

GREGORY EVANS (California SBN 147623)
WILLIAM R. PLETCHER (California SBN 212664)
Integer Law Corporation
Pro hac vice
811 West Seventh Street
Twelfth Floor
Los Angeles, California 90017
Telephone: (213) 627-2268
Facsimile: (213) 627-2579
E-mail: gevans@integerlegal.com

STEVEN G. JONES, WSBA No. 19334
LINDA R. LARSON, WSBA No. 9171
RUSSELL C. PRUGH, WSBA No. 41415
Marten Law PLLC
Pro hac vice
1191 Second Avenue, Suite 2200
Seattle, Washington 98101
Telephone: (206) 292-2600
Facsimile: (206) 292-2601
E-mail: sjones@martenlaw.com

JEFFREY C. FEREDAY (ISB No. 2719)
MICHAEL P. LAWRENCE (ISB No. 7288)
Givens Pursley LLP
601 W. Bannock Street
Boise, Idaho 83702
Telephone: (208) 388-1200
Facsimile: (208) 388-1300
E-mail: jefffereday@givenspursley.com

Attorneys for Asarco LLC

**UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

ASARCO LLC, a Delaware limited liability
company,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a
Delaware corporation, and UNION PACIFIC
CORPORATION, a Utah corporation,

Defendants.

Case No. 2:12-cv-00283-EJL

**ASARCO'S FIRST AMENDED COMPLAINT
FOR CONTRIBUTION UNDER CERCLA
SECTION 113(f)**

For its First Amended Complaint (“Complaint”) against Defendant Union Pacific Railroad Company and Union Pacific Corporation (collectively, “Union Pacific”), Asarco LLC (“Asarco”) alleges as follows:

NATURE OF THE ACTION

1. For more than 100 years, Union Pacific used and transported hazardous materials consisting of ore and mining wastes throughout the Coeur d’Alene River Basin (defined below in Paragraph 22). As used in this Complaint, the “Coeur d’Alene Site” (or “Site”) consists of a 1,500-square mile area located in northern Idaho and eastern Washington. The Site includes the Bunker Hill mining and smelting complex and a 21-square mile area around that complex (known as the “Box”). The Site includes various mines and mining-contaminated areas in the Coeur d’Alene River Basin including, without limitation, along the North Fork and the South Fork of the Coeur d’Alene River (respectively, “North Fork” and “South Fork”) and their tributaries, and the main stem Coeur d’Alene River corridor, adjacent floodplains, downstream water bodies (including Coeur d’Alene Lake), tributaries and fill areas. The Site has been impacted as a result of more than 120 years of historical mining, milling, smelting, and transport and handling activities by a number of different entities at more than 100 historical mines, ore processing facilities, and transportation facilities such as railroads.

2. On information and belief, Union Pacific’s actions within the Coeur d’Alene Site resulted in arsenic, mercury, lead, cadmium, and other contamination in soil, surface water, groundwater, fish, and migrating birds located within the Site. Based on these actions, Union Pacific is responsible under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.* (“CERCLA”) for the costs to remediate the environmental harm caused by these actions.

3. On information and belief, Union Pacific constructed rail beds, including those within the North Fork drainage, out of mining wastes that contained hazardous substances. As a result of precipitation, flooding, leaching of surface and groundwater through these rail beds, erosion of the rail beds themselves, and through airborne displacement, those hazardous substances have been released into the environment.

4. In addition, the operation of these rail lines and the transport, disposal, handling and use of hazardous substances resulted in release of hazardous substances within the Coeur d'Alene Site.

5. Asarco has paid hundreds of millions of dollars to the U.S. Government to clean up environmental contamination arising from the mining, transport and disposal of hazardous substances within the Coeur d'Alene Site. Significant portions of that contamination was caused by the actions of or attributable to Union Pacific's actions relative to the North Fork and other areas for which Union Pacific has no contribution protection. This action seeks to require Union Pacific to acknowledge the environmental harm it caused and repay the costs of that harm which have been paid by Asarco.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action and the Defendant pursuant to 28 U.S.C. §§ 1331 and 2201, and Sections 107 and 113 of CERCLA, 42 U.S.C §§ 9607 and 9613.

7. Venue is proper in this judicial district pursuant to Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(b), and 28 U.S.C. §§ 1391(b), because the claims arose, and the threatened and/or actual releases of hazardous substances occurred within the District of Idaho.

