. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by Plaintiffs under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the EE/CA's, Action Memorandum's and the SOW's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of Environmental Cleanup Office (ECL), EPA Region 10, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 99.a. This decision shall be binding upon the disputing Party, subject only to the right to seek judicial review pursuant to Paragraph 99.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 99.b. shall be reviewable by this Court, provided that a motion for judicial review from the decision is filed by the disputing Party with the Court and served on all Parties within ten (10) days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States or any other Party may file a response to the disputing Party's motion.

d. In proceedings on any dispute governed by this Paragraph, the disputing Party shall have the burden of demonstrating that the decision of the ECL Director is arbitrary and capricious or otherwise not in accordance with the law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 99.a.

100. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of the final Supplemental Statement of Position submitted pursuant to Paragraph 98.b., the ECL Director, EPA Region 10, will issue a final decision resolving the dispute. The ECL Director's decision shall be binding on the disputing Party unless, within ten (10) days of receipt of the decision, the disputing Party files with the Court and serves on all of the Parties a motion for judicial review of the decision setting forth the

matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States or any other Party may file a response to the disputing Party's motion.

b. Notwithstanding Paragraph 19 of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

101. State Formal Dispute Resolution.

a. The following procedures shall govern any dispute solely concerning the State and the Settling Defendant, or any dispute for which the IDEQ Waste Program Administrator shall make the final decision under Paragraph 95.b. of Section XIX (Plaintiffs' Decision-Making Process). In the event that the State and the Settling Defendant cannot resolve a dispute by informal negotiations under Paragraph 97, the position advanced by the State shall be considered binding unless, within ten (10) days after the conclusion of the informal period, the Settling Defendant invokes formal dispute resolution procedures by serving on the State, with copies to the Tribe and the United States, a written Statement of Position on the matters in dispute, including but not limited to, any factual data, analysis or opinions supporting that position and any supporting documentation relied upon by the Settling Defendant. The Statement of Position shall specify the Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 102 or Paragraph 103.

b. Within fourteen (14) days after receipt of the Settling Defendant's Statement of Position, the State will serve on the Settling Defendant, with copies to the Tribe and the United States, its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the

State. The State's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 102 or 103. Within fourteen (14) days after receipt of the State's Statement of Position, Settling Defendant may submit a Supplemental Statement of Position in reply. Within fourteen (14) days of receipt of the Settling Defendant's Supplemental Statement of Position, the State may submit a Supplemental Statement of Position. The United States and the Tribe may submit statements of position, with copies to the Settling Defendant, and within fourteen (14) days after receipt of any such statements the Settling Defendant and the State may submit replies.

c. If there is disagreement between the State and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 102 or 103, the parties to the dispute shall follow the procedures set forth in the paragraph determined by the State to be applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability as set forth in Paragraphs 102 and 103.

102. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by Plaintiffs under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling

Defendant regarding the validity of the EE/CA's, Action Memorandum's and the SOW's provisions.

a. An administrative record of the dispute shall be maintained by the State and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the State may allow submission of supplemental statements of position by the parties to the dispute.

b. The IDEQ Waste Program Administrator will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 102.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 102.c. and d.

c. Any administrative decision made by the State pursuant to Paragraph 102.b. shall be reviewable by this Court, provided that a motion for judicial review from the decision is filed by the Settling Defendant with the Court and served on all Parties within ten (10) days of receipt of the State's decision. The motion shall include a description of the matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The State may file a response to Settling Defendant's motion. The United States and the Tribe may seek to intervene.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the IDEQ Waste Program Administrator is arbitrary and capricious or otherwise not in accordance with the law. Judicial review of the State's decision shall be on the administrative record compiled pursuant to Paragraph 102.a.

103. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of the final Supplemental Statement of Position submitted pursuant to Paragraph 101.b., the IDEQ Waste Program Administrator will issue a final decision resolving the dispute. The IDEQ Waste Program Administrator's decision shall be binding on the Settling Defendant unless, within ten (10) days of receipt of the decision, the Settling Defendant files with the Court and serves on all Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The State may file a response to Settling Defendant's motion. The United States and the Tribe may seek to intervene.

b. Notwithstanding Paragraph 19 of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

104. Tribe Formal Dispute Resolution.

a. The following procedures shall govern any dispute solely concerning the Tribe and Settling Defendant, or any dispute for which the Tribe's Natural Resource Director shall make the final decision under Paragraph 95.c. of Section XIX (Plaintiffs' Decision-Making Process). In the event that the Tribe and the Settling Defendant cannot resolve a dispute by informal negotiations under Paragraph 97, the position advanced by the Tribe shall be considered binding unless, within ten (10) days after the conclusion of the informal period, the Settling Defendant invokes formal dispute resolution procedures by serving on the Tribe, with copies to

the State and the United States, a written Statement of Position on the matters in dispute, including but not limited to, any factual data, analysis or opinions supporting that position and any supporting documentation relied upon by the Settling Defendant. The Statement of Position shall specify the Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 105 or Paragraph 106.

b. Within fourteen (14) days after receipt of the Settling Defendant's Statement of Position, the Tribe will serve on the Settling Defendant, with copies to the State and the United States, its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Tribe. The Tribe's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 105 or 106. Within fourteen (14) days after receipt of the Tribe's Statement of Position, Settling Defendant may submit a Supplemental Statement of Position in reply. Within fourteen (14) days of receipt of the Settling Defendant's Supplemental Statement of Position, the Tribe may submit a Supplemental Statement of Position. The United States and the State may submit statements of position, with copies to the Settling Defendant, and within fourteen (14) days after receipt of any such statements the Settling Defendant and the Tribe may submit replies.

c. If there is a disagreement between the Tribe and the Settling Defendant as to whether dispute resolution should proceed under Paragraph 105 or 106, the parties to the dispute shall follow the procedures set forth in the paragraph determined by the Tribe to be applicable. However, if the Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 105 and 106.

105. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and for all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by the Plaintiffs under this Consent Decree; and (2) the adequacy of the performance of the response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendant regarding the validity of the EE/CA's, Action Memorandum's and the SOW's provisions.

a. An administrative record of the dispute shall be maintained by the Tribe and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the Tribe may allow submission of supplemental statements of position by the parties in the dispute.

b. The Tribe's Natural Resource Director will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 105.a. This decision shall be binding upon the Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraph 105.c. and d.

c. Any administrative decision made by the Tribe pursuant to Paragraph 105.b. shall be reviewable by this Court, provided that a motion for judicial review from the decision is filed by the Settling Defendant with the Court and served on all Parties within ten (10) days of receipt of the Tribe's decision. The motion shall include a description of the matter in dispute, the efforts made to resolve it, the relief requested, and the schedule, if any,

within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Tribe may file a response to Settling Defendant's motion. The United States and the State may seek to intervene.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Tribe's Natural Resource Director is arbitrary and capricious or otherwise not in accordance with the law. Judicial review of the Tribe's decision shall be on the administrative record compiled pursuant to Paragraph 105.a.

106. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of the final Supplemental Statement of Position submitted pursuant to Paragraph 104.b., the Tribe's Natural Resource Director will issue a final decision resolving the dispute. The Tribe's Director's decision shall be binding on the Settling Defendant unless, within ten (10) days of receipt of the decision, the Settling Defendant files with the Court and serves on all Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The Tribe may file a response to Settling Defendant's motion. The United States and the State may seek to intervene.

b. Notwithstanding Paragraph 19 of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

107. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendant under this Consent Decree not directly in dispute, unless EPA, the State, or Tribe, as the case may be, or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 116. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXI (Stipulated Penalties).

XXI. STIPULATED PENALTIES

108. Settling Defendant shall be liable for stipulated penalties to the United States, the State and the Tribe in the aggregate amounts set forth in Paragraphs 109.a. and 110 for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). In the event it is liable for a stipulated penalty, Settling Defendant will pay one-third of the aggregate amount of the stipulated penalty to each of the United States, the State and the Tribe. "Compliance" by Settling Defendant shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by Plaintiffs pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

109. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$5,000	15th through 30th day
\$10,000	31st day and beyond

b. Activities/Deliverables.

Submission of deliverables in compliance with Section 4 of the SOW.

Initiation of construction activities in compliance with Section 4 the SOW.

Completion of any element of the Response Action as further described in Section 4 of the SOW.

