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U.S. Department of Justice

Environment and Natural Resources Division

Washington, D.C. 20530

DRAFT: DOJ SENSITIVE

SUBJECT: Settlement Agreement in Atlas Corporation and Vinnell Mining and Minerals Corporation v. Bureau of Land Management, Department of Interior, United States of America, CV-91-1321 (D.D.C.)

SUMMARY

This case was brought under sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Recovery Act ("CERCLA"), 42 U.S.C. §§ 9607, 9613. The Plaintiffs are two mining companies that formerly owned and operated the subject property, known as the Atlas Asbestos Mine Superfund Site (the "Site"), situated in western Fresno County, California. The two Plaintiffs were, in a previously filed federal enforcement action filed in California, alleged by EPA to be potentially responsible parties based on their disposal of asbestos at the Site. Although DOJ attempted to negotiate a global settlement of both EPA's claims and the potential claims by and against DOI, they were unsuccessful in resolving claims between the private parties and DOI. Therefore, that litigation was settled by resolving only EPA's claims against the private PRPs, who reserved the right to, and subsequently did, file a complaint against the United States Bureau of Land Management ("BLM") alleging that BLM is liable as a current owner of the Site within the meaning of CERCLA section 107(a)(1), 42 U.S.C. § 9607(a)(1). BLM subsequently filed a counterclaim alleging that the mining companies, as past owners and operators of the Site within the meaning of CERCLA section 107(a)(2), 42 U.S.C. § 9607(a)(2), are liable to BLM for response costs expended by BLM at the Site. Both the complaint and the counterclaim thus seek cost recovery and contribution under CERCLA.

In the settlement agreement, BLM agrees to implement certain (primarily non-structural) portions of the remedy selected in EPA's Record of Decision ("ROD") for this operable unit at the Site and to contribute up to $25,000 annually toward the operation and maintenance component of the Site remedy. In addition, BLM agrees to pay a portion of EPA's future oversight and response costs related to implementation of the ROD for the Site. The total cost of the settlement to BLM is approximately $1.2 million, spread out over the term of the remedy.

DISCUSSION

I. Background

A. Description and History of the Site

The Site is located in a largely rural area of central California, approximately 18 miles northwest of the nearest city, Coalinga (population 8,307). The Site covers approximately 450 acres (1.8 square kilometers) and contains an estimated three million cubic yards of asbestos mining and milling waste. All but ten acres of the Site are owned by the United States and are under BLM's jurisdiction.

EPA's involvement with the Site dates back over ten years, when elevated levels of asbestos were detected far downstream of the Site in water samples taken from the California Aqueduct near Los Angeles by the Southern California Metropolitan Water District ("MWD"). The sampling program, conducted in August through September of 1980, suggested that the Site was one probable source of asbestos in the Aqueduct. After further investigations by State authorities and EPA, the Site was rated using the Hazard Ranking System and approved for listing on the National Priorities List ("NPL") on September 21, 1984, in accordance with Section 105(a)(8) of CERCLA, 42 U.S.C. § 9605(a)(8).

The Plaintiffs, Atlas Corporation ("Atlas") and Vinnell Mining and Minerals Corporation ("VMMC"), are mining companies that operated the Site at different times pursuant to the General Mining Law of 1872, 30 U.S.C. §§ 22 et seq. Under the 1872 Mining Law, mining companies can obtain one of two forms of title to public lands open to mineral exploration: (1) a claimant may stake a "claim" on the land and thereby receive a possessory right to carry out mining operations; or (2) a claimant may seek to "patent" the land, and thereby receive the entire fee title.

In 1962-63, Atlas assembled a large block of mining claims and constructed an asbestos mill at the Site. Atlas conducted mining operations there until 1967, when it sold the operation to VMMC, who continued the mining and milling operations from 1967 to 1974. During the time Atlas and VMMC were operating the Site, the United States granted patents to the mining companies covering approximately ten (10) acres of the Site. In 1974, VMMC sold the operation to Wheeler Properties, Inc. ("Wheeler").

Wheeler, which was subsequently adjudicated bankrupt, operated the mine facility until 1979 when operations finally ceased.