PARTIES

8. Asarco is a limited liability company organized under the laws of the State of Delaware. Asarco is the successor in interest to all rights of the American Smelting and Refining Company, Inc. and ASARCO, Inc., including those rights obtained by ASARCO LLC as a result of settlement agreements between ASARCO LLC and the United States, as well as the judicially-approved plan of reorganization adopted in the case of *In re ASARCO LLC*, U.S. Bankruptcy Court for the Southern District of Texas, Case No. 05-21207.

9. Asarco has accepted responsibility for the cleanup of all of its known liabilities under CERCLA for Asarco's operations within the Coeur d'Alene Site. Asarco has settled all of its liability at the Site with the State of Idaho, the United States, and Natural Resources Trustees acting for the State of Idaho and the United States.

10. Union Pacific Railroad Company is a corporation incorporated in the State of Delaware and is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Union Pacific Railroad Company has owned and operated rail lines in states across the nation, including Idaho, Montana and Washington.

11. Union Pacific Corporation is a Utah corporation doing business and residing within the State of Arizona and is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Defendant Union Pacific Corporation has owned and operated rail lines in states across the nation, including Idaho, Montana and Washington. Throughout its Complaint, Asarco refers to Union Pacific Railroad Company and Union Pacific Corporation, together with any and all of their predecessors-in-interest and subsidiaries, collectively as "Union Pacific."

12. Union Pacific is responsible for multiple releases and for the disposal of hazardous substances within the Coeur d'Alene Site, including within the North Fork drainage and from there into the mainstem river and Lake Coeur d'Alene, for which Asarco has paid the costs of remediation through a judicially-approved settlement.

13. Union Pacific is also the de facto successor to the identically named Union Pacific Railroad Company, chartered through the Pacific Railroad Act of 1862, and to the Union Pacific Railway Company, created on January 24, 1980, through merger of the Union Pacific Railroad and the Kansas Pacific Railway Company.

14. Defendant Union Pacific returned to its original name after a reorganization of Union Pacific Railway that began in 1893 and concluded in 1897. Although Defendant Union Pacific nominally emerged from the reorganization as a new company, its directors, management, and business operations remained the same and it has operated as a mere continuation of the historic Union Pacific business and has held itself out as the same company that was founded in 1862.

15. Union Pacific is a person within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and as used in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

16. Union Pacific is the current owner of, and the former owner and/or operator of numerous operations and facilities at the Site, including without limitation numerous rail lines located within the Coeur d'Alene Site. On information and belief, as a result of Union Pacific's ownership and operation of those lines, Union Pacific released and/or disposed of hazardous substances as those terms are defined in CERCLA.

17. Union Pacific's releases within the Site occurred in part as a result of spills or other discharges of ore and ore slurry from rail cars within in the North Fork drainage and thence

into other rivers and tributaries, soils, surface waters and groundwater located within the Coeur d'Alene Site.

18. In addition, on information and belief, Union Pacific constructed rail lines and related facilities within the Site using mining waste and other materials containing hazardous substances. Based on these actions, Union Pacific arranged for the disposal of hazardous substances and transported hazardous substances for disposal since those substances were deposited or disposed of both inside and outside the rights-of-way of Union Pacific's lines, including those within the North Fork drainage. Flooding and leaching of surface water and groundwater dispersed such hazardous substances into the environment.

STATUTORY FRAMEWORK

19. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part:
- (1) the owner and operator of a vessel or a facility,
 - (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
 - (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
 - (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan....

20. Section 113(f) of CERCLA, 42, U.S.C. § 9613(f), provides in pertinent part:

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under § 9607(a) of this title....

....

(3) Persons not party to settlement

....

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

21. The “paragraph (2)” to which section 113(f)(3)(B) refers is Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), which provides in pertinent part that a person who has resolved its CERCLA liability in an administratively or judicially approved settlement “shall not be liable for claims for contribution *regarding matters addressed in the settlement.*”

(Emphasis added.)

SITE DESCRIPTION AND FACTUAL BACKGROUND

22. The Basin. The Coeur d’Alene River Basin encompasses the watershed of the Coeur d’Alene River and Lake Coeur d’Alene. The South Fork and North Fork of the Coeur d’Alene River converge to form the main stem of the Coeur d’Alene River approximately twenty miles east of Lake Coeur d’Alene. Between this confluence and the mouth of the Coeur d’Alene River at the Lake is an extensive system of lateral lakes and thousands of acres of associated wetlands. For purposes of this action, the Coeur d’Alene Basin refers to the watersheds of the North Fork and the South 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.

