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August 11, 2009

**BY E-FILING**

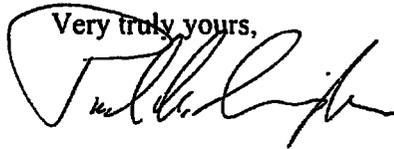
Anne K. Quinlan, Esquire  
Acting Secretary  
Surface Transportation Board  
Office of the Secretary  
395 E Street, S.W.  
Washington, DC 20423-0001

Re: **ASARCO Inc. – Petition for Declaratory Order – Americas Mining Corporation**  
**(STB Finance Docket No. 35286)**

Dear Ms. Quinlan:

Enclosed for filing in the above referenced docket please find the Reply of Sterlite (USA), Inc., to Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation.

Very truly yours,



Paul A. Cunningham

Enclosure

cc: Gregory Evans, Esquire  
Robert Winter, Esquire

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35286**

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**ASARCO INC.**

**- PETITION FOR DECLARATORY ORDER -  
AMERICAS MINING CORPORATION**

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**REPLY OF STERLITE (USA), INC.,  
TO PETITION FOR DECLARATORY ORDER OF  
ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

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*Counsel for Sterlite (USA), Inc.*

Dated: August 11, 2009

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35286**

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**ASARCO INC.**

**– PETITION FOR DECLARATORY ORDER –  
AMERICAS MINING CORPORATION**

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**REPLY OF STERLITE (USA), INC.,  
TO PETITION FOR DECLARATORY ORDER OF  
ASARCO INCORPORATED AND AMERICAS MINING CORPORATION**

Sterlite (USA), Inc. (“Sterlite”), hereby responds to the Petition for Declaratory Order (the “Petition”) filed by ASARCO Incorporated and Americas Mining Corporation (together, “Petitioners”) in this proceeding on August 7, 2009. The Petition should be denied.

Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. *Union Pac. R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219, slip op. at 3 (STB served June 11, 2009). But there is no basis for exercise of that authority in this case, because there is no controversy to be terminated, and if there is any appearance of uncertainty, it exists only because Petitioners have created it.

Sterlite is party to the Settlement and Purchase and Sale Agreement (“PSA”), executed March 9, 2009, by ASARCO LLC; AR Silver Bell, Inc.; Copper Basin Railway, Inc. (“CBRY”); ASARCO Santa Cruz, Inc.; Sterlite; and Sterlite Industries (India), Ltd. The PSA provides,

among other things, for the acquisition by Sterlite of the rail assets of CBRY.<sup>1</sup> Because Sterlite is not a rail carrier subject to the Board's jurisdiction, the proposed acquisition of CBRY's assets is subject to 49 U.S.C. § 10901(a), which provides that a person other than a rail carrier may only "acquire a railroad line or acquire or operate an extended or additional railroad line" pursuant to regulatory authorization of the Board. Sterlite has never asserted anything to the contrary.

According to Petitioners, "[i]t is beyond question that the STB has jurisdiction over the proposed transfer of ownership and operations of the CBRY" (*id.* at 5). Sterlite agrees: it has never questioned that proposition. Petitioners, however, repeatedly misrepresent Sterlite's position and intentions in order to suggest that there is some question. While they state that "Sterlite asserts that the STB does not have jurisdiction over this transaction" and refer to "statements ... indicat[ing] a complete disregard for the STB's jurisdiction over the transaction" (*id.* at 4) and to "Sterlite's apparent claim that the STB has no jurisdiction or authority over its purchase" (*id.* at 6), they point to no statement in which Sterlite makes such an assertion. Nor can they, for Sterlite has never made it. They state categorically that "Sterlite proposes to operate the CBRY, by this sale, without seeking appropriate review by the STB" (*id.* at 3), without any basis for this claim other than their speculation about what "Sterlite apparently believes" (*id.* at 5).<sup>2</sup>

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<sup>1</sup> Closing under the PSA cannot take place unless and until the Debtors' Sixth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Modified ("Debtors' Plan"), is approved by the United States Bankruptcy Court for the Southern District of Texas in the proceedings in *In re ASARCO LLC*, (Case No. 05-21207). There is no statutory or regulatory requirement that a transaction subject to 49 U.S.C. § 10901 must be authorized by the Board before the bankruptcy court may consider or confirm a plan that includes such a transaction.

