



## DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

### AN OVERVIEW OF DEVELOPMENTS IN MONTANA V. ARCO (1983 to 1999)

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and  
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#### I. Brief Case History

- A. **The State of Montana commenced its natural resources damages ("NRD") action against ARCO on December 12, 1983. In that case captioned State of Montana v. Atlantic Richfield Company (CV 83-317-HLW-PGH), the State asserted claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 USC § 9601-9674 ("CERCLA"), for alleged injuries to natural resources in the Clark Fork River Basin in southwest Montana. The State's initial Complaint alleged that the Berkeley Pit and other unnamed "facilities" owned or operated by the Atlantic Richfield Company ("ARCO") or its predecessor, The Anaconda Company, had released hazardous substances which "caused injury to land, surface and groundwater, drinking water supplies, fish, biota and other such natural resources within the State of Montana." Complaint and Claim of Loss at ¶7. In one of its several amended Complaints filed some seven years after the initial Complaint, the State added claims for the same alleged natural resource damages under the State of Montana's Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), Mont. Code Ann. §§ 75-10-701 to 75-10-752 (1997).**
- B. **However, soon after the State filed its initial Complaint and after only very limited preliminary motions and discovery practice, the parties filed on August 13, 1984 a stipulation requesting a stay of the proceedings ". . . until such time as the Court receives notice from either party that the Remedial Investigation and Feasibility Study RI/FS currently being conducted by the Plaintiff Department of Health and Environmental Services [for Silver Bow Creek] under Section 104 of CERCLA and Title 75, Chapter 10, Part 6, MCA, has been finalized." Stipulation for Stay of Proceedings at ¶1. On August 24, 1984, the Court entered an Order staying the case and it remained stayed until December 5, 1989 when the Court entered an Order removing the stay.**
- C. **A case management order was entered on August 20, 1990 and both discovery and motions practice ensued from September 1990 to December 16, 1992. During that period the State also began in earnest to conduct its natural resource damages assessment ("NRDA") which it claimed to be conducting in accordance with the United States Department of the Interior's regulations for the conduct of NRDA's which are set forth at 40 CFR Pt. 11 ("the DOI NRD Regulations"). The State issued a Preassessment Screen in October 1991 and published its Assessment Plan in three parts beginning with Part I in January 1992, Part II in April 1992, and Part III in June 1994. ARCO submitted extensive legal and technical**

comments upon each part of the State's Assessment Plan.

- D. On December 16, 1992, the parties filed a motion requesting the Court to again stay the litigation to allow them time to attempt to negotiate a memorandum of understanding which would serve as the framework for future confidential settlement negotiations. The Court granted the motion and on March 18, 1993, after four months of negotiations, the parties filed such a MOU and requested that the stay be extended to allow the parties to engage in three rounds of confidential settlement negotiations focused upon: (1) Injury Determination and Quantification; (2) Damages Determination; and (3) Final Negotiations regarding the amount of any settlement and the terms of any final settlement agreement. Those confidential negotiations took place between August 1993 and June 1994, but the parties were unable to resolve the State's claims.
- E. As a result of these unsuccessful negotiations, ARCO concluded that it would be virtually impossible to resolve the State's claims either through negotiations or litigation until further progress was made in selecting and implementing remedies for the various operable units which make up the Upper Clark Fork River Basin National Priorities List (NPL) sites. Resolving the State's NRD claims before such remedies were selected had already proven to be very difficult because these claims were limited by CERCLA's language and the DOI NRDA regulations to the residual injury, if any, remaining after remediation was conducted. ARCO filed a motion seeking to extend the stay of litigation following the failed negotiations, however, the motion was opposed by the State and denied by the Court.
- F. On October 15, 1995, the same day that the stay expired, the Confederated Salish and Kootenai Tribes ("Tribes") served a Motion to Intervene and proposed Complaint in Intervention. The Tribes had first formally asserted that they were co-trustees whose interests were implicated by the State's claims in a letter dated May 3, 1993 in which they notified ARCO, the State, the Court and the United States that they intended to assert claims for alleged injuries to natural resources in the Clark Fork River Basin over which they claimed trusteeship.
- G. After the stay was lifted, ARCO and the State once again began motions practice and discovery in earnest. Also, during January of 1995, the State issued its injury assessment reports which the State claimed also served as expert reports. The reports were divided into the following resource categories: (1) groundwater, (2) aquatic, and (3) terrestrial. The State simultaneously issued its compensable value damages and restoration damages assessment reports. Together these reports comprised the State's NRDA. The State contended that its NRDA was conducted in accordance with the DOI NRDA regulations, and was therefore entitled to a rebuttable presumption at trial. Over the next six months, ARCO took the depositions of the dozens of scientists and economists employed by the State to prepare those reports. In July 1995, ARCO served upon the State over 25 expert reports prepared by scientists, economists and a historian setting forth ARCO's positions with respect to the State's claims of injuries and damages. Subsequently, the State took the depositions of most of ARCO's experts and the parties exchanged rebuttal and surrebuttal expert reports. During the first half of 1996, the parties filed numerous motions for summary judgment and other substantive motions including ARCO's motion to exclude the State's contingent valuation methodology economic survey from evidence and the State's motion for review of its claims on the administrative record it had compiled. The Court denied both of these motions in important rulings on the eve of trial.