23. Mining of metals, including silver, lead, zinc, cadmium, copper and gold, has occurred within the Coeur d'Alene Basin since the late 1800's. Between the late 1800's and late 1960's, mining practices, including ore and hazardous substances hauling and disposal along rail lines (and other areas in which Union Pacific operated), included disposal and release of hazardous substances directly into and along the banks of the North Fork and its tributaries or into disposal areas in the Basin.

24. The Box: The "Bunker Hill Mining and Metallurgical Complex Superfund Site" was added to the National Priorities List by the Environmental Protection Agency ("EPA") in 1983. The Bunker Hill Site consists of three operable units: Operable Units 1 and 2 are located within a twenty-one square mile area, in the location of historic smelting operations, referred to as "the Box." EPA issued Records of Decision for Operable Units 1 and 2 in 1991 and 1992, respectively.

25. In 1994, the Court issued a Consent Decree in Case Number CV-94-0206-N-HLR (the "Box Consent Decree") addressing clean-up of Operable Unit 1 and assigning responsibility for Operable Unit 1 to several Settling Defendants, including Asarco. The State of Idaho was a party to the Box Consent Decree in CV-94-0206-N-HLR. Pursuant to the Box Consent Decree, the clean-up of Operable Unit 1 has been funded by the Settling Defendants, including Asarco.

26. The clean-up of Operable Unit 2 has been funded by the United States and the State of Idaho.

27. Operable Unit 3 consists of the areas located outside of the Box, where mining related contamination has come to be located in the Basin.

28. Various issues concerning the Site have been heavily litigated over the past 25 years. The United States, the State of Idaho and the Coeur d'Alene Tribe each have previously filed various environmental claims against Asarco and other mining companies under CERCLA, 42 U.S.C. § 9601 *et seq.* The claims pursued against Asarco ultimately were settled as part of the Coeur d'Alene Site Settlement achieved in Asarco's bankruptcy, as described further below.

29. In 1990, the Coeur d'Alene Tribe and the United States began a joint Natural Resource Damage Assessment in the Coeur d'Alene Basin, which resulted in plans and assessments published between 1991 and 2000.

30. In 1991, the Tribe sued ASARCO LLC, Hecla Mining Company and various other mining companies and Union Pacific, seeking to recover natural resource damages caused by the release of mine tailings and other hazardous substances in the Basin. *Coeur d'Alene Tribe v. ASARCO, et al.* (District of Idaho Civil Action No. 91-0342-N-HLR).

31. On March 22, 1996, the United States brought an action against Asarco and other parties for the recovery of response costs and natural resource damages in connection with the Bunker Hill Mining and Metallurgical Complex Superfund Site. *U.S. v. ASARCO, et al.* (District of Idaho, Civil Action No. 96-0122-N-EJL).

32. In September 1996, the Court granted a Motion to Consolidate the United States' and Tribe's actions under CERCLA related to the Bunker Hill Mining and Metallurgical Complex Superfund Site.

33. In 1998, EPA initiated a Remedial Investigation/Feasibility Study ("RI/FS") for Operable Unit 3.

34. On September 12, 2002, EPA issued an interim Record of Decision (“ROD”), which outlined an interim remedy for ecological harm and a comprehensive remedy for human health for Operable Unit 3.

35. In a lengthy opinion issued after 78 days of trial, Federal District Judge Edward Lodge concluded that ASARCO LLC’s liability could be apportioned based on the historical mine tailings produced in the Basin and that ASARCO LLC was therefore not jointly and severally liable under CERCLA for the damages asserted in the consolidated action. *Coeur d’Alene Tribe v Asarco, Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003) (“2003 Asarco Decision”). In that opinion, the Court ruled that ASARCO LLC is responsible for contributing 22 percent of certain mine tailings and that divisibility of liability based on this is reasonable. Therefore, Asarco was deemed responsible for 22 percent of the costs of CERCLA remediation at the Site. 280 F. Supp. 2d at 1121. A second phase of the trial was planned to consider damages, *id.* at 1111 and 1135, but this second phase was never commenced.

36. On August 9, 2005, Asarco filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code in the Bankruptcy Court for the Southern District of Texas (the “Bankruptcy Court”).

37. On March 13, 2009, Asarco filed a motion in the Bankruptcy Court for approval of a settlement of Asarco’s CERCLA liability under which Asarco would pay approximately \$482 million to resolve its environmental liabilities at the Coeur d’Alene Site (the “Coeur d’Alene Site Settlement”). The Coeur d’Alene Site Settlement was approved by the Bankruptcy Court and United States District Court for the Southern District of Texas. The Coeur d’Alene Site Settlement was to be funded upon court approval of a plan of reorganization.