Atlas and VMMC's asbestos mining and milling operations at the Site resulted in the creation and widespread disposal of asbestos laden waste at the Site. The mining activities included digging the asbestos ore out of surface pits and then milling the ore. The by-products of the milling process (sometimes referred to as "mill tailings") were bulldozed into large piles near the mill building. Chrysotile asbestos, the only contaminant of concern at the Site, was found by EPA to exist at high levels in the soils, ore piles and mill tailings.

With the exception of the patented 10 acres, the United States held title to the Site during all the years the Site was being mined, and is the current owner. It is under the administrative jurisdiction of BLM. Since the cessation of mining over ten years ago, BLM has allowed certain right-of-way holders to utilize the road that crosses the Site, and also encouraged recreational users to access the Site. BLM allowed ORV races and other such uses of the site to continue even after the Site was placed on the NPL. Plaintiffs allege that these users have disturbed waste piles and surfaces at the Site, thereby causing and exacerbating releases of asbestos from the Site. EPA has, in various public documents, made similar assertions concerning BLM's actions (and inaction).

B. PRP Negotiations With EPA

After the Site was listed on the NPL, EPA undertook a Remedial Investigation/Feasibility Study ("RI/FS"), which was completed in March of 1990. While the RI/FS was ongoing, EPA sent general notice letters to potentially responsible parties ("PRPs"), including BLM. On March 19, 1991, special notice letters were sent to the two private party PRPs (Atlas and VMMC) pursuant to section 122(e) of CERCLA. Simultaneously, notice of federal facility agreement negotiations were sent to BLM pursuant to CERCLA section 120.

Thereafter, EPA and BLM attempted to negotiate a comprehensive settlement with the two mining companies. However, in part because of the paucity of case law on allocation of an owner's share of liability, the private parties and BLM valued their cases very differently. BLM offered to resolve its share of liability at the Site by payment to Atlas and VMMC of $800,000. Atlas and VMMC rejected this offer, demanding that BLM pay an allocated share of not less than one-third. EPA then

negotiated a consent decree with the private PRPs that required them to complete the remedy called for in the ROD, but allowed the private PRPs and the Department of Interior to pursue those contribution actions against one another.

C. The Response Action

According to EPA, asbestos waste at the Site presents three major problems: 1) generation of airborne asbestos on-Site by vehicular or other human disturbance; 2) the transport of asbestos from the Atlas Mine Area by vehicles which have been driven through the Mine Area; and 3) the release, during heavy rains, of chrysotile asbestos from the Mine Area into local creeks, with the potential for this asbestos to later become airborne after deposit at downstream locations.

The remedy for the asbestos found at the Site focuses on controlling the release of asbestos from and restricting access to the Mine Area using engineering and institutional controls consistent with modern reclamation practices. More specifically, the selected remedy entails:

1. Fencing and other appropriate controls to restrict Site access;

2. Paving the existing road through the Mine Area or implementing an appropriate road maintenance alternative;

3. Constructing stream diversions and sediment trapping dams to minimize the release of asbestos into local creeks;

4. Conducting a revegetation pilot project to determine whether revegetation is an appropriate means of increasing stability and minimizing erosion of the disturbed areas, and implementing revegetation if that is found to be feasible;

5. Dismantling the mill building and disposing of construction debris;

6. Filing deed restrictions; and

7. Implementing an operation and maintenance program.

In EPA's opinion, stabilizing and controlling asbestos waste will minimize the release of asbestos, thus providing long-term protection of human health and the environment. EPA has estimated the cost of the selected remedial action at $4.2 million, exclusive of EPA costs totalling approximately $2.7 million.

The operation and maintenance ("O&M") activities (referred to above as remedy item no. 7) will be required to ensure the effectiveness of the response action. Under the EPA consent decree, in the event of a natural disaster such as a flood or earthquake, repairs necessary to contain the hazardous substances must be made. Because the asbestos waste will not be treated, long term management of the waste will be required. Also, EPA will periodically review the remedial action pursuant to CERCLA Section 121(c).

