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and Counterclaimant**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION

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STATE OF MONTANA,	)	No. V-83-317-HLN-SEH
	)	
Plaintiff and,	)	
Counterclaim Defendant	)	CONSENT DECREE
vs.	)	
	)	
ATLANTIC RICHFIELD COMPANY,	)	
	)	
Defendant, and.	)	
Counterclaimant.	)	

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## I. BACKGROUND

### The State of Montana's Complaint

A. The State Action commenced on December 12, 1983, when the State of Montana ("State") filed its complaint, seeking to recover from Atlantic Richfield Company ("AR") natural resource damages pursuant to Section 107 of CERCLA, and the Montana Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), Mont. Code Ann. § 75-10-715(2)(b), in *State of Montana v. Atlantic Richfield Company*, No. CV-83-317-HLN-SEH (D. Mont.) ("State Action"). In its complaint, the State alleged that Hazardous Substances have been released into the environment since the 1860s as a result of mining, milling, mineral processing, and related activities centered in Butte and Anaconda, Montana. The State alleged that AR remains legally responsible for these releases under CERCLA and CECRA by virtue, *inter alia*, of its own actions and its assumption of the liabilities of its alleged predecessors-in-interest, including the Anaconda Copper Mining Company and the Amalgamated Copper Mining Company. The State further alleged that natural resources have been injured as a result of the release of Hazardous Substances. Natural resources the State alleged are injured include fish, wildlife, surface water, groundwater, soil, and vegetation. As a trustee for natural resources pursuant to CERCLA and CECRA, the State is statutorily authorized to recover natural resource damages.

B. A trial in the State Action commenced on March 3, 1997, and ended in January 1998, prior to its completion. A partial settlement in the State Action which was lodged with the Court on June 19, 1998, and entered on April 19, 1999 ("State CD"), resolved all the State's claims for Natural Resource Damages except for (1) the State's Assessment and Litigation Costs incurred on or after January 1, 1998, (2) the State's claims for Restoration Damages for the Step

2 Sites , and (3) certain reservations and certain of AR’s counterclaims, as these terms are defined in the State CD.

Consent Decree for the Clark Fork River Operable Unit and for the Remaining State of Montana Clark Fork Basin Natural Resource Damage Claims

C. This Consent Decree (also referred to as “State CD II” herein and in the Clark Fork Site Consent Decree) is being filed contemporaneously with the Consent Decree for the Clark Fork River Operable Unit and for Remaining State of Montana Clark Fork Basin Natural Resource Damage Claims (“Clark Fork Site Consent Decree”). The Clark Fork Site Consent Decree is entered into by the United States, the State of Montana and AR. The Clark Fork Site Consent Decree resolves, subject to certain reservations of rights by the United States and the State, the United States’ and the State’s claims for response costs and response actions relating to the Clark Fork River Site, the United States’ reserved NRD claims for the Grant-Kohrs Ranch National Historic Site and certain parcels of BLM land, all of the State’s reserved claims for restoration damages relating to the Step 2 Sites, and the State’s claims for response costs and response actions relating to certain State-owned lands within the Anaconda Regional Water, Waste and Soils Operable Unit (“ARWW&S OU”) of the Anaconda Smelter NPL Site. This Consent Decree resolves the State’s and AR’s claims for response costs and response actions as to additional State-owned lands within the ARWW&S OU, and contains certain agreements between the State and AR relating to State obligations under this Consent Decree and the Clark Fork Site Consent Decree.