38. On November 13, 2009, the Bankruptcy Court approved Asarco's Plan of Reorganization, under which Asarco would make full payment on the environmental claims asserted against Asarco and which had been settled as part of the proceedings in the bankruptcy case.

39. On December 9, 2009, Asarco's Plan of Reorganization became effective, enabling disbursement of funds for environmental settlements, including funds for the Coeur d'Alene Site Settlement. Asarco fully funded the Coeur d'Alene Site Settlement as part of its reorganization. Thus, the Coeur d'Alene Site Settlement constitutes a judicially-approved settlement which stems from enforcement action taken pursuant to Section 106 or Section 107 of CERCLA.

**UNION PACIFIC'S OWNERSHIP AND OPERATIONS MAKE IT A PARTY
LIABLE TO ASARCO UNDER CERCLA**

40. Union Pacific and its predecessors have owned or operated, and Union Pacific and continues to own and/or operate, rail lines and other facilities located within or adjacent to the Coeur d'Alene Site, including both the South Fork and the North Fork drainages.

41. Upon information and belief, in connection with its construction, ownership and operation of these facilities, Union Pacific arranged, transported, handled, disposed of, or otherwise caused to be released, hazardous substances within the Site, including in connection with its rights-of-way and facilities within the North Fork drainage, and these releases also have contaminated the Coeur d'Alene River and associated waters, lands, and wetlands downstream of the North Fork.

42. By at least 1888, Union Pacific had constructed a standard gauge rail line in the Coeur d'Alene Basin that extended from Tekoa, Washington to Wallace, Idaho. Union Pacific

also constructed and operated within the North Fork drainage to reach mining areas such as the Jack Waite Mine. For approximately 100 years, Union Pacific transported, handled, arranged, and disposed of mine concentrates, ores, and mine waste in the Coeur d'Alene Basin.

43. Based on the topography of the Coeur d'Alene Basin, the Union Pacific rail lines and spurs were constructed to traverse the canyon bottoms along the tributaries and river system. This meant that the rail lines were constructed and operated in continuous close proximity to the various river systems and tributaries within the Coeur d'Alene Basin.

44. Asarco alleges five separate bases for Union Pacific's liability under CERCLA for actions within the Coeur d'Alene Site.

45. First, Asarco alleges that Union Pacific is liable as a result of its construction, ownership and operation of its rail lines within the North Fork drainage and the contamination within the North Fork drainage and downstream that is associated with that construction, ownership and operation. Union Pacific constructed its rail lines in the Basin using mining waste and chat as ballast, and used this same material for repair and refurbishment of the rail beds. Union Pacific also caused hazardous substances to spill from its rail cars in various ways. These actions constitute releases of hazardous substances into the environment.

46. Monitoring within the Coeur d'Alene Basin has identified cadmium, lead, mercury, and zinc as primary surface water contaminants in the river, lake, and wetland systems downstream from the mouth of the North Fork, with lead and zinc tracked as indicators of metals contamination. These are the same hazardous substances transported, used, and disposed of by Union Pacific for decades.

47. Second, Asarco also alleges that Union Pacific is liable as a "transporter" as that term is defined under CERCLA. On information and belief, Union Pacific's selection of the

location of its rail lines and rail beds within the North Fork drainage, its planning and construction of rail lines there, and its transport and use of mining waste and chat along these lines and rail beds, constitutes the transportation of hazardous substances to a specific place of intentional disposal, namely the rail beds, which resulted in a release of hazardous substances to the environment.

48. Third, based on these same allegations, Asarco maintains that Union Pacific is liable as an “arranger” as that term is defined under CERCLA.

49. Fourth, upon information and belief, Union Pacific’s operations, including its active use and disposal of these wastes and tailings, resulted in releases and accumulations of hazardous substances in areas within the North Fork drainage and downstream therefrom, including at the loading/unloading areas, sidings, and other areas associated with these.

50. Fifth, upon information and belief, Asarco alleges that ore slurries and particulates were released into the environment from the numerous rail gondolas operated by Union Pacific to transport ores throughout the Coeur d’Alene Site for many years, and specifically that rail gondolas which carried ore within the North Fork drainage had open tops and hinged bottoms, which caused releases of hazardous substances within the North Fork drainage and from there into the main stem Coeur d’Alene River and Lake Coeur d’Alene.