110. For all other requirements of this Consent Decree, stipulated penalties shall accrue for each violation in the following amounts:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$5,000	31st day and beyond

111. In the event that any Plaintiff assumes performance of a portion or all of the Work pursuant to Paragraph 126 of Section XXII (Covenants Not to Sue by Plaintiffs), Settling Defendant shall be liable for a stipulated penalty in the amount of three (3) times the cost incurred by such Plaintiff to perform that portion of the Work or \$500,000, whichever is less. This penalty shall be in addition to any applicable daily penalties under Paragraphs 109 and 110 that accrue until the time that such Plaintiff assumes performance of a portion or all of the Work. Such daily penalties shall not continue to accrue after such Plaintiff assumes performance of a portion or all of the Work.

112. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (Approval of Plans and Other Submissions), during the period, if any, beginning on the thirty-first (31st) day after Plaintiffs' receipt of such submission until the date that Plaintiffs notify Settling Defendant of any deficiency; (2) with respect to a decision by the applicable Plaintiff decisionmaker under Section XX (Dispute Resolution), during the period, if any, beginning on the twenty-first (21st) day after the date that the final Supplemental Statement of Position is submitted pursuant to Paragraph 98.b., 101.b. or 104.b., as applicable, until the date that the applicable Plaintiff decisionmaker issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XX (Dispute Resolution), during the period, if any, beginning on the thirty-first (31st) day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

113. Following Plaintiffs' determination that Settling Defendant has failed to comply with a requirement of this Consent Decree, Plaintiffs may give Settling Defendant written notification of the same and describe the noncompliance. EPA, the State and the Tribe may send the Settling Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA, the State or the Tribe has notified the Settling Defendant of a violation.

114. All penalties accruing under this Section shall be due and payable to the United States, the State and the Tribe within thirty (30) days of the Settling Defendant's receipt from

Plaintiffs of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

U.S. Environmental Protection Agency
EPA Hazardous Substance Superfund
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #103D, the DOJ Case Number 90-11-3-128L, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVII (Notices and Submissions), and to:

Regional Financial Management Officer
U.S. EPA Region 10
1200 Sixth Avenue
Seattle, Washington 98101

All payments to the State under this Section shall be paid by check made payable to Idaho Division of Environmental Quality, shall be mailed to:

IDEQ, Fiscal Office
1410 N. Hilton
Coeur d'Alene, ID 83706-1253

and shall indicate that the payment is for stipulated penalties and shall reference this Consent Decree. All payments to the Tribe under this section shall be paid by check made payable to the "Coeur d'Alene Tribe," shall be mailed to:

Phillip J. Cernera, Project Manager
Natural Resource Damage Assessment
Coeur d'Alene Tribe
424 Sherman Avenue, Suite 306
Coeur d'Alene, ID 83814

and shall indicate that the payment is for stipulated penalties and reference the Tribe's "NRD Case No. 91-0342" and this Consent Decree. Copies of check(s) sent pursuant to this Section and any accompanying transmittal letter(s) shall be sent to the Tribe as provided in Section XXVII (Notices and Submissions).

115. The payment of penalties shall not alter in any way Settling Defendant's obligation to complete the performance of the Work required under this Consent Decree.

116. Penalties shall continue to accrue as provided in Paragraph 112 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA, the State or the Tribe that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA, the State and the Tribe within fifteen (15) days of the agreement or the receipt of EPA's, the State's or the Tribe's decision or order;

b. If the dispute is appealed to this Court and the United States, the State or the Tribe prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA, the State and the Tribe within sixty (60) days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States, the State and the Tribe into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue,

at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA, the State and the Tribe or to Settling Defendant to the extent that it prevails.

117. a. If Settling Defendant fails to pay stipulated penalties when due, the United States, the State or the Tribe may institute proceedings to collect the penalties, as well as interest. Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 114 at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States, the State or the Tribe to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA. Provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

118. Notwithstanding any other provision of this Section, the United States, the State and/or the Tribe may, in their sole, unreviewable discretion, waive any portion of the stipulated penalties owed to them that have accrued pursuant to this Consent Decree.

XXII. COVENANTS NOT TO SUE BY PLAINTIFFS

119. Covenants Not to Sue for Response Actions and Costs. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 121, 122 and 125 of this Section, the United States covenants not to sue or to take administrative action against

Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), Section 311 of the Clean Water Act, 33 U.S.C. § 1321, or Section 7003 of RCRA, 42 U.S.C. § 6973, for the recovery of response or removal costs or the performance of response or removal actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Project Area. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 121, 122 and 125 of this Section, the State covenants not to sue or to take action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the Hazardous Waste Management Act (HWMA), Idaho Code Section 39-4401, et seq., the Environmental Protection and Health Act (EPHA), Idaho Code Section 39-101, et seq., or any other applicable statutory or common law provision to recover costs or damages or the performance of actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Project Area. In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 121, 122 and 125 of this Section, the Tribe covenants not to sue or take action against Settling Defendant pursuant to Sections 106 and 107 of CERCLA or any other applicable statutory, tribal law or common law provision for the recovery of costs or damages or the performance of actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Project Area. Except with respect to future liability, these covenants not to sue shall take effect upon receipt by Plaintiffs of the payments required by Paragraph 73 of this Decree (Reimbursement of Past Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of the

Response Action pursuant to Paragraph 69.b. of Section XIV (Certificate of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant, and, with respect to liability derived from Settling Defendant, to its successors and assigns, and do not extend to any other person.

120. Covenant Not to Sue for Natural Resource Damages.

a. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendant under the terms of this Consent Decree, the United States, the State and the Tribe covenant not to sue or to take administrative action against Settling Defendant, pursuant to CERCLA, the Clean Water Act, the Oil Pollution Act, the Idaho Hazardous Waste Management Act, the Idaho Environmental Protection and Health Act, or any other federal, state, Tribal, or common law, for any relief recoverable under such authorities for injury to, destruction of or loss of Natural Resources including without limitation assessment costs and any and all damages for the restoration, replacement, or acquisition of the equivalent of injured or destroyed or lost Natural Resources and Natural Resource Damages resulting from the presence, release or threatened release of Waste Materials within, at, in, from, on, or under the Coeur d'Alene Basin Environment;

b. The covenants not to sue in Paragraph 120.a. shall take effect upon the receipt by the Natural Resource Trustees of the payments required by Paragraphs 77 and 78 of Section XVI (Reimbursement of Response Costs and Payments in Settlement of Natural Resource Damages Claims). These covenants not to sue are conditioned upon the complete and satisfactory performance by Settling Defendant of its obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendant, and, with respect to liability

derived from Settling Defendant, to its successors and assigns, and do not extend to any other person.

121. Plaintiffs' Pre-certification Reservation With Respect to the Covenant Not to Sue for Response Actions and Costs.

a. Notwithstanding any other provision of this Consent Decree, the United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant

(1) to perform further response actions relating to the Project Area or

(2) to reimburse Plaintiffs for additional costs of response

if, prior to Certification of Completion of the Response Action,

(a) conditions at the Project Area, previously unknown to Plaintiffs, are discovered or,

(b) information, previously unknown to Plaintiffs, is received, in whole, or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Response Action is not protective of human health or the environment.

b. Except as otherwise provided in Paragraph 121.a. or elsewhere in this Consent Decree, the Settling Defendant reserves all defenses it may have with regard to any actions taken by Plaintiffs under this Paragraph.

122. Plaintiffs' Post-certification Reservation With Respect to the Covenant Not to Sue for Response Actions and Costs.

a. Notwithstanding any other provision of this Consent Decree, the United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendant

- (1) to perform further response actions relating to the Project Area or
- (2) to reimburse the Plaintiffs for additional costs of response

if, subsequent to Certification of Completion of the Response Action,

- (a) conditions at the Project Area, previously unknown to Plaintiffs, are discovered, or
- (b) information, previously unknown to Plaintiffs, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Response Action is not protective of human health or the environment.

b. Except as otherwise provided in Paragraph 122.a. or elsewhere in this Consent Decree, the Settling Defendant reserves all defenses it may have with regard to any actions taken by Plaintiffs under this Paragraph.