## II. Brief Summary of the State's Claims and ARCO's Defenses and Counterclaims

Based upon these massive multi-year pretrial proceedings, the parties developed opposing positions regarding the condition of the natural resources in the Clark Fork River Basin, the anticipated results of clean up actions, and the issue of what, if any, monetary damages were caused as a result of those alleged injuries.

### A. The State's Claims

## 1. Alleged Injuries

### a. Aquatic Resources

- **Alleged reduction of trout populations to one-sixth of baseline in the Clark Fork River ("CFR").**
- **Alleged reduction in diversity and abundance of macroinvertebrates in the CFR and Silver Bow Creek ("SBC").**
- **Alleged elimination of fish from SBC.**

### a. Terrestrial Resources

- **Alleged elimination or reduction of vegetation upon 17.8 square miles of uplands habitat. According to the State, these areas do not provide adequate habitat to maintain viable populations of wildlife typical of upland areas in Montana.**
- **Alleged elimination or reduction of riparian vegetation along the entire length of SBC, the upper 17 miles of the CFR and approximately 3,400 acres in the Opportunity Ponds. According to the State, these injured areas no longer provide adequate habitat to maintain viable populations of wildlife typical of Montana riparian habitat.**
- **Alleged reduction in populations of semi-aquatic mammals such as otter, mink and raccoon.**

### a. Groundwater Resources

- **Alleged contamination of over 500,000 acre-feet of groundwater located in the following areas: Butte, Montana Pole and Treating Plant, Rocker, Anaconda and Milltown.**

## 1. State's Alleged Damages

### a. Alleged Restoration Damages

- **The State alleged that CERCLA response actions would not restore natural resources to baseline at nine geographic areas in the Upper Clark Fork River Basin: Butte Hill, Area One, Silver Bow Creek, Montana Pole and Treating Plant, Rocker, Smelter Hill Area Uplands, Anaconda Area, Clark Fork River, and Milltown Reservoir.**
- **The State sought a total of \$341.7 million for restoration measures that it claimed were necessary to restore the injuries it alleged had occurred and which would continue to exist after the completion of response**

**actions.**

**a. Alleged Compensable Value Damages**

- **The State calculated its alleged damages using a contingent valuation methodology study, a recreational use study and groundwater use study.**
- **Based upon these studies, the State claimed lost use and non-use values of \$410,480,000.**

**a. Alleged Assessment and Enforcement Costs**

- **The State alleged that it had incurred recoverable costs of assessment and litigation which, including interest, equaled \$12,318,000.**

**a. State's Total Alleged Damages**

- **The State alleged that it had suffered damages, including interest, totalling \$764,450,000.**

**A. ARCO's Defenses and Counterclaims**

**ARCO responded to the State's claims in its Answer, in numerous motions and at trial with numerous factual and legal defenses and counterclaims far too extensive to even list here in their entirety. What follows is a partial list of those defenses and counterclaims:**

**1. Selected ARCO Defenses**

- **ARCO's predecessor, The Anaconda Company, in purchasing the assets of other mining companies did not succeed to any liability of such companies under CERCLA or CECRA.**
- **In determining and quantifying injury to resources, the State failed to determine the proper baseline conditions in 1980 and failed to include in baseline the effects of other activities or events such as: placer and silver mining, copper mining, milling and smelting by third parties, major floods, timber harvesting, and road and railroad construction.**
- **All, or substantially all, damages, if any, which the State alleges and all releases of hazardous substances, if any, from which the State alleges such damages resulted occurred wholly before December 11, 1980.**
- **As a result of basic flaws in both the design and implementation and analysis of its injury assessment studies, the State over-estimated the effect, if any, of mine, mill and smelter wastes upon natural resources and systematically underestimated the effects of other natural and human-induced impacts upon those same natural resources.**
- **The State encouraged, abetted and facilitated mining, milling, and**

**smelting operations in Montana, including those of The Anaconda Company with full knowledge of the effects of those operations on natural resources.**

- **The State failed to apportion the claimed injury to resources among various sources of hazardous substances.**
- **The State is not a trustee of soil, vegetation or wildlife habitat on privately-owned land.**
- **To the extent, if at all, that releases of hazardous substances for which ARCO is alleged to be liable injured natural resources, such resources have been or will be restored to baseline by remediation and/or natural recovery.**
- **The State's damages claim includes claims for groundwater for which there is no committed use.**
- **The State failed to develop and select from among a broad range of alternatives, including restoration, replacement, rehabilitation and acquisition alternatives. The State based the alternative development and selection process on an improperly assumed preference in the law for physical restoration of the resource, categorically excluded acquisition alternatives from consideration, and excluded all but one replacement scenario. For example, the state selected an option to restore allegedly injured lands for approximately \$2,600 per acre despite the fact that equivalent land can be purchased for far less than \$1,000 per acre.**
- **The State's estimate of alleged compensable value damages is based, in part, upon the contingent valuation methodology which is an experimental technique, subject to large, imprecise margins of error and which is nothing more than an opinion survey of hypothetical questions to which respondents give hypothetical answers. Compensable values based upon contingent valuation surveys cannot be externally validated and simulated market studies show that contingent valuation surveys overstate the amount individuals are actually willing to pay for the same commodity.**
- **The State of Montana's Revised Assessment of Damages to Anglers and other Recreators utilized an incorrect statistical procedure for treating sample data which resulted in a substantial upward bias in the State's estimated damages for Montana residents. The State also used an untested, experimental survey design that oversampled avid anglers thereby biasing the State's estimate of alleged damages upward.**
- **To estimate potential economic losses associates with recreation services ARCO conducted a comprehensive data collection effort and utilized a state-of-the-art travel cost application of the random utility model. The sample design and the random utility model estimated using these data are applications of proven methodologies contained in peer-reviewed literature.**

- The State executed various releases of damage claims, including one release set forth in a 1964 lease pertaining to the Warm Springs Ponds area, which bar the State's NRD claims. Additionally, the State took lands within its Mt. Haggin terrestrial injury area subject to a binding release and covenant running with the land that precludes any claim by the State against The Anaconda Company or its successor, ARCO.

#### 1. Selected ARCO Counterclaims

- ARCO has incurred and will incur necessary response costs which are consistent with the National Contingency Plan.
- The State played a significant role in the events which led to ARCO's incurrence of these costs, and the State is responsible for a portion of those cost as well as any natural resource damages and legal or technical costs, by reason of, among other things, the State's ownership of the beds and banks of the CFR and SBC; the State's ownership and operation of highway rights of way; the State's previous ownership of a section of land near Anaconda and the substantial part played by that section of State land in historic waste disposal practices from the Anaconda Smelter; State highway construction activities, State sewage disposal activities; and the State's mining, milling and smelting activities, including various acts, omissions, decisions, permits, approvals, and agreements made by the State and its predecessor the Territory of Montana, which were made with the knowledge or understanding that inquiry to, destruction of, or loss of natural resources would result.