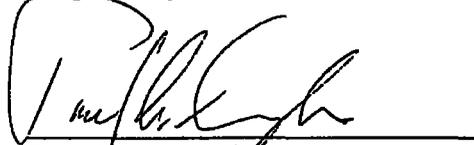
<sup>2</sup> Petitioners claim that "[d]ocuments produced in discovery state that Sterlite does not believe that STB approval is necessary" (Petition at 7), but the only document Petitioners cite in support of this claim states no such thing. While Petitioners correctly state that the document was provided in discovery by the Debtor in the pending bankruptcy proceedings (not by Sterlite),

Thus, despite Petitioners' efforts to create a controversy about the Board's jurisdiction over the proposed acquisition, there is none. Sterlite acknowledges that jurisdiction, and intends to make all filings with the Board needed to obtain regulatory authority for that acquisition. Petitioners are trying to create the false impression that there is such a controversy, in hopes they may thereby influence current proceedings in the bankruptcy court.<sup>3</sup> This Board, however, should not allow its procedures to be abused and its resources (and those of Sterlite) to be wasted for that purpose. The decision to institute a declaratory order proceeding is within the discretion of the Board, and it should exercise that discretion here to deny the Petition.

#### CONCLUSION

For the reasons stated above, the Board should deny the Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation.

Respectfully submitted,



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*Counsel for Sterlite (USA), Inc.*

Dated: August 11, 2009

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they provide no evidence regarding the authorship of that document, the purpose for which it was created, or what it indicates about Sterlite's past or current intentions.

<sup>3</sup> On the same day they filed the Petition with the Board, Petitioners filed a Proffer by their expert witness (attached as Exhibit A hereto) in the bankruptcy proceeding, citing the Petition and claiming that "[b]ecause litigation has now been commenced before the STB, it is now my opinion that the initiated litigation and follow-on litigation challenging STB approval will prolong the STB approval process." Supplemental Proffer of Sidney I. Strickland, Jr. ¶ 6.

**EXHIBIT A**

**SUPPLEMENTAL PROFFER OF SIDNEY L. STRICKLAND, JR.**

*In re ASARCO LLC, et al.,*  
**Case No. 05-21207 (Bankr. S.D. Tex. filed Aug. 7, 2009)**

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

<b>In re:</b>	§	<b>Case No. 05-21207</b>
	§	
<b>ASARCO LLC, et al.,</b>	§	<b>Chapter 11</b>
	§	
<b>Debtors.</b>	§	<b>Jointly Administered</b>
	§	

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**SUPPLEMENTAL PROFFER OF SIDNEY L. STRICKLAND, JR. IN SUPPORT  
OF ASARCO INCORPORATED AND AMERICAS MINING CORPORATION'S  
MODIFIED SIXTH AMENDED PLAN OF REORGANIZATION FOR THE  
DEBTORS UNDER CHAPTER 11 OF THE UNITED STATES  
BANKRUPTCY CODE**

1. The information contained in this Supplemental Proffer is a true and accurate statement of my direct testimony as if I were called as a witness in open court in this case with respect to this Court's consideration of ASARCO Incorporated and Americas Mining Corporation's Modified Sixth Amended Plan of Reorganization for the Debtors Under Chapter 11 of the United States Bankruptcy Code, as well as the Debtors' Sixth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Modified, and the Second Amended Chapter 11 Plan filed by Harbinger Capital Partners Mater Fund I, Ltd. In this Supplemental Proffer, I provide my expert opinion regarding the federal regulatory approval necessary for the Debtors' proposed sale of the Copper Basin Railway ("CBRY") and its operations to Sterlite (USA), Inc. ("Sterlite").

2. This Supplemental Proffer is based upon my personal knowledge, experience, inquiry, and research. This Supplemental Proffer describes my analysis at this time based on the information currently available to me. To the extent additional or updated information is made available for review, and such information impacts my

findings, I will respectfully request the opportunity to supplement this Supplemental Proffer.

3. In addition to the opinions provided previously in my Proffer of July 22, 2009, Docket No. 12056, I provide this Supplemental Proffer based on newly acquired information. As noted in my original Proffer, I pledged to supplement my opinions for the Court should new, relevant information come to my attention.

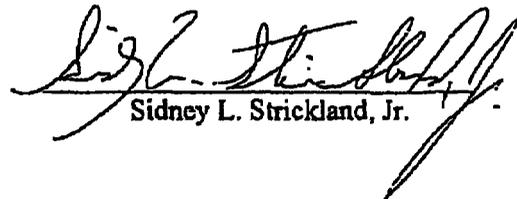
4. I have learned that today a Petition for Declaratory Order (the "Petition") was filed with the Surface Transportation Board ("STB"). *Petition for Declaratory Order of ASARCO Incorporated and Americas Mining Corporation*, STB Finance Docket No. 35286. The Petition contends that Sterlite continues to refrain from filing any sort of request for STB approval or review of its proposed purchase of the CBRY from the Debtors. *Id.* Accordingly, litigation has been commenced requesting that the STB assert and exercise its jurisdiction over the proposed railroad purchase.

5. I have verified the statements in the Petition. Specifically, I have checked with the STB for any filings regarding the CBRY transaction and see no activity involving Sterlite and CBRY. I continue to see no other action taken by Sterlite to initiate the legally required STB review and approval process of the proposed purchase of the CBRY.

6. Because litigation has now been commenced before the STB, it is now my opinion that the initiated litigation and follow-on litigation challenging STB approval will prolong the STB approval process. With this new information in mind, and based on my years of experience as Secretary of the Interstate Commerce Commission ("ICC") (predecessor to the STB), my work within the office of the General Counsel at the ICC,

and my subsequent work before the STB, it is my expert opinion that STB approval of the proposed transaction will be delayed. With due regard for the STB's authority, it is my expert opinion that Sterlite's continued failure to seek STB approval for the Sterlite purchase of the CBRY is greatly increasing the controversial nature of the proceedings that should ultimately be before the STB. This, in turn, foreshadows extensive and protracted litigation that will likely delay the STB approval process. Indeed, Sterlite's refusal to file with the STB is reflective of other proceedings in which there was a refusal to seek appropriate regulatory approval. Those cases took years to resolve.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of August, 2009 in Washington, D.C.

  
Sidney L. Strickland, Jr.

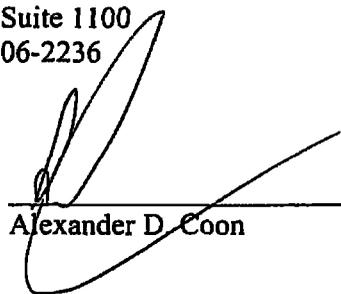
**CERTIFICATE OF SERVICE**

I hereby certify that I have this 11th day of August, 2009, served copies of the foregoing  
Reply of Sterlite (USA), Inc., to Petition for Declaratory Order of ASARCO Incorporated and  
Americas Mining Corporation by first-class mail upon

Gregory Evans  
Robert Moore  
Milbank, Tweed, Hadley & McCloy LLP  
601 South Figueroa Street, 30th Floor  
Los Angeles, California 90017-5735

and by hand upon

Robert Winter  
Milbank, Tweed, Hadley & McCloy LLP  
1850 K Street, N.W., Suite 1100  
Washington, DC 20006-2236

  
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Alexander D. Coon