123. Known Information and Conditions

a. For purposes of Paragraph 121 the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of lodging of this Consent Decree. For purposes of Paragraph 121, information and

conditions known to Plaintiffs shall include information and conditions: i) included in the EE/CA and its attachments for the Project Area, the administrative records and site files for the Project Area, the Bunker Hill Superfund Site or the Basin Wide RI/FS, and any written information submitted to and received by the Plaintiffs' Project Coordinators prior to the date of lodging of this Consent Decree; ii) included in or developed or reviewed pursuant to the natural resource damages assessment being conducted by the United States and/or the Tribe (including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment); (iii) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment or the Basin-Wide RI/FS; (iv) included in the SOW or the Agreements in Principle among the Parties; (v) submitted to the STB to satisfy the environmental conditions referenced in Paragraph 13 of this Decree; or (vi) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in U.S. v. ASARCO Inc., et al., (D. Idaho) Case No. CV 96-0122-N-EJL or Coeur d'Alene Tribe v. Union Pacific Railroad, et al., (D. Idaho) Case No. CV 91-0342-N-EJL.

b. For purposes of Paragraph 122, the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of Certification of Completion of the Response Action. For purposes of Paragraph 122, information and conditions known to Plaintiffs shall include information and conditions:

i) included in the EE/CA and its attachments for the Project Area, the administrative record and site file(s) for the Project Area as of the date of Certification of Completion of the Response Action, the administrative records and site files for the Bunker Hill Superfund Site or the Basin Wide RI/FS, and any written information submitted to and received by the Plaintiffs' Project

Coordinators pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Response Action; ii) included in or developed or reviewed pursuant to the natural resource damages assessment being conducted by the United States and/or the Tribe as of the date of the Certificate of Completion of the Response Action (including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment); (iii) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment or the Basin-Wide RI/FS; (iv) included in the SOW or the Agreements in Principle among the Parties; (v) submitted to the STB to satisfy the environmental conditions referenced in Paragraph 13 of this Decree; or (vi) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in U.S. v. ASARCO Inc., et al., (D. Idaho) Case No. CV 96-0122-N-EJL or Coeur d'Alene Tribe v. Union Pacific Railroad, et al., (D. Idaho) Case No. CV 91-0342-N-EJL.

124. Plaintiffs' Reservation with Respect to the Covenant Not to Sue for Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, the United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action for Natural Resource Damages or the restoration, replacement, or acquisition of the equivalent of the injured, destroyed or lost Natural Resources if, subsequent to entry of this Consent Decree:

- a. conditions in the Coeur d'Alene Basin Environment, previously unknown to Plaintiffs are discovered, or
- b. information, previously unknown to Plaintiffs is received, in whole or in part,

and these previously unknown conditions or information demonstrate that there is injury to, destruction of, or loss of Natural Resources in the Coeur d'Alene Basin Environment of a type unknown or of a magnitude significantly greater than was known at the time of entry of this Decree .

c. For purposes of Paragraph 124, the information and the conditions (including the types and magnitude of injury, destruction of, or loss of Natural Resources) known to Plaintiffs shall include that known to Plaintiffs as of the date of lodging of this Consent Decree. For purposes of Paragraph 124, the information and conditions (including the types and magnitude of injury, destruction of, or loss of Natural Resources) known to Plaintiffs shall include only that information and those conditions: i) included in the EE/CA and its attachments for the Project Area, and the administrative records and site files for the Project Area, the Bunker Hill Superfund Site or the Basin Wide RI/FS; ii) included in any written information submitted to and received by the Plaintiffs' Project Coordinators or the trustees' representatives prior to the date of lodging of this Consent Decree; iii) included in or developed or reviewed pursuant to the natural resource damages assessment being conducted by the United States and/or the Tribe as of the date of lodging of this Consent Decree including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment; iv) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment or the Basin-Wide RI/FS; (v) included in the SOW or the Agreements in Principle among the Parties; vi) submitted to the STB to satisfy the environmental conditions referenced in Paragraph 13 of this Decree; or vii) obtained by Plaintiffs through depositions, written interrogatories, or requests

for admission in U.S. v. ASARCO Inc., et al., (D. Idaho) Case No. CV 96-0122-N-EJL or Coeur d'Alene Tribe v. Union Pacific Railroad, et al., (D. Idaho) Case No. CV 91-0342-N-EJL.

125. General Reservation of Rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraphs 119 and 120. The United States, the State and the Tribe reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;
- b. liability for response costs or the performance of response actions arising from the past, present, or future disposal, release or threat of release of Waste Material outside of the Project Area;
- c. liability for future disposal of Waste Material in the Project Area, other than as directed in this Consent Decree or otherwise ordered by EPA;
- d. criminal liability; and
- e. liability for violations of federal, tribal or state law which occur during or after implementation of the Response Action.

126. Work Takeover. In the event that Plaintiffs determine that Settling Defendant has ceased implementation of a portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, a Plaintiff entity, in Consultation with the other Plaintiffs, may assume the performance of all or any portions of the Work as it determines necessary. Settling Defendant may invoke the procedures set forth in Section XX (Dispute

Resolution), Paragraphs 99, 102 or 105, to dispute Plaintiffs' determination that takeover of the Work is warranted under this Paragraph. Costs incurred by any of the Plaintiffs in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendant shall pay pursuant to Section XVI (Reimbursement of Response Costs).

127. Notwithstanding any other provision of this Consent Decree, Plaintiffs retain all authority and reserve all rights to take any and all response actions authorized by law.

128. The Plaintiffs recognize that the State and the Tribe intend to own and manage portions of the Project Area and provide Operation and Maintenance-Trail consistent with the State/Tribe Agreement upon Certification of Completion of the Response Action. The State and Tribe shall exercise due care, as provided by Paragraph 45.b., with respect to Waste Materials present within the Project Area. Each of the Plaintiffs agrees not to assert any claim pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. § 9606 and 9607(a), Section 311(c) and (e) of the Clean Water Act, 33 U.S.C. § 1321(c) and (e), or Section 7003 of RCRA, 42 U.S.C. § 6973, for response costs or the performance of response actions, or a claim for Natural Resource Damages, against another Plaintiff entity, including agencies of a Plaintiff, with respect to Waste Material present at the Project Area on the date of entry of this Consent Decree. Provided, however, that this agreement by Plaintiffs not to assert any claims against another Plaintiff entity does not apply to claims for response actions or response costs for releases or threatened releases of hazardous substances other than the existing Waste Material or for releases or threatened releases of existing Waste Materials resulting from actions by such Plaintiff entity which compromise the Response Action.

XXIII. COVENANTS BY SETTLING DEFENDANT

129. Covenant Not to Sue. Subject to the reservations in Paragraph 131, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, the State, any Idaho county, city or local governmental entity, or the Tribe with respect to the Project Area and Past and Future Response Costs as defined in this Consent Decree, including, but not limited to,

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States, or against the State, any Idaho county, city or local governmental entity, or the Tribe, under CERCLA Sections 107 or 113 related to the Project Area, or

c. any claims arising out of response activities at the Project Area, including claims based on Plaintiffs' selection of response actions, oversight of response actions or approval of plans for such actions.

130. Subject to the reservations in Paragraph 131, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, the State, any Idaho county, city or local governmental entity, or the Tribe with respect to Natural Resource Damages for the Coeur d'Alene Basin Environment as defined in this Consent Decree,

131. The Settling Defendant reserves, and this Consent Decree is without prejudice to:

(i) claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions or the oversight or approval of the Settling Defendant's plans or activities except as provided by the preceding sentence. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA, Section 7003 of RCRA or Section 311 of the Clean Water Act, and for which the waiver of sovereign immunity is found in a statute other than CERCLA, RCRA or the Clean Water Act; and

(ii) any claims, causes of action or defenses the Settling Defendant may have against the United States, the State, any Idaho county, city or local government entity, or the Tribe in the event one or more of the Plaintiffs assert a claim against the Settling Defendant pursuant to the provisions of Paragraphs 121 (pre-certification reservations) or 122 (post-certification reservations), or 124 (NRD reservations), within the scope of the claims so asserted by the Plaintiffs.

132. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 12 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXIV. EFFECT OF SETTLEMENT, CONTRIBUTION PROTECTION

133. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Project Area, the Bunker Hill Superfund Site, the ROW, the Coeur d'Alene Basin Environment, the SOW and/or this Consent Decree against any person not a Party hereto.

134. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendant is entitled to protection from contribution actions or claims for Matters Addressed in this Consent Decree to the full extent as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

135. The Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it with regard to Matters Addressed in this Consent Decree, it will notify the Plaintiffs in writing no later than sixty (60) days prior to the initiation of such suit or claim.

136. The Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for Matters Addressed in this Consent Decree, it will notify in writing the Plaintiffs within ten (10) days of service of the complaint on it. In addition, Settling Defendant shall notify the Plaintiffs within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

137. In any subsequent administrative or judicial proceeding initiated by the United States, the State or the Tribe for injunctive relief, recovery of response costs, or other appropriate relief relating to the Project Area, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States, the State or the Tribe in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXII (Covenants Not to Sue by Plaintiffs).

XXV. ACCESS TO INFORMATION

138. Settling Defendant shall provide to EPA, the State and the Tribe, upon request, copies of all non-privileged documents and information within its possession or control or that of its contractors or agents relating to activities at the Project Area or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendant shall also make available to EPA, the State and the Tribe, for purposes of investigation, information gathering, or testimony, relating to the Work or implementation of the Consent Decree, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

139. a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b), or state or tribal law as applicable. Documents or

information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, the State, and the Tribe, or if EPA has notified Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), the public may be given access to such documents or information without further notice to Settling Defendant.

b. The Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide the Plaintiffs with the following: (1) the title of the document, record or information; (2) the date of the document, record or information; (3) the name and title of the author of the document, record or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record or information; and (6) the privilege asserted by Settling Defendant. No final (including the most recent draft when there is no "final" version) documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

140. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Project Area.

XXVI. RETENTION OF RECORDS

141. Until five (5) years after the Settling Defendant's receipt of Plaintiffs' notification pursuant to Paragraph 70.b. of Section XIV (Certificate of Completion of the Work), Settling

Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Project Area, regardless of any corporate retention policy to the contrary. Until five (5) years after the Settling Defendant's receipt of Plaintiffs' notification pursuant to Paragraph 70.b. of Section XIV (Certificate of Completion of the Work), Settling Defendant shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

142. At the conclusion of this document retention period, Settling Defendant shall notify the United States, the State and the Tribe at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, the State or the Tribe, Settling Defendant shall deliver any such records or documents to EPA, the State or the Tribe. Settling Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, it shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record or information; (3) the name and title of the author of the document, record or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record or information; and (6) the privilege asserted by the Settling Defendant. However, no final (including the most recent draft when there is no "final" version) documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

143. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Project Area since notification of potential liability by the United States, the State or the Tribe or the filing of suit against it regarding the Project Area and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XXVII. NOTICES AND SUBMISSIONS

144. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the State, the Tribe, and the Settling Defendant, respectively.

As to the United States:

Chief Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ #90-11-3-128L

Director Environmental Cleanup Office
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, WA 98101

As to EPA:

Earl Liverman
EPA Project Coordinator
United States Environmental Protection Agency
Region 10
Coeur d'Alene Field Office
1910 Northwest Blvd. #208
Coeur d'Alene, ID 83814

Clifford J. Villa
U.S. EPA Region 10, ORC-158
1200 Sixth Avenue
Seattle, WA 98101

As to the State:

State Project Coordinator-Union Pacific
Idaho Division of Environmental Quality
1005 McKinley Avenue
Kellogg, Idaho 87837

Curt A. Fransen
Office of the Attorney General
2005 Ironwood Parkway Ste. 120
Coeur d'Alene, Idaho 83815

Rick Cummins
Region Manager
Idaho Department of Parks and Recreation
2750 Kathleen Avenue, Ste. 1
Boise, Idaho 83815

Leo Hennessy
Trails Coordinator
Idaho Department of Parks and Recreation
P.O. Box 83720-0065
Boise, Idaho 83720

Mike Thomas
State Technical Services Program
Idaho Division of Environmental Quality
1410 North Hilton
Boise, Idaho 83706-1255

As to the Tribe:

Alfred Nomee
Director of Natural Resources
Coeur d'Alene Tribe
P.O. Box 408
Plummer, ID 83851

Raymond C. Givens
Howard Funke
Givens, Funke and Work
424 Sherman Avenue, Suite 308
P.O. Box 969
Coeur d'Alene, ID 83816

As to the Governments' Project Coordinator:

Ed Moreen
U.S. Army Corps of Engineers
Bunker Hill Project Office
1005 W. McKinley Avenue
Kellogg, ID 83837

As to the Settling Defendant:

Mike Cooper
McCulley, Frick & Gilman
4900 Pearl East Circle
Suite 300 W
Boulder, CO 80301
Settling Defendant's Project Coordinator

Rick Eades
Director Environmental Field Operations
Union Pacific Railroad Company
Room 930
1416 Dodge Street
Omaha, NE 68179

James V. Dolan
Vice President - Law
Union Pacific Railroad Company
Room 830
1416 Dodge Street
Omaha, NE 68179

Robert W. Lawrence
Davis, Graham & Stubbs LLP
370 Seventeenth Street
Suite 4700
P.O. Box 185
Denver, CO 80201-0185

XXVIII. EFFECTIVE DATE

145. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXIX. RETENTION OF JURISDICTION

146. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XX (Dispute Resolution) hereof.

XXX. APPENDICES

147. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the application for a CITU.

“Appendix B” is Union Pacific’s statement regarding acceptance of a trail use condition.

“Appendix C” is the EE/CA.

“Appendix D” is the Action Memorandum.

“Appendix E” is the Escrow Agreement.

“Appendix F” is the map showing the Excluded Rail Lines.

“Appendix G” is the SOW and its attachments.

XXXI. COMMUNITY RELATIONS

148. Settling Defendant shall propose to EPA, the State and the Tribe its participation in the community relations plan to be developed by Plaintiffs. Plaintiffs will determine the appropriate role for the Settling Defendant under the community relations plan. Settling Defendant shall also cooperate with Plaintiffs in providing information regarding the Work to the public. As requested by Plaintiffs, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by any of the Plaintiffs to explain activities at or relating to the Project Area.

XXXII. MODIFICATION

149. Schedules specified in this Consent Decree and the SOW for completion of the Work may be modified by agreement of Plaintiffs and the Settling Defendant. All such modifications shall be made in writing.

150. Except as provided in Paragraph 33 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the Plaintiffs, Settling Defendant, and the Court. Non-material modifications may be made to the SOW upon agreement by the Parties without notification and approval by the Court. Modifications to the SOW that do not materially alter that document may be made by written agreement between Plaintiffs and the Settling Defendant. No material modification shall be made to this Consent Decree without written notification to and written approval of all Parties and the Court. The notification required by the preceding sentence shall set forth the nature of and reasons for the requested modification. No oral modification of this Consent Decree shall be effective. Modifications that do not materially affect this Consent Decree may be made upon the

written consent of all Parties affected by the modifications. Nothing herein shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

151. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

152. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. Prior to entry of this Decree, the United States, the State and the Tribe reserve the right to withdraw or withhold their consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree in the form presented without further notice.

153. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

154. In the event the conditions specified in Paragraphs 23 and 27 above, are not satisfied, this Consent Decree shall terminate along with the rights and obligations set forth herein, and all moneys Union Pacific has provided pursuant to this Consent Decree shall be returned to Union Pacific along with all interest or investment proceeds accrued thereon.

XXXIV. SIGNATORIES/SERVICE

155. The undersigned representative of the Settling Defendant to this Consent Decree, the undersigned representative of the State, the undersigned representative of the Tribe, and the Assistant Attorney General for the Environment and Natural Resources Division of the

Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

156. Except as otherwise provided in Paragraphs 23, 27 and 154 of this Consent Decree, Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

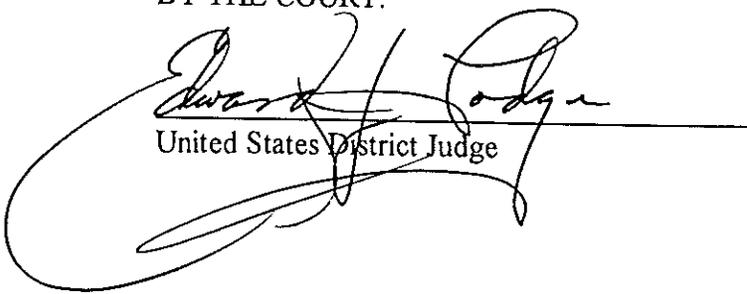
157. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to any matter arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

XXXV. FINAL JUDGMENT

158. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State and the Tribe and the Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54.

SO ORDERED THIS 25th DAY OF August, 2000.

BY THE COURT:


United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States of America and State of Idaho v. Union Pacific Railroad Company and Coeur d'Alene Tribe v. Union Pacific Railroad Company.

For the United States of America

Date: December 21, 1999



LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 2530

Date: December 21, 1999



THOMAS W. SWEGLE
Senior Lawyer
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-3143

MARC HAWS
Assistant U.S. Attorney
District of Idaho
P.O. Box 32
Boise, ID 83707
(208) 334-1211

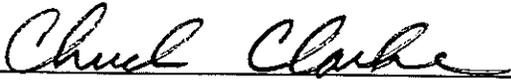
Of Counsel:

Barry Stein, Attorney
Office of the Solicitor
U.S. Department of the Interior
500 N.E. Multnomah, Suite 607
Portland, OR 97232

Steve Silverman, General Attorney
Office of General Counsel
U.S. Department of Agriculture
740 Simms, Third Floor
Golden, CO 80401

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States of America and State of Idaho v. Union Pacific Railroad Company and Coeur d'Alene Tribe v. Union Pacific Railroad Company.

Date: 12/20/99



CHUCK CLARKE
Regional Administrator
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

Date: 12/20/99

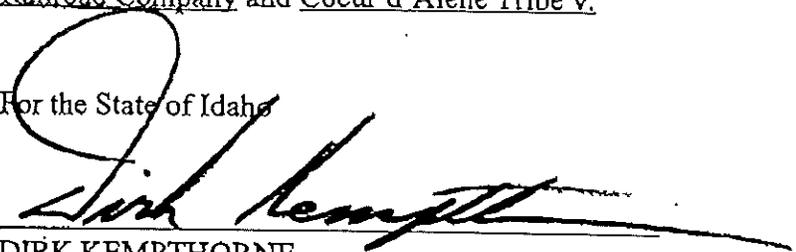


CLIFFORD J. VILLA
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States of America and State of Idaho v. Union Pacific Railroad Company and Coeur d'Alene Tribe v. Union Pacific Railroad Company.

For the State of Idaho

Date: 12-22-99


DIRK KEMPTHORNE

Governor
State of Idaho
Statehouse
Boise, ID 83720

Date: 12/20/99

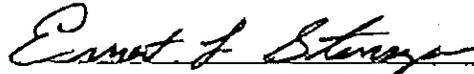

CURT A. FRANSEN

Deputy Attorney General
Office of the Attorney General
State of Idaho
2005 Ironwood Drive, Suite 120
Coeur d'Alene, ID 83814

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States of America and State of Idaho v. Union Pacific Railroad Company and Coeur d'Alene Tribe v. Union Pacific Railroad Company.

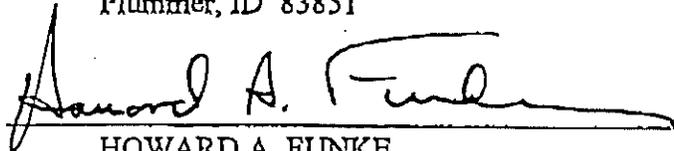
For the Coeur d'Alene Tribe

Date: 12-22-99



ERNEST STENSGAR
Tribal Chairman
Coeur d'Alene Tribe
P.O. Box 408
Plummer, ID 83851

Date: 12-22-99

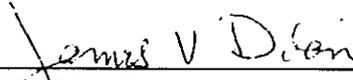


HOWARD A. FUNKE
Counsel for Coeur d'Alene Tribe
Givens, Funke and Work
424 Sherman Avenue, Suite 308
P.O. Box 969
Coeur d'Alene, ID 83816

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States of America and State of Idaho v. Union Pacific Railroad Company and Coeur d'Alene Tribe v. Union Pacific Railroad Company.

For Union Pacific Railroad Company

Date: 12-20-99



JAMES V. DOLAN
Vice President - Law
Union Pacific Railroad Company
Room 830
1416 Dodge Street
Omaha, NE 68179
(402) 271-5359

ATTACHMENT D

**Expert Report
Of
Brian G. Hansen, P.E., P.G.**

**In the Matter of
Asarco LLC v. NL Industries, Inc., et al.
Case No. 4:11-cv-00864-JAR**

March 21, 2014

Introduction

This report is submitted on behalf of the Union Pacific Railroad Company (“Union Pacific”) in the matter of Asarco LLC v. NL Industries, Inc., et al., Case No. 4:11-cv-00864-JAR. It summarizes my findings and professional opinions regarding the actions EPA has taken at mining sites in southeastern Missouri and the tendency for mine waste piles to contaminate adjacent areas. This report also rebuts certain observations made by Mr. Paul Rosasco as presented in his report dated January 27, 2014 (Rosasco, 2014a).

I am a geological engineer with over 25 years of professional experience with mining and metals refining sites, subsurface investigations, waste disposal, Superfund, hazardous waste site investigation, and remediation. I hold a Bachelor of Science degree in Geology from Fort Lewis College (Durango, Colorado) and a Master of Engineering, Geological Engineer degree from the Colorado School of Mines. My graduate curriculum emphasized hydrogeology and groundwater contaminant fate and transport. My professional career has focused on the investigation and remediation of mining and mineral processing sites and the fate and transport of metals in the environment. I am a registered Professional Engineer and a registered Professional Geologist. I am a Senior Geological Engineer and partner with Formation Environmental, LLC, an environmental consulting firm located at 2500 55th Street, Suite 200, Boulder, Colorado, 80301. A copy of my resume is provided in Attachment A along with a list of my prior testimony.

Summary Opinions to be Expressed

I am prepared to offer the following opinions in this matter.

- a. Opinion 1 –The actions that have been or are currently being implemented by EPA at the Big River Mine Tailings/St. Joe Minerals Corporation Site and the Madison County Mines Site (collectively, “Sites”) address major mining-related features that are the primary sources of contamination and residential areas that have become contaminated. None of these actions address railroad rights of way that have been or

are currently owned or operated by Union Pacific or its historic affiliated railroad companies.

- b. Opinion 2 – Water-mobilized contaminants and wind-blown dust originating from the chat piles and tailings impoundments being addressed by EPA at the Sites have broadly impacted adjacent areas, potentially including portions of railroad rights of way.
- c. Opinion 3 – Mr. Rosasco has unreliably identified eroding “chat ballast” in the Sites based on visual observation only and without the benefit of chemical analysis to confirm the presence of chat.
- d. Opinion 4 – Mr. Rosasco has inappropriately applied certain chemical screening criteria in his opinions regarding impacts associated with the presence of mining-related materials in the railroad rights of way in the Sites.

Bases for Opinions

Opinion 1 – The actions that have been or are currently being implemented by EPA at the Big River Mine Tailings/St. Joe Minerals Corporation Site and the Madison County Mines Site (collectively, Sites) address major mining-related features that are the primary sources of contamination and residential areas that have become contaminated. None of these actions address railroad rights of way that have been or are currently owned or operated by Union Pacific or its historic affiliated railroad companies.

Seven major areas of mine waste are present in the Big River Mine Tailings/St. Joe Minerals Corporation Site (Bonne Terre Mine Tailings Site, Leadwood Mine Tailings Site, Elvins Mine Tailings Site, Federal Mine Tailings Site, Desloge Mine Tailings Site, Doe Run Mine Tailings Site, and National Mine Tailings Site). At least 13 major mine waste deposits are present in the Madison County Mines Site. Each of these primary sources is large (for example, the National Tailings pile is reportedly 200 feet high and 2,500 feet across; Abbott, 1999); each includes up to several million cubic yards of unvegetated mine waste (prior to any remediation); and many are located immediately proximate to water bodies. As an example, the Desloge Tailings occupy the interior of a horse shoe meander of the Big River and thus the tailings are surrounded by the river on the west, north, and east sides. Metals, including cadmium, lead, and zinc, originating from these primary sources have contaminated soil and water in adjacent areas. In a single event, approximately 50,000 cubic yards of mine waste slumped into the Big River in 1977 during a period of heavy rain (EPA, 2012a). With an approximate lead content of 0.5 percent in the tailings, or 5,000 parts per million, this event alone resulted in the release of over 800,000

pounds of lead to the Big River.¹ Ongoing erosion of the primary sources contributed and will continue to contribute (until remediated) additional lead, along with other metals, to the Big River and other water bodies.

In addition, wind-blown dust from the primary sources has mobilized metals to soil in adjacent areas, including residential areas. Mine waste has reportedly been used on residential properties for fill material and private driveways, used as aggregate for road construction, and placed on public roads as a traction agent in winter (EPA, 2008). Due to the wind-blown dust from the primary sources and incorporation of mine waste into residential settings, EPA has required residential yard remediation.

In contrast to the large, primary sources of mining-related contamination in the Sites, railroad rights of way comprise relatively narrow areas of material that are a few tens of feet wide and a few feet thick that are only locally adjacent to water bodies and residential areas. The small area of possible mine material (chat) in the rail bed per unit area limits the potential for the railroad rights of way to act as sources of metals to the environment. Further, many of the abandoned railroad rights of way are well vegetated which significantly limits any wind-blown dust issues, erosion by surface water, and percolation of rainfall through the rail bed material to groundwater. The active Union Pacific rights of way are well maintained.

Accordingly, EPA's investigative and cleanup actions have appropriately focused on the primary sources of contamination and human exposure. EPA's 2012 Fact Sheet for the Big River Mine Tailings/St. Joe Minerals Corporation Site (EPA, 2012a) indicates that engineering evaluation/cost analyses (EE/CAs) and non-time-critical removal actions (NTCRAs) have been completed for the majority of the primary sources. Similarly, EPA's 2012 Fact Sheet for the Madison County Mines Site indicates that two NTCRAs were completed by 2006, with additional work scheduled for completion in 2012 (EPA, 2012b).

In addition to the aforementioned EPA fact sheets, I reviewed the 2011 Record of Decision for the Big River Mine Tailings/St. Joe Minerals Corporation Site (EPA, 2011a) and the Five-Year Review Report for Madison County Mines (EPA, 2013); the Proposed Plan, Conrad Tailings Operable Unit 4, Madison County Mines Superfund Site (EPA, 2011b), and the Interim Record of Decision, Residential Property Surface Soil (part of Operable Unit 3) at Madison County Mines Superfund Site (EPA, 2008).

All of these documents describe various NTCRAs and final remedies that have been implemented at the Sites to address the release of contaminants to the environment from the primary sources and to control human exposures to contaminants. The NTCRAs and remedies have generally consisted of stabilization and vegetation of mine tailings piles and impoundments

¹ Based on a typical density of 120 pounds per cubic foot for mine waste.

to limit wind-blown dust and reduce erosion by water with subsequent transport to streams and excavation/replacement of residential-area soils, with placement of the excavated, contaminated soil in repositories. None of the documents I reviewed identified the need to conduct any kind of response actions on railroad rights of way that are owned or operated by Union Pacific or its historic affiliated railroad companies. None of the documents I reviewed suggest that EPA is currently planning to conduct any kind of response actions on railroad rights of way that are owned or operated by Union Pacific or its historic affiliated railroad companies.

Asarco concedes that EPA has taken no action with respect to Union Pacific's railroad rights of way within the Sites. In its September 21, 2012 letter to EPA, Asarco's counsel states "as best we can determine, EPA's current plans fail to address the substantial, on-going contamination from abandoned rail lines of the Union Pacific Railroad Company" (Integer, 2012). Mr. Rosasco agreed with this finding during his February 27, 2014 deposition (Rosasco, 2014b). When asked if he was aware of any location where Asarco settlement funds are being used to remediate Union Pacific right of way, Mr. Rosasco replied "I'm not aware that any remediation of Union Pacific right of way is being performed at this time." Similarly, when asked "are you aware of any Asarco money being used for Union Pacific property or railroad rights of way" during his March 19, 2014 deposition, Asarco's 30(b)(6) witness, Mr. Chris Pfahl, responded "we're not aware of any" (Pfahl, 2014).

Opinion 2 – Water-mobilized contaminants and wind-blown dust originating from the chat piles and tailings impoundments being addressed by EPA in the Sites have broadly impacted adjacent areas, potentially including portions of railroad rights of way.

Contaminants are mobilized from the primary sources (tailings piles and impoundments) by wind and water and are dispersed to adjacent areas. As discussed in Opinion 1, over 800,000 pounds of lead were mobilized to the Big River during a single event in 1977. Ongoing erosion of the primary sources contributed additional lead, along with other metals, to the Big River and other water bodies.

An air dispersion modeling effort was conducted to assess the extent to which metal-bearing dust would be distributed from the primary sources (Abbott, 1999). The model used actual meteorological data, assumed an 80-year deposition period, estimated the lead concentrations in undisturbed soil where particulates were modeled to be deposited, and compared the estimated soil lead concentrations with actual soil lead concentrations. Based on the modeling results, it was concluded that the highest modeled deposition rates occurred to the east-southeast of each primary source area, with a secondary impact area to the north of each primary source area. Such model results were produced for the Bonne Terre Tailings, Desloge Tailings, Federal Tailings, and Leadwood Tailings. The predicted surficial soil concentrations were deemed to be in good agreement with measured surficial soil concentrations.

To the extent that any portion of railroad right of way is or becomes impacted by the primary sources, those impacts would constitute releases from the primary sources, not releases from the railroad rights of way.

Opinion 3 – Mr. Rosasco has unreliably identified eroding “chat ballast” in the Sites based on visual observation only and without the benefit of chemical analysis to confirm the presence of chat.

At page 3 of his January 27, 2014 report, Mr. Rosasco indicates that he traveled to and inspected various active and abandoned railroad lines in St. Francois and Madison Counties on December 3, 2013. At page 9, Mr. Rosasco states “I observed the presence of coarse sand/fine gravel consistent with chat/mining waste of the rail beds and as fill material beneath railroad grades and within bridge abutments.” At page 19, Mr. Rosasco states “During my site visit, I personally observed erosion of chat ballast and embankment fill from railroad lines and bridge abutments in St. Francois and Madison Counties owned or previously abandoned by Union Pacific or its predecessors.”

Mr. Rosasco conducted no sampling of railroad ballast himself and provides no specific chemical data for the locations where he indicates that he had observed the erosion of chat ballast. He instead relies on chemical data reported by NewFields (2007) and by Asarco (Rosasco, 2014a). I view the Asarco data set to be suspect with regard to characterization of rail bed material because sample location information (i.e., geographic positioning system [GPS] coordinates, latitude/longitude, etc.) has not been provided and the locations are only generally indicated by symbols on maps. Thus, it is unclear whether the samples were collected on the railroad rights of way or in areas off of the railroad rights of way, including nearby primary source areas.

Because Mr. Rosasco did not sample the rail bed material himself, I infer that he identified the presence of chat at these locations based on visual observation of gravel-like material that he has deemed to be consistent with chat. In his February 27, 2014 deposition, Mr. Rosasco clarified the manner in which his observations were made: “I did not walk the active rail lines or any of the property owned or where there was an easement for the rail line. I looked at it from adjacent property.” When asked about the closest distance from which he inspected active rail lines, Mr. Rosasco responded “I don’t recall the specific distances. I didn’t measure them. But 30, 50, 75, 100 feet.”

At page 9 of his report, Mr. Rosasco notes that the particle size of chat ranges from $\frac{1}{4}$ to $\frac{5}{8}$ inch. According to NewFields, 2007, “modern railroad ballast that meets American Railway Engineering and Mining Association (AREMA) specifications contains between 45 and 80 percent plus $\frac{3}{4}$ -inch sized rock.” Thus, based on this characterization, 20 to 55 percent of

modern railroad ballast consists of particles that are less than ¾-inch in dimension. In my opinion, it would be very difficult, if not impossible, to visually discern a small difference in particle size from a distance of 30 to 100 feet to differentiate between the presence of chat or modern railroad ballast which may have been placed as part of ongoing track maintenance. In the absence of any corroborating chemical data, I therefore conclude that Mr. Rosasco's observations of chat ballast on the railroad lines, as stated on pages 9 and 19 of his January 27, 2014, are unreliable.

Opinion 4 - Mr. Rosasco has inappropriately applied certain chemical screening criteria in his opinions regarding impacts associated with the presence of mining-related materials in the railroad rights of way in the Big River Mine Tailings/St. Joe Minerals Corporation Site and the Madison County Mines Site.

At Section D (page 13) of his January 27, 2014 report, Mr. Rosasco provides comparisons of the metals concentration data in rail bed materials reported by NewFields (2007) and Asarco (Rosasco, 2014a) with several regulatory criteria. As noted in Opinion 3, above, the Asarco sample locations are vague and therefore it is not possible to verify whether the samples are reflective of rail bed materials or not. The metals concentration data that Mr. Rosasco relies upon are total metals concentrations (NewFields and Asarco data) and leachate data for metals generated by the Synthetic Precipitation Leaching Procedure (SPLP; EPA Method 1312; Asarco data).

Some of the comparisons presented in Section D of Mr. Rosasco's report are inappropriate. Examples are provided below.

1. At page 16, Mr. Rosasco cites EPA guidance for the use of chat as an aggregate in asphalt and concrete, noting that EPA has specified that SPLP leachate concentrations for such products that include chat should meet National Primary Drinking Water Standards. Mr. Rosasco notes that some of the SPLP leachate concentrations for chat reported by Asarco exceed the National Primary Drinking Water Standards for lead. This comparison is inappropriate because the SPLP testing referenced in EPA's guidance is to be conducted on asphalt and/or concrete products and not chat samples.
2. At pages 16 and 17, Mr. Rosasco cites Probable Effects Levels (PELs) and Probable Effects Concentrations (PECs) for sediment that were developed by McDonald et al. (2000). Mr. Rosasco represents that PELs are the concentrations of trace metals in sediment at which some toxic effects on aquatic life is likely and the PECs are concentrations of trace metals in sediment at which toxicity to benthic organisms is probable. Mr. Rosasco notes that many of the total metals concentrations in rail bed material reported by NewFields and Asarco exceed the PELs and PECs of McDonald et

al. (2000). This comparison is inappropriate because the rail bed material is not sediment in an aquatic setting where exposure to aquatic organisms would occur. In his deposition testimony, Mr. Rosasco admits that he has never previously recommended application of either of these sediment evaluation criteria to soils (Rosasco, 2014b).

3. At pages 17 and 18, Mr. Rosasco cites Missouri Risk-Based Corrective Action Technical Guidance that contains risk-based target levels for protection of aquatic life and human health from chronic and acute exposures to chemicals of concern in water, including cadmium, lead, and zinc. Mr. Rosasco notes that some of the SPLP leachate concentrations reported by Asarco exceed the chronic standards set forth in this guidance. Comparison of the SPLP leachate concentrations to the Missouri risk-based target levels is inappropriate because aquatic and human receptors would not be exposed to pure SPLP leachate originating from rail bed materials. SPLP leachate data merely provide information on the relative potential for leaching; test values are not an appropriate point of comparison for risk-based comparisons because a release would need to reach a water body in sufficient quantity to create an exceedance of the risk-based criteria.

Data and Information Considered in Forming My Opinions

The data and information sources I relied upon to form my opinions are referenced in Attachment B. My opinions reflect my training and expertise as a geological engineer and my prior experience at other mining and minerals refining sites. The information I reviewed, in combination with my training and experience, provide a basis for my opinions that is consistent with that reasonably relied upon by other experts in my field to form opinions about the magnitude of contaminant sources and associated contaminant transport. Use of this information in this manner, in combination with my training and experience, is generally accepted practice within the scientific community. I reserve the right to add to or modify my opinions based upon any new data that may become available to me.

Supporting Documents

The documents I relied upon to form my opinions are listed in Attachment B. I reserve the right to supplement the list of documents contained in Attachment B in response to new information or data, or in response to any ongoing discovery activities.

Compensation

Formation Environmental, LLC receives \$179/hour for my normal work related to this matter and \$268.50/hour for work while providing expert testimony. The total amount invoiced by Formation Environmental, LLC through February 2014 in connection with this matter is approximately \$16,900.

List of Prior Expert Testimony

A list of my prior expert testimony is provided in Attachment A along with my resume.

Signature

Brian G. Hauze

March 21, 2014

**ATTACHMENT A
RESUME
AND
LIST OF PRIOR EXPERT TESTIMONY**

PRIOR EXPERT TESTIMONY PROVIDED BY BRIAN G. HANSEN, P.E., P.G.

Dent/Skeen v. Asarco Incorporated (Case No. CV-02-65-M-DWM) and Rapier v. Asarco Incorporated (Case No. CV-02-67-M-DWM). Deposition - February 2004. Trial testimony - November 2004.

U.S. v. Asarco, et al., No. 96-0122-N-EJL. Deposition - April 2005.

Chapter 11 bankruptcy of ASARCO, LLC, Bankruptcy Court for the Southern District of Texas, Corpus Christi Division, Case No. 05-21207. Depositions – April and May 2009. Bankruptcy hearing testimony – May 2009.

Brian G. Hansen, P.E., P.G.
Senior Geological Engineer

Mr. Hansen has 29 years of experience in the fields of geology, geological engineering, and hydrogeology. He provides project management and engineering expertise for environmental investigation and remediation projects, including:

- Groundwater and soil investigation design and data interpretation;
- Contaminant fate and transport evaluations;
- Remedial Investigations/Feasibility Studies;
- Engineering Evaluations/Cost Analyses;
- Remedial Design/Remedial Action; and
- Litigation support, including expert testimony.

REPRESENTATIVE EXPERIENCE

Smoky Canyon Phosphate Mine, Idaho. Contributing author to the Engineering Evaluation/Cost Analysis (EECA) for the mine site that evaluated several removal action alternatives to reduce mobilization of selenium from site waste rock piles. Served as project manager and regulatory liaison for Removal Action construction activities associated with water diversion around a 26-million cubic yard overburden pile, which fills a stream valley. The construction activities include a 10,000 foot pipeline, a partially lined infiltration basin, and a 4,000-foot run-on control channel. The water diversion measures are designed to significantly reduce selenium loadings originating from the pile. Currently serving as Engineer of Record for a second Removal Action that consists of placing a revegetated, earthen cover system on the overburden pile to reduce infiltration of precipitation.

Talache Mine Tailings Site, Idaho. Served as project manager and Engineer of Record for site characterization, preparation of EE/CAs, and ecological/human health risk assessments, and tailings piles closure. Oversaw a team of engineers during the development of the remedial design that addressed collection of dispersed tailings and stabilization of the tailings ponds, and coordinated oversight of the construction. Served as Corporate Representative [30(b)(6)] witness for a mining/smelting company regarding its historic operations at the site. Provided testimony in a deposition and during a bench trial with respect to cost allocation among the parties responsible for Site cleanup. Also prepared an expert report and provided expert witness testimony in an arbitration regarding faulty construction work by a remediation contractor.

Anaconda Copper Mining Company (ACM) Smelter and Refinery Site, Montana. Assisted counsel in reviewing and commenting on EPA's Hazard Ranking System score for this former copper smelter located near Great Falls, Montana. The site was placed on the National Priorities List in 2011 and includes several hundred residential properties that may have been impacted by aerial emissions from the former smelter. Currently serving as project manager for the Remedial Investigation/Feasibility Study (RI/FS) for Operable Unit 1 of the site, which includes adjacent residential areas.

Butte Priority Soils Operable Unit (BPSOU) Phase II Remedial Investigation/Feasibility Study (Silver Bow Creek/Butte Area Superfund Site), Montana. Served as project manager for the Phase II RI/FS, which spanned over ten years. The primary issues at this site are waste rock piles proximal to residences; elevated lead concentrations in some residential yards; metals-impacted storm water runoff; and metals-impacted groundwater. The project included coordination of a diverse PRP group and liaison with EPA, the state regulatory agency, and technical representatives of a local citizens' group. The FS evaluated six distinct alternatives for soil, surface water, storm water, and groundwater remediation in the Butte urban area. Currently providing assistance to the responsible party during Consent Decree negotiations.

Asarco LLC Bankruptcy - Miscellaneous Federal and State Sites. Expert witness regarding reasonable settlement amounts for 25 former mining and metals refining sites across the United States. The settlement amounts, which were negotiated between Asarco LLC, the federal government, and several state governments, were contested by a creditors' committee in the Bankruptcy Court for the Southern District of Texas in May 2009. Prepared an expert report and provided testimony during both a deposition and the bankruptcy hearing. The total settlement amount for the 25 sites was approximately \$100,000,000. The court ruled in favor of the settlement amounts.

Confidential Site, Brazil. Prepared and oversaw the execution of a soil sampling and analysis plan to evaluate the extent of metals contamination in soil at this remote former mining site.

Dresser Industries-Magcobar Mine Site, Arkansas. Serving as project manager for the Site Investigation and Feasibility Study at this former barite mining property. The Site includes a flooded mine pit, over 20 million cubic yards of acid-generating mine spoil, and tailings ponds. The Site Investigation includes baseline human health and ecological risk assessments. The Arkansas Department of Environmental Quality is in the process of formally selecting the remedial alternative recommended in the Feasibility Study.

El Paso Copper Smelter, Texas. Provided litigation support, prepared expert report, and provided testimony during a deposition regarding the quantity of groundwater that may need to be extracted and treated to facilitate reconstruction of a canal adjacent to the smelter site.

Coeur d'Alene Basin, Idaho. Provided technical support to counsel in preparation for Natural Resource Damages litigation against private mining companies. Prepared an expert report and provided testimony during a deposition regarding lead emissions from a former milling and smelting operation as well as the environmental impacts of tailings that were used to construct an interstate highway.

Eureka Mills Superfund Site, Utah. Provided technical assistance to a major railroad company and its counsel during successful settlement negotiations with EPA and the Utah Department of Environmental Quality. Provided project coordination and regulatory liaison on behalf of the railroad.

Bunker Hill Superfund Site, Idaho. Provided management and hydrogeological expertise supporting the RI/FS and various remedial designs for this site, which is impacted by mine tailings and lead-smelter emissions. These designs addressed remediation of residential yards, commercial properties, rights-of-way, water well closure, smelter demolition and closure, closure of a 265-acre tailing impoundment by capping, and development of a large (174-acre) constructed wetland treatment system.

Iron Mountain Mine Site, Montana. Prepared expert reports, provided deposition testimony, and participated as an expert witness on behalf of a mining company defendant in a jury trial regarding the potential presence of mine tailings on the plaintiff's property. In a separate action, prepared an expert report to assist the mining company in its defense of a lawsuit alleging that tailings from the client's historic mining site had impacted a natural spring that served as the water supply for a nearby community.

Triumph Mine Tailings Piles Site, Idaho. Served as project manager for Remedial Design/Remedial Action activities at the site. The project involved residential yard remediation, regrading and capping of two tailings piles and a waste rock pile, and installation of a concrete mine-adit plug.

Abandoned Railroad Right-of-Way, Washington. Managed and provided engineering expertise for removal of lead-bearing railroad ballast (impacted from mine tailings) from residential areas. Overall, approximately 60,000 tons of ballast were removed, with approximately 19,000 tons requiring chemical stabilization prior to disposal to limit potential leaching of lead.

Metal Recycling Sites, Montana and Idaho. Managed and oversaw subsurface investigation and remediation of impacts associated with former lead battery recycling operations at three operating facilities. Remediation included chemical fixation of the lead.

Upper Blackfoot Mining Complex (Heddeleston District), Montana. Managed, provided engineering expertise, and served as regulatory liaison for voluntary remedial activities at a complex mining site in western Montana. The project included 1) relocation of mine waste rock to engineered repositories, and 2) construction of passive biological treatment systems (constructed wetlands) to address mine-adit discharges.

Canyon Creek, Idaho. Provided management and engineering expertise for the design of a pilot bioreactor project to treat mine adit discharge. The bioreactor system was designed to treat up to 10 gpm through either a high-permeability (gravel substrate) bioreactor or a low-permeability (compost-based) bioreactor.

Alleged Clean Water Act Violations, Washington. Provided technical assistance to a confidential mining client and its counsel during summary judgment activities in connection with a lawsuit alleging violations of the Clean Water Act due to seepage from tailings ponds.

“Shadow” Hazard Ranking System Scoring, Idaho. Scoring was conducted for an open-pit mine/cyanide heap leach facility to assist the confidential client in assessing potential CERCLA liabilities. The shadow scoring showed that, using the flexibility in the HRS, the site could either be listed on the NPL or not, depending on the assumptions used.

Industrial Landfill, California. Conducted a computer modeling study to assess the effectiveness of various alternative extraction well arrays in terms of containing or extracting a plume of volatile organic constituents in groundwater originating in the industrial landfill.

REGISTRATIONS AND PROFESSIONAL AFFILIATIONS

Registered Professional Engineer in Arkansas, Idaho, Montana, Nevada, and Washington.

Registered Professional Geologist in Wyoming.

Member, Association of Engineering Geologists (AEG)

Member, American Society of Civil Engineers (ASCE)

EDUCATION AND TRAINING

M.E., Geological Engineering - Colorado School of Mines, 1988

B.S., Geology - Fort Lewis College, Durango, Colorado, 1983

Hazardous Waste Site Health and Safety Training (40 hours, OSHA Hazardous Waste Operations Standard 1910.120), Dames & Moore, 1988; annual 8-hour refreshers, 1990 through 2008.

Practical Application of the Hydrologic Evaluation of Landfill Performance (HELP) Model to Landfill Evaluation, Colorado School of Mines, Golden, CO, December 1986.

Passive Treatment of Mining Influenced Waters. Tailings & Mine Waste '03, Vail, CO. November, 2003.

WORK HISTORY

Senior Geological Engineer, Partner – Formation Environmental, LLC; Colorado (2009 - Present)

Senior Engineer/Hydrogeologist, Partner – NewFields Boulder, LLC; Colorado (2004 - 2009)

Senior Engineer/Hydrogeologist – MFG, Inc. (now TetraTech MM); 1991-1993: Colorado; 1994-2002: Montana; 2002-2004: Colorado.

Project Hydrogeologist/Geological Engineer - Dames & Moore; Colorado (1988-1991)

Graduate Research Assistant - Kansas Geological Survey (1987-1988)

Engineering Geologist - Michael W. West & Associates; Colorado (1986-1988)

Hydrologic Technician - U.S. Geological Survey; Colorado (1985-1986)

Civil Engineering Technician - R.V. Lord & Associates; Colorado (1984)

PUBLICATIONS

Co-author, "U.S. Geological Survey Urban Stormwater Database of Constituent Storm Loads; Characteristics of Rainfall, Runoff, and Antecedent Conditions; and Basin Characteristics." U.S. Geological Survey Water-Resources Investigations 87-4306.

Author, "Evaluating the Hydrogeology of Meade County, Kansas, Using Vertical Variability Analysis and Numerical Modeling." Kansas Geological Survey Open File Report 88-47.

PRESENTATIONS

Presentor, "Mine Waste and Water Management at the Upper Blackfoot Mining Complex, Montana." Tailings & Mine Waste '99 Conference, Fort Collins, Colorado, January 1999.

Co-presentor, "Remediation of Mining Sites," Rocky Mountain Mineral Law Foundation Special Institute on RCRA and CERCLA "Changing Requirements for Hazardous Substances in the Natural Resource Industries," Denver, Colorado, April 1997.

Association of Engineering Geologists 1989 Annual Meeting, Vail, CO. Presentation of paper: "Evaluating the Hydrogeology of Meade County, Kansas, Using Vertical Variability Methods and Numerical Modeling."

AWARDS

Association of Engineering Geologists (AEG) Marliave Scholar, 1987.

Eugene M. Shoemaker Outstanding Senior Geologist, Fort Lewis College, 1983.

ATTACHMENT B
LIST OF INFORMATION SOURCES RELIED UPON

List of Information Sources Relied Upon

- Abbott, 1999. Air Dispersion Modeling of Mine Waste in the Southeast Missouri Old Lead Belt. Prepared for the U.S. Department of Energy, Assistant Secretary for Environmental Management, Under DOE Idaho Operations Office Contract DE-AC07-99ID13727. Prepared by Idaho National Engineering and Environmental Laboratory Integrated Earth Sciences Department, Idaho Falls, Idaho. October. Presented as Appendix B-1 of NewFields, 2007. ARCOSEMO00022967.
- EPA, 2008. Interim Record of Decision, Residential Property Surface Soil (Part of operable unit 3), Madison County Mines Superfund Site in Madison County, Missouri. Prepared by U.S. EPA Region 7. July.
- EPA, 2011a. Big River Mine Tailings Superfund Site, St. Francois County, Missouri, CERCLIS ID#: MOD981126899, Operable Unit 1. Prepared by U.S. EPA Region 7. September.
- EPA, 2011b. Proposed Plan, Conrad Tailings Operable Unit 4, Madison County Mines Superfund Site, Madison County, Missouri. Prepared by U.S. EPA Region 7. July.
- EPA, 2012a. Big River Mine Tailings/St. Joe Minerals Corporation Site, Missouri. Fact Sheet. EPA ID# MOD981126899. EPA Region 7. City: Desloge. County: St. Francois County. April 24, 2012.
- EPA, 2012b. Madison County Mines, Missouri. Fact Sheet. EPA ID# MOD098633415. EPA Region 7. City: Fredericktown. County: Madison County. May 21, 2012.
- EPA, 2013. Five-Year Review Report for Madison County Mines Superfund Site, Madison County, Missouri. Prepared by U.S. EPA Region 7. September.
- Integer, 2013. Letter from Gregory Evans, Integer Law Corporation, to Jason Gunter, Project Manager, U.S. EPA Region 7. September 21.
- NewFields, 2007. Focused Remedial Investigation for Mined Areas in St. Francois County, Missouri. Prepared for the Doe Run Company by NewFields, Denver, CO. March. ARCOSEMO000022820.
- Pfahl, 2014. Deposition transcript of John Christopher Pfahl, P.E., rough transcript only; official transcript unavailable on report date. March 19.

Rosasco, 2014a. Expert Report of Paul V. Rosasco, P.E. Asarco LLC v. NL INDUSTRIES, INC. et al. Case No. 4:11-CV-00864 JAR. January 27.

Rosasco, 2014b. Deposition transcript of Paul V. Rosasco, P.E., not all reference documents available on report date. February 27.