D. The EPA Consent Decree

In August of 1992, EPA, Atlas and VMMC entered into a consent decree in United States District Court for the Eastern District of California for the remediation of the Site. The consent decree requires Atlas and VMMC to perform all of the remedial work necessary to protect public health, welfare and the environment, and to reimburse EPA for its future oversight costs. In addition to performing at their expense the design and

implementation of the remedy, Atlas and VMMC are required under the EPA decree to conduct operation and maintenance for a period of thirty (30) years. The EPA consent decree also requires Atlas and VMMC to reimburse EPA $1,620,748.00. According to EPA, this sum represents 60% of the Agency's past costs.[1]

Under the existing EPA consent decree, Atlas and VMMC are subject to stipulated penalties -- ranging from $1,500 to $10,000 per day, depending on the type and duration of the violation -- if they fail to comply with the decree. In addition, the decree provides for a $50,000 penalty in the event EPA assumes performance of the work.

C. Negotiations Between Plaintiffs and BLM

Following the failure of the parties to reach a comprehensive global settlement in 1991, the mining companies and BLM prepared for trial in the District Court for the District of Columbia, J. Greene presiding. The parties propounded and responded to extensive discovery requests, and a number of depositions were taken. During the course of this first round of discovery, BLM submitted a "task specific" settlement offer to the mining companies in which BLM agreed to perform certain remedial tasks for which the mining companies had responsibility under the EPA consent decree. The offer was largely a reiteration of a settlement offer made by BLM several years earlier, which was rejected by Atlas and VMMC. After the completion of the first round of discovery, in mid-March of 1992, the mining companies agreed in concept to many of the provisions of BLM's offer, but major details remained unresolved.

The negotiation of a document memorializing this agreement became an arduous task. For example, the mining companies insisted that the agreement take the form of a consent decree entered in the district court. We would not agree to such a format because the action filed by the mining companies was for cost recovery and contribution; in such an action a plaintiff is not entitled to injunctive relief mandating that work be performed at the Site and therefore such a consent decree would, in our view, be outside of the Court's jurisdiction. Other problem areas included, inter alia: the percentage of EPA's

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[1] EPA believes that BLM is liable for the remaining portion of EPA's past costs incurred at the Site. BLM disputes this. The agencies are currently negotiating this issue and may eventually seek to resolve it through administrative channels.

future costs to be paid by each of the parties; who would bear the burden of contracting for the thirty-year O&M plan required under the EPA consent decree; and how to resolve disputes between the parties.

In mid-November of 1992, after entering a stipulation as to liability, the parties continued to negotiate the agreement while simultaneously preparing for an allocation trial. Atlas and Vinnell did not concede several critical issues until we propounded a significant volume of written discovery demands and noticed 30(b)(6) depositions of both companies, including the depositions of former employees who agreed to testify at trial. Shortly after receiving these discovery requests, the mining companies softened their positions and acceded to virtually all of our settlement conditions. On February 8, 1993, the parties asked the court to extend any action on the case for sixty (60) days to allow completion, if possible, of the settlement discussions. The court agreed to this request, requiring the parties to fully resolve this matter by April 5 or face trial. The mining companies have now approved the attached agreement, which we believe is a very favorable settlement for the United States and which will at last conclude the litigation over the Atlas Site.

II. The Settlement Agreement

A. Description of the Agreement

In the proposed settlement agreement, BLM agrees to perform the following elements of the EPA consent decree:

1. Revegetation Project: BLM agrees to assume responsibility for the EPA revegetation pilot project and any revegetation project that EPA deems feasible based on the results of the pilot project;

2. Road Maintenance: BLM agrees to undertake the paving of the White Creek Road, which runs through the Site, or to provide another engineering alternative acceptable to EPA (such as applying a dust suppressant);

3. Fence Repair and Maintenance: BLM agrees to repair, maintain or replace the existing fence at the Site as may be required by EPA;

4. Patrolling and Monitoring: BLM agrees to patrol the Site on a monthly basis (or more frequently, if EPA so requires). BLM's only obligation in this regard would be to inspect, record and report conditions at the Site. This obligation specifically excludes monitoring for problems that would require more expertise than that of a layperson;

5. Contribution to O&M: BLM agrees to contribute up to $25,000.00 per year (adjusted every four years according to the local consumer price index) toward the O&M costs at the Site related to: (1) sediment removal from sediment catchment basins to be built by Atlas and VMMC at the Site; (2) maintenance of access to the basins; and (3) removal of any obvious obstructions that become lodged in the basins. BLM also agrees to be responsible for letting any contracts necessary for completion of these tasks;

6. Contribution to EPA's Future Costs: BLM agrees to pay 18% of EPA's future oversight costs at the Site; Atlas and VMMC will pay the remaining 82%. BLM also agrees to pay any future response costs incurred by EPA at the Site specifically relating to the tasks assumed by BLM under this agreement.

Atlas and VMMC are obligated under this settlement to perform all remaining elements of the remedy required by the EPA consent decree and the ROD.

Throughout the settlement negotiations, we attempted to anticipate and resolve potential problems that could have arisen because of the unique posture of this case. For example, although the above list constitutes the basic obligations BLM has agreed to undertake, the mining companies insisted on incorporating most of the provisions of the EPA consent decree into this settlement agreement. The primary reason for such an inclusion is that, as between the mining companies and EPA, the mining companies are entirely responsible for the remedy at the Site.

For example, if BLM fails to perform any of the enumerated tasks it agrees to complete, EPA can proceed against the mining companies for stipulated penalties. Thus, the agreement provides that BLM will reimburse the mining companies, with interest, for any penalties that the mining companies must pay as a direct result of any BLM non-compliance. This issue presented a

difficult problem, because Atlas and Vinnell (understandably) would not settle unless they had some protection in the event BLM's failures resulted in EPA imposing stipulated penalties against the mining companies.

Were this a "normal" third party site settlement, we could not have agreed to reimburse such penalties because there is no waiver of sovereign immunity to impose penalties against BLM except for violations of a Section 120 interagency agreement. Here, however, since most of the Site involves a federal facility, investigation and cleanup should have been undertaken by DLM pursuant to a Section 120 agreement with EPA. The liability of Atlas and Vinnell could then have been resolved either by their agreeing to perform the work they will be doing and signing the Section 120 agreement (as Shell Oil Co. did at the Rocky Mountain Arsenal) or the mining companies could have committed to do the work in a separate Consent Decree. Either way Atlas and Vinnell would not have been subject to stipulated penalties if BLM defaulted because they would have been responsible to perform only their own work. DLM, in that scenario, would have been directly subject to stipulated penalties assessed by EPA.

Because of the unusual procedural posture of this case we believe there is authority to reimburse Atlas and Vinnell: first, the Interior Solicitor's office has taken the position that DOI would, under its contracting authority, be able to reimburse Atlas and Vinnell for penalties incurred because of BLM's breach, and they have taken the position such would be recoverable as consequential damages as well. In addition, we believe that because BLM would be directly liable for such penalties to EPA had this cleanup proceeded in under a Section 120 agreement, that in effect Atlas and Vinnell are BLM's contractors carrying out part of BLM's responsibility; therefore any penalties assessed against Atlas and Vinnell for BLM's failure to meet its cleanup obligations, are tantamount to the penalties EPA could assess against BLM under a Section 120 agreement.

While this analysis is certainly not as compelling as we might prefer, in our opinion there would be no settlement without the commitment by BLM to reimburse penalties. In addition, BLM clearly retains the right to seek administrative review of any penalties pursuant to federal dispute resolution procedures. Even without such an agreement, DOI's Solicitor's Office has taken the position that such penalties, if not paid by BLM, would

be recoverable as "damages" in a breach of contract action brought by the mining companies in claims court.[2]

Another settlement impasse centered around the means of handling disputes between EPA and BLM. As noted, there is currently no interagency agreement between the two agencies regarding the remediation of this Site, and relations between the two agencies on this site have sometimes been strained. We incorporated a provision that, in the event of a dispute between EPA and BLM, BLM reserves the right to resolve such dispute through "appropriate executive branch administrative channels." However, if EPA refuses to negotiate with BLM (a possibility given the somewhat strained relations between those two agencies over this site), EPA could simply bring an action under the EPA consent decree against Atlas and VMMC and insist that the mining companies perform any tasks that BLM refuses to perform.[3] In essence, this provision makes the standard that is applicable to the mining companies equally applicable to BLM: as to this remedy, EPA's decisions are controlling.