### I. Brief Summary of the Trial

#### A. The Court's Order Re Segmentation of Trial

- In a January 21, 1997 Order, the court divided the trial into five distinct segments as follows: (1) aquatic resources; (2) terrestrial resources; (3) groundwater resources; (4) damages; and (5) ARCO's counterclaims. The court further divided the first, second and third segments of the trial into two subsegments as follows: (1) liability; and (2) causation/injury. The fourth segment of the trial was divided into three subsegments as follows: (1) alleged costs of restoration, rehabilitation, replacement and/or acquisition of equivalent resources; (2) compensable value; and (3) assessment and enforcement costs.
- On the same day the Court also entered a Memorandum and Order in which the Court granted the Tribes a right of permissive intervention for the limited purpose of prosecuting any natural resource damage claims against ARCO that are "separate and distinct" from the State's claims. The Court also directed that the Tribes would be allowed to attend the trial, but not participate in the presentation of evidence. Finally, the Court's Order also provided that upon the conclusion of each of the three resource segments of trial, the Tribes could identify by motion and supporting brief any NRD claims they have against ARCO which are "separate and distinct" from the State's claims. The Order provided that if the Tribes were successful in convincing the Court that they possess NRD claims against ARCO which were "(1) unique to the Tribes, and (2) cognizable under CERCLA . . .", the Tribes would be permitted document

discovery and be allowed to present evidence in a separate trial following trial of the State's claims.

#### A. Overview of Three Completed Trial Phases

- Trial of the Liability and Aquatics Resources Phase began on March 3, 1997 and continued on a sporadic basis through June 4, 1997.
- Trial of the Terrestrial Resources Phase began on November 3, 1997 and continued through November 19, 1997.
- Trial of the Groundwater Resources Phase began on January 12, 1998 and continued through January 22, 1998.
- ARCO and the State submitted revised proposed findings of fact and conclusions of law to the Court after each of these trial phases.

#### I. Brief Summary of Public Information Concerning Settlement Negotiations and the Agreements Which Were Reached

The Court entered several orders during 1997 directing ARCO and the State and later also the United States and the Tribes to engage in confidential settlement negotiations first under the auspices of Magistrate Anderson in Billings and later under the auspices of Special Master Jeremiah Lynch in Great Falls.

With the assistance of these individuals, ARCO and the State were eventually able to agree upon the terms of a consent decree to resolve approximately two-thirds of the State's claims in Montana v. ARCO. That consent decree was lodged with the Court on June 19, 1999. The Montana v. ARCO consent decree ("State Consent Decree") was contingent upon the negotiation of a second consent decree with the United States and the State concerning past and future response cost claims for the Streamside Tailings Operable Unit ("SSTOU"). On November 18, 1999, a consent decree relating to SSTOU remediation issues and to certain NRD claims by the United States and all of the Tribes' NRD claims for the Clark Fork River Basin was signed by ARCO, the United States, the State and the Tribes and lodged with the Court.

#### A. Summary of Consent Decrees

##### 1. State Consent Decree

The settlement embodied in the State Consent Decree establishes a two-step process for the settlement of all of the State's NRD claims against ARCO. The first step resolves approximately \$559,000,000 of the \$765,000,000 in claims asserted by the State. The State Consent Decree required the payment of \$133,000,000 and the transfer of land valued at \$2,000,000 to settle the State's Step One claims. Of the \$133,000,000 to be paid to the State, \$15,000,000 was a non-refundable advance payment to settle the State's assessment and enforcement costs incurred through December 31, 1997.

The simplest way to explain what claims are resolved by the State Consent Decree is to list the State's claims which were not resolved and which will be the subject of the "Step Two" negotiations. Those remaining claims to be addressed are the State's restoration damages claims for the CFR, Anaconda Uplands and Area One in Butte and the State's claim for assessment and enforcement cost incurred after December 31, 1997. The State Consent Decree also required ARCO to pay \$80 million to the State for future response costs for the SSTOU. The payment of this amount for

SSTOU response costs, and indeed the entire State Consent Decree, was made contingent upon the negotiation of a second consent decree between ARCO, the State and the United States relating to response costs for the SSTOU. The State Consent Decree required ARCO to pay interest on each of the amounts payable under the decree from April 6, 1998 (the date the parties reached an agreement in principle) through the dates of payment.

## 2. SSTOU Consent Decree

The SSTOU Consent Decree, which was lodged in U.S. v. ARCO (CV-89-39-BU-PGH), is a very lengthy, complicated document that addresses the following issues:

- Settlement of the governments' claims against ARCO for future remediation of the SSTOU, subject to a reopener for any cost overrun, in return for ARCO's payment of \$80,000,000;
- Settlement of the governments' claims for past remediation cost claims against ARCO for the SSTOU in return for ARCO's payment of \$3,900,000;
- Settlement of the Tribes' NRD claims for All Sites (a term defined in the SSTOU Consent Decree at ¶7e) in consideration of ARCO's payment of \$18,300,000 to the Tribes;
- Settlement of the United States' claims for NRD for All Sites, except for certain specifically identified parcels of land owned by the United States within All Sites, in exchange for: (a) ARCO's payment of \$1,700,000 to the United States; (b) ARCO's creation, restoration, or enhancement of 400 acres of wetlands; (c) the Tribes' and the State's creation of up to an additional 1,200 acres of newly constructed, restored, or enhanced wetlands or enhanced riparian areas or the expenditure of \$8,600,000 toward that goal;
- Settlement of ARCO's counterclaims against the United States for SSTOU response costs and for NRD claims regarding All Sites in exchange for the United States' payment of \$2,000,000 to the Superfund; and
- Settlement of the United States' claims against ARCO for ARCO's alleged failure to perform certain work at the SSTOU in exchange for ARCO's payment of \$1,800,000.
- First the State Consent Decree and later the SSTOU Consent Decree were made available for public review and comment. The State and the United States provided written responses to the comments on the State and SSTOU Consent Decrees respectively and both governments recommended in separate filings with the Court that the Court enter those Consent Decrees.

- A. On April 19, 1999, the Court entered both the State and SSTOU Consent Decrees. Following expiration of the time for appeal of those Consent Decrees, ARCO made the required payments.

### I. Brief Summary of Developments Since Entry of the State and SSTOU Consent Decrees

- A. On June 10, 1999 the State issued its Revised Restoration Determination Plan ("Revised RDP") for the Smelter Hill Area Upland Resources ("Upland Area"). In its Revised RDP,



the State explained that "It is clear that a significant portion of the State's injured area will be reclaimed as a part of EPA's remedy." Based upon this determination, the State reduced its restoration damages claims for the Upland Area from \$40.4 million to approximately \$15.5 million. However, the State also asserted that it was reserving its restoration damages claim with respect to the areas it believes will undergo reclamation in the event that the areas or portions of these areas are not reclaimed in the manner presently anticipated by the State.

- B. In accordance with the terms of the State Consent Decree, during the summer of 1999, ARCO and the State also conducted confidential negotiations mediated by Special Master Lynch regarding the State's restoration claims for the Anaconda Uplands Area. Those negotiations reached impasse and the State filed its Notice of Inability to Settle and Request to Reconvene Trial of the State of Montana's Claim for Restoration Cost Damages for the Smelter Hill Area Uplands. In its responsive filing, ARCO pointed out that in the second phase of trial, the Court heard testimony on the issue of whether ARCO bears any liability for alleged injuries to natural resources within the Anaconda Uplands Area and, therefore, that issue is ripe for decision. However, ARCO also pointed out that the State's claim for restoration damages on the Uplands Site is not ripe for trial because "by its own admission in the revised RDP, the acreage in the Uplands Site for which the State will ultimately seek restoration damages and the amount of damages it will seek are contingent and will remain so as long as the State insists upon the reservation to its current damage claim that the area must be 'reclaimed in the manner which the State presently anticipates.' " ARCO's response also stated that if this contingency cannot be removed by the State's retraction of the contingency or by order of the Court, then the Court should not reconvene the trial until after the ARWW&S remedial design has been completed. As of October 20, 1999, the Court had not yet ruled on this issue.
1. EPA recently indicated that the Record of Decision (ROD") for the Clark Fork River Operable Unit will not be issued until November 30, 2000 at the earliest. The ROD for the Butte Priorities Soil Operable Unit is currently scheduled to be issued during 2001. Pursuant to the terms of the State Consent Decree, negotiations between ARCO and the State concerning its restoration damages claims for the Clark Fork River and Area One in Butte will occur after the issuance of the Clark Fork River and Butte Priority Soils RODs, respectively.
  2. The State and ARCO continue to work through the process for conveyance of land along Silver Bow Creek to the State, as required by the State Consent Decree. In September 1999 the State released its Draft Restoration Plan Procedures and Criteria for public comment and the State and its citizens have turned in earnest to addressing the issue of how to spend the proceeds from the Step One settlement.

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