The Clark Fork Site

D. Butte, Montana was the site of mining, milling and smelting activities from the 1860s to the present. In response to the release and threatened release of Hazardous Substances from facilities in and around Butte into Silver Bow Creek, EPA placed the original Silver Bow

Creek Superfund Site on the National Priorities List (“NPL”) by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605. The Silver Bow Creek Superfund Site was later extended to include the Clark Fork River to the Milltown Reservoir through administrative action taken by EPA. In February 1990, the Clark Fork River portion of the Silver Bow Creek / Butte Area Superfund Site was administratively transferred to the Milltown Reservoir Superfund Site. After the transfer, the entire site became known as the Milltown Reservoir/Clark Fork River Superfund Site. As between the State and AR, this Consent Decree supplements the Clark Fork Site Consent Decree which addresses the Clark Fork River Operable Unit of the Milltown Reservoir / Clark Fork River Superfund Site, and is referred to as the "Clark Fork Site."

E. After conducting other data collection and liability searches, EPA, in consultation with the Montana Department of Environmental Quality ("DEQ"), initiated a Remedial Investigation and Feasibility Study ("RI/FS") for the Clark Fork Site pursuant to and in accordance with 40 C.F.R. § 300.430. These activities were performed primarily by AR in accordance with amendments to Administrative Order on Consent Docket No. CERCLA-VIII-90-07, and were completed in 2003. In August of 2002, EPA proposed a combination of the analyzed alternatives as the most appropriate remedy for the Clark Fork Site and, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, published notice of the Clark Fork Site Proposed Plan in a major local newspaper of general circulation. The United States Department of Interior concurred in EPA’s proposed plan. In April of 2004, EPA, in consultation with the State, made its final decision regarding a remedy for the Clark Fork Site in accordance with CERCLA, and in a manner not inconsistent with CERCLA’s governing regulations in the National Contingency Plan (“the NCP”), 40 C.F.R. Part 300. EPA issued a Record of Decision ("ROD") regarding its

selection in April of 2004, and published notice of the Clark Fork Site ROD in a major local newspaper of general circulation on May 4, 2004. DEQ gave its concurrence on behalf of the State of Montana. The United States Department of Interior also concurred in the Clark Fork Site ROD.

The Anaconda Smelter NPL Site and the Anaconda Regional Water, Waste and Soils Operable Unit

F. The Anaconda Smelter NPL Site is located at the southern end of the Deer Lodge Valley, at and surrounding the location of the former Anaconda Minerals Company ore-processing facilities. These facilities were developed to remove copper from ore mined in Butte, and operated from about 1894 through 1980, when the smelter closed. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA listed the Anaconda Smelter NPL Site on the NPL on September 8, 1983, 48 Fed. Reg. 40658. The ARWW&S OU is one of the operable units of the Anaconda Smelter NPL Site.

G. The ARWW&S OU RI/FS examined alternatives for a final remedial action at the ARWW&S OU. In October 1997, EPA proposed one of these alternatives as the most appropriate remedy for the ARWW&S OU of the Anaconda Smelter NPL Site and, pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, published notice of the proposed plan in a major local newspaper of general circulation. In September 1998, EPA, with the concurrence of the State, issued the Record of Decision for the ARWW&S OU (“ARWW&S ROD”). Notice of the final plan was published in accordance with Section 117(b) of CERCLA. Remedial design for the ARWW&S OU began in 2000 and is still in progress. Remedial action has also been conducted on portions of the OU. EPA anticipates preparing an Explanation of Significant Differences to document changes to the ARWW&S ROD.

H. This Consent Decree addresses areas of contamination on State Lands within the Anaconda Smelter NPL Site, including State-owned Property within Remedial Design Units (“RDUs”) 1 and 15, that are part of the ARWW&S OU.

I. The State and AR agree to address in this Consent Decree:

1. the State’s commitment under this Consent Decree to promptly reimburse AR for any Further Response Costs up to \$9.4 million, as that term is defined in the Clark Fork Site Consent Decree, paid by AR pursuant to the terms of the Clark Fork Site Consent Decree; and

2. the State’s obligation to perform the State Property Remedial Commitments pursuant to the terms of the Clark Fork Site Consent Decree and this Consent Decree.

3. The State’s obligations to perform the State Lands Obligations pursuant to the terms of this Consent Decree.

No Admission of