Another issue that created settlement difficulties arises from the fact that BLM is administrator of the public lands on and around which the Site is located. In light of that status, BLM required that it not suffer any penalty under this agreement if it questioned the impact of any portion of EPA's remedy on those other lands. Thus, BLM demanded a provision that such a disagreement between EPA and BLM would be handled through proper executive branch administrative channels and BLM would suffer no penalty under this agreement for questioning such an EPA determination.

We realize that provisions such as those mentioned above are rarely necessary. In this case, however, EPA and BLM are currently negotiating over BLM's liability for EPA's $1 million

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[2] In a letter to BLM dated March 9, 1993, we confirmed this analysis as the basis for BLM's agreement to reimburse Plaintiffs for stipulated penalties caused as a direct result of any BLM failure to perform under the agreement.

[3] Furthermore, in such an action the mining companies would doubtless file a counterclaim against the United States, arguing that the United States (through BLM) agreed to perform the non-completed tasks. This fact will hopefully act as an incentive for EPA and BLM to work out their differences at this site.

outstanding past costs at the Site. Furthermore, there exists a certain amount of acrimony between the agencies regarding the initial handling of this Site.

This agreement represents an outstanding settlement opportunity for BLM. As discussed below, the cost to BLM of the obligations it undertakes herein is low in relation to the risks involved in litigating the parties' allocation of costs at trial. The agreement as written does not infringe on EPA's rights against the mining companies. It also preserves BLM's rights as administrator of the land on which the Site is located. The agreement does not, of course, address the issue of BLM's liability for EPA's past costs; that issue will be decided intra-governmentally.

B. Estimated Cost of the Settlement

We estimate the costs of the remedial tasks as follows:

1. Revegetation Project: BLM has already done some initial revegetation studies and provided the results to EPA. BLM estimates that the revegetation will cost a total of approximately $253,000. We assume that figure accurately depicts the costs of the project, but this cost is entirely within EPA's discretion. Importantly, the knowledge gained from this research will be usable by the government for remediation of similar sites in California.

2. Road Maintenance: BLM believes that concerns regarding asbestos emissions from the White Creek Road can be alleviated at little cost by using a dust suppressant. BLM estimates that such a suppressant would cost $25,000. Since BLM (and its licensees) will continue to use this road, it makes sense for the Bureau to undertake this obligation.

3. Fence Repair and Maintenance: BLM has already constructed a fence around the site at a cost of approximately $100,000. EPA stated in the EPA consent decree that this fence satisfies the fencing requirement of the ROD. As with the road, site management and security is within BLM's expertise as federal land manager.

4. Patrolling and Monitoring: BLM, in its capacity as administrator of the land on which the Site is located, currently patrols the Site on at least a

monthly basis. Thus, the patrolling and monitoring of the Site, will not materially increase the cost of the agreement to BLM and (like site security) is not in any event properly delegable to private concerns.

5. Contribution to O&M: BLM agrees to contribute up to $25,000.00 per year (adjusted every three years according to the consumer price index) for the next 30 years. By comparison with the amount originally offered to settle the case ($800,000 up front), this sum is extremely small. In fact, assuming an interest rate of 8%, $25,000 per year represents merely the interest that would have accrued on the $800,000 sum originally offered by BLM to settle the case. Moreover, BLM personnel charged with implementing the settlement believe that the actual O&M costs will be less than $25,000 per year, especially in the early and later years of the project. By comparison, the construction costs for the remedy - which must be borne in the first two years will be paid for entirely by Atlas and VMMC.

6. Contribution to EPA's Future Costs: BLM agrees to pay only 18% of EPA's future oversight costs at the Site. EPA estimates that its future costs will be approximately 10% of the remedial cost for the Site (exclusive of EPA's costs). EPA estimated the remedial cost at $4.2 million. Ten percent of this would be $420,000. BLM's portion of these costs (18%) would total approximately $75,600.00, which would be paid out over the thirty-year term of the remedy; this would total approximately $2,500/year. By comparison, at the outset of litigation, Atlas and VMMC took the position that BLM's allocated share should be between one-half and one-third of the total.

Thus, while the total cost of the settlement to BLM is approximately $1.2 million, the proposed settlement allows BLM to spread most of its costs over a long period of time, while imposing virtually all of the up-front capital expenditures on Atlas and Vinnell.[4]

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[4] Atlas and VMMC have also incurred and sought recovery of hundreds of thousands of dollars in "soft" costs, including environmental consulting fees and attorney's fees. This

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It also bears emphasis that many of the settlement obligations agreed to by BLM are security-oriented tasks that the agency would be performing in its capacity as a prudent manager of federal property regardless of any agreement with the mining companies. For example, BLM, as land manager, constructed a fence around the Site to secure it from continued use by individuals who were vandalizing and otherwise inappropriately using the old mine structures. Similarly, the road maintenance allows BLM to effectively patrol the area without causing releases of asbestos-laden dust.

Department of Interior attorneys in the Sacramento Regional Solicitor's Office, as well as in the Solicitor's Office in Washington, have been kept advised throughout these negotiations. These attorneys have informed us that they strongly support this agreement. We have also provided a copy of this agreement to Laurie Williams, the EPA attorney in the EPA Regional Counsel's Office for Region IX who worked with DOJ EES on the EPA enforcement case. She informs us that EPA has no problem with the agreement.

c. Litigation Risks

In light of the facts of this case, BLM could not contest liability. CERCLA's definition of liable parties (section 107(a)(1)) includes the "owner" of a facility from which there is a "release" of hazardous substances that causes the incurrence of response costs. In this case, the United States owns most of the contaminated Site. It is also incontrovertible that there have been releases of hazardous substances at the Site and that response costs have been incurred by Atlas and VMMC (as well as by BLM).

Thus, BLM agrees with EPA that BLM is a potentially responsible party. The only issue here was whether BLM could meet the requirements of any of the CERCLA defenses prescribed in section 107(b). Specifically, to avoid liability BLM would have to satisfy, by a preponderance of the evidence, the demanding test for the "third party" defense, prescribed in section

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[4] (...continued)
settlement avoids the risk that BLM will be assessed any of these costs. In light of the uncertainty now prevailing on the issue of attorney's fees recoverability under CERCLA, this risk can not be disregarded.

107(b)(3), to wit: (1) that the releases on the Site were "caused solely by an act or omission of a third party;" (2) that the third-party did not have a contractual relationship (direct or indirect) with BLM; (3) that BLM exercised "due care" with respect to the hazardous substance concerned; and (4) that BLM took all reasonable precautions against foreseeable acts or omissions of the third-party.

When this case was originally referred to EDS, DOI's attorney assigned to the case was unaware of the fact that BLM had (as recently as 1991) actively participated in planning and issuing permits for annual off-road vehicle races that crossed the site, several of which required payment to BLM of entry fees. Once BLM personnel verified at depositions that these races occurred, we determined that it would be extremely difficult, if not impossible, to prevail on any of the four 107(b)(3) elements discussed above.[5]

First, by sanctioning the races, which unquestionable resulted in "releases" as a result of the breaking up of the surface crust of the asbestos, and BLM would likely be found to have, in part at least, "caused" the releases. Second, by accepting permit fees for the races, BLM would likely be held to have had a contractual relationship with the racers. Third, by sanctioning races that crossed the Site, BLM would not likely be deemed to have exercised "due care." And fourth, by sanctioning the races, BLM likely would be held to have failed to take reasonable precautions to prevent releases of asbestos at the Site. It would also come out at trial that EPA believes these races to be ill advised, if not irresponsible.

Additionally, during our examination of BLM personnel and records, we discovered that BLM had allowed purported holders of certain rights-of-way to use the White Creek Road, which crosses the Site, to service microwave towers and repeater stations in the area. For similar reasons as those enumerated above concerning the off-road vehicle races, BLM's permitting of right-of-way users to cross the Site increased the difficulty of prevailing on the 107(b)(3) defense.[6]

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[5] We also learned that BLM receives money from the State of California to allow these races.

[6] Additionally, EPA publicly stated that, based on BLM's failure to control site access, BLM was a PRP at the Site. This

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Because the CERCLA section 107(b)(3) defense is potentially critical at other DOI sites with better facts, we believed it imprudent to risk an adverse precedent on the poor facts present here. Therefore, in order to avoid sacrificing resources (and our credibility with the Court) by asserting the third-party defense during the liability phase of the case, we decided to forego the 107(b)(3) defense and stipulate to liability. On November 7, 1992, the parties entered a stipulation agreeing that BLM was a "liable party" under CERCLA and requesting the Court to begin the second, or allocation, phase of the litigation.

CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1), provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." As previously mentioned, there is little case law dealing with the proper allocation of response costs to the owner (as compared to an operator) of a CERCLA site. However, the reported allocation cases that have addressed this issue indicate that a current owner is likely to face a significant struggle in arguing for "minimal" liability. For example, in United States v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991), the court reviewed the amount of clean-up costs the trial court had apportioned to a lessor who did not contribute extensively to the contamination on the site. The court of appeals held that the trial court's apportionment of one-third of costs to the lessor was not clearly erroneous because CERCLA gives wide discretion to the courts to establish levels of contribution.

That discretion, the court held, includes considerations besides direct causation. Id. at 574. Some of the considerations that the R.W. Meyer court said a trial court could consider included : (1) the degree of involvement by the parties in handling the hazardous waste, (2) the degree of care exercised by the parties taking into consideration the characteristics of the involved hazardous waste, (3) the degree of cooperation by the parties to prevent further harm to the public or the environment, (4) the economic status of the parties, and (5) any other factors appropriate to balance the equities in light of the totality of the circumstances. Id. at 572-74.

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[6](...continued)
further diminished our chances of prevailing on the Section 107(b)(3) defense.

exploitation of the resources at the Site.[7] These factors might reduce our allocated share of response costs.

The mining companies, however, have several valid arguments. First, some experts believe that when the asbestos in the pits and piles on the Site is exposed to the weather for a number of years, it forms a "crust" which reduces or eliminates airborne emissions of asbestos. Plaintiffs would argue that the only disturbance to this crust since mining stopped in 1979 was recreational and right-of-way uses encouraged by BLM; had BLM not encouraged and permitted these uses, the Site would now be stable. Plaintiffs have also pointed out that BLM, although the landowner during the entire period of mining, never complained or requested that the operation be conducted differently. Plaintiffs have also noted that the express purpose of the 1872 mining law was to encourage mineral exploitation in the United States.

In our opinion, a reasonably likely judicial allocation of response costs at the Site would be assignment of 1/3 (33 1/3%) of the costs to each party -- BLM, Atlas and VMMC. However, if the Court accords substantial weight to evidence introduced by Atlas and VMMC, it might well decide that the United States poorly addressed the cleanup of this Site and thus the United States should bear 50% or more of the costs for remediation of the Site. Such a decision would set a disturbing precedent for future allocation cases involving federal agencies.

As this discussion shows, it is very difficult to place a value on BLM's potential liability in an allocation proceeding. We believe that the settlement accords BLM a much lower percentage (in the range of 10-15%) of the overall costs of remediation than would likely be assessed by the court. The approximate dollar value of such a negative judicial finding would be in the $3-4 million range (much of which would be incurred immediately), compared to the approximately $1.2 million BLM will pay over time under the settlement. Moreover, the operations and maintenance costs are expected by BLM to likely to

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[7] Plaintiffs' records show that the companies themselves did not make a profit on their operations at the Site. We would attempt to argue that the reason they did not make a profit was because of the numerous royalties paid out to claimholders by the corporations; in most cases, these claims were held by principals of the Plaintiff corporations or by partnerships and corporations in which these principals had an interest.

be less than projected, whereas BLM expects the mining companies' initial capital outlay to be more costly than heretofore projected.

RECOMMENDATION

Based on the above analysis, we feel that the proposed settlement is in the best interests of the United States. We therefore recommend that you approve it.