UNION PACIFIC’S CONSENT DECREES AND THE SCOPE OF THE CONTRIBUTION PROTECTION PROVIDED UNDER THOSE CONSENT DECREES

51. Union Pacific entered consent decrees related to the Coeur d’Alene Site in 1995, 2000, and 2010. Each of these consent decrees was limited in scope and neither any of them, nor all of them together, provide Union Pacific with a complete or comprehensive contribution protection related to the Coeur d’Alene Site.

52. The 1995 Consent Decree only “resolved Union Pacific’s liability at both the Box Populated Site (OU1) and the Box Non-Populated Site (OU2).” The 1995 Consent Decree defines “Site” as an “approximately twenty-one square mile area in Shoshone County, Idaho,” and excludes substantial areas where Union Pacific has operated. The 1995 Consent Decree does not purport to extend to or address hazardous substances in the primary contaminated waterway in the Coeur d’Alene Basin – it specifically excludes “any hazardous substances in the South Fork of the Coeur d’Alene River.” The 1995 Consent Decree also does not cover, and therefore does not absolve Union Pacific from, any “liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site” or any liability for natural resource damages. 1995 Consent Decree at 83, ¶ 91

53. The 2000 Consent Decree likewise provides Union Pacific only limited contribution protection at the Coeur d’Alene Site. These matters are limited to Union Pacific’s rights-of-way in limited areas, namely Union Pacific’s releases from rights-of-way constituting the Wallace Branch and the Mullan Branch located along the South Fork and the main stem Coeur d’Alene River. The 2000 Consent Decree also provides Union Pacific contribution protection for natural resource damages within the Coeur d’Alene Basin.

54. Union Pacific’s 2010 Consent Decree is limited in scope to the Wallace Yard and Spur Lines in the South Fork drainage.

55. The scope of Asarco’s contribution claim asserted against Union Pacific in this action is broader than the areas and liabilities covered by any of the three Consent Decrees. In particular, the Consent Decrees do not address, and do not provide Union Pacific contribution protection for, Union Pacific’s releases along and into the North Fork.

56. Union Pacific's contribution protection under the Consent Decrees does not extend to any mining wastes, chat, slag, or other wastes or hazardous substances disposed of beyond Union Pacific's rights-of-way and other discrete sites defined in the Consent Decrees. Upon information and belief, Union Pacific is responsible for a significant volume of releases of hazardous substances from waste and other materials placed outside of such rights-of-way and discrete sites, including wastes and other materials containing such substances known to have been placed directly in Coeur d'Alene Basin waterways.

**ASARCO'S SETTLEMENTS AND PAYMENTS RELATING
TO THE COUER D'ALENE SITE**

57. In its bankruptcy, Asarco settled its CERCLA liabilities, including its liability for NRD, for the Coeur d'Alene Site. A copy of the Coeur d'Alene Site Settlement is attached as Exhibit 1 to this Complaint.

58. The Site definition for purposes of Asarco's Coeur d'Alene Site Settlement – and therefore Asarco's bankruptcy settlement for the Site – includes any location within the Coeur d'Alene Basin at which hazardous substances from historical mining and associated activities have come to be located. Specifically, the Site includes the Box and “all mining-contaminated areas in the Coeur d'Alene River corridor, adjacent floodplains, downstream water bodies, tributaries, and fill areas,” and encompasses “contaminated soil, sediments, surface water, groundwater, fish, and migratory birds allegedly impacted by hazardous substance releases from historical mining, milling and smelting operations, as further described in the proofs of claim, and includes any location at which hazardous substances from this site have come to be located.”

59. The United States filed two Proofs of Claim against Asarco in the bankruptcy proceedings. In its February 16, 2002 Proof of Claim (“Initial Proof of Claim”), the United States asserted that Asarco owed the United States \$25.4 million dollars for response costs incurred in connection with Operating Unit 3, and enforcement costs, natural resource damage assessment, and restoration planning activities in connection with the Coeur d’Alene Basin, which represented Asarco’s 22 percent divisible allocation determined in the 2003 Asarco Decision.

60. The geographical scope of the Initial Proof of Claim (referred to therein as the “Bunker Hill Facility”) was defined to include “areas contaminated with mine waste within the Coeur d’Alene River corridor and tributaries, adjacent flood plains, including lateral lakes and associated wetlands, Coeur d’Alene Lake, fill areas and the 21-square mile area that surrounds the Bunker Hill Mine and Smelting Complex that has come to be known as the Bunker Hill ‘Box.’” The Initial Proof of Claim expressly described mining and milling activities, mining-related contamination, and response action taken along the North Fork of the Coeur d’Alene River, including at the Jack Waite Mine which the United States alleged that Asarco had once “owned” and/or “operated.”

61. In its July 28, 2006 Proof of Claim (“Supplemental Proof of Claim”), the United States asserted that Asarco instead was jointly and severally liable for: (a) \$137.3 million of response costs and enforcement costs (including interest) incurred in connection with Operating Unit 3; (b) \$326 million of estimated additional response costs in Operating Unit 3; and (c) \$10 million of estimated responses costs incurred (including interest) and to be incurred at Gem Portal (which is within Operating Unit 3, but addressed separately in the Supplemental Proof of Claim). In the Supplemental Proof of Claim, the United States also asserted a contingent

unliquidated claim that Asarco was jointly and severally liable for additional response costs that may be required.

62. In addition to the claims described in the preceding paragraph, the United States set out separate claims against Asarco in the Supplemental Proof of Claim for joint and several liability for \$8.4 million of estimated response costs associated with the Jack Waite Mine Site in the North Fork drainage (a sum that includes \$116,539 claimed specifically in connection with the Jack Waite Mine Site in the Initial Proof of Claim).

63. In December 2009, Asarco made \$482.143 million in payments tied to the Coeur d'Alene Site as part of a bankruptcy reorganization settlement. The majority (\$359.179 million) of the settlement was assigned for EPA-selected general and specialized Site response actions.

The settlement funds were placed into the following accounts:

- \$330.25 million: General work account.
- \$28.929 million: Specialized work account.
- \$41.464 million: Past and future oversight costs.
- \$14 million: Administrative expenses.
- \$67.5 million: Natural Resource Damages account.

64. The Site covered by the Asarco bankruptcy settlement includes areas with contamination resulting from the erosion and other releases of mine wastes placed by Union Pacific as fill and railroad ballast or otherwise, within and beyond its rights-of-way, as well as mine wastes released by Union Pacific in connection with Union Pacific's transportation and handling of ores and concentrates. This includes releases within the North Fork drainage that contaminated the North Fork and areas downstream, including the main stem of the Coeur d'Alene River, Lake Coeur d'Alene, and associated wetlands and environments.

COUNT I - CLAIM FOR CONTRIBUTION UNDER SECTION 113(f) OF CERCLA

65. Asarco incorporates by reference the preceding paragraphs as if fully set forth herein.

66. The Coeur d'Alene Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

67. "Hazardous substances," within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), were disposed of, placed, released, or otherwise became located within the Coeur d'Alene Site at times relevant to this action by Union Pacific. Union Pacific is responsible for "releases" within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), or "disposals" within the meaning of Section 101(29), 42 U.S.C. § 9601(29), into the environment at the Coeur d'Alene Site at times relevant to this action.

68. Response costs incurred by Asarco for the Coeur d'Alene Site are consistent with the National Contingency Plan (the "NCP"), pursuant to Section 107(a)(4)(B) of CERCLA, 42 U.S.C. § 9607(a)(4)(B), and implementing regulations. Any person may seek contribution from any other person who is liable or potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), 42 U.S.C. § 9613(f)(1).

69. A person is liable under Section 107(a) of CERCLA if the person owned or operated any facility at which such hazardous substances were disposed. 42 U.S.C. § 9607(a)(2).

70. A person is liable under Section 107(a) of CERCLA if the person arranged, by contract or otherwise, with a transporter for transport or disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or

incineration vessel owned or operated by another party or entity and containing such hazardous substances. 42 U.S.C. § 9607(a)(3).

71. A person is liable under Section 107(a) of CERCLA if the person accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs. 42 U.S.C. § 9607(a)(4).

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

73. Asarco has resolved its CERCLA liability for a response action with the United States through the judicially approved bankruptcy reorganization and may seek contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f).

74. To date, Asarco has incurred approximately \$482,143,000 for response actions that are consistent with the NCP pursuant to 42 U.S.C. § 9607(a)(4)(B). This amount represents more than Asarco's allocable share of costs related to the releases or disposal of hazardous substances that have taken place within the Coeur d'Alene Site.

75. Union Pacific qualifies as a responsible party under CERCLA § 107(a) and it is liable for its equitable share of any overpayment of costs by Asarco at the Site for which Union Pacific does not have a defense.

76. WHEREFORE, Asarco respectfully requests that judgment be entered in its favor and against Union Pacific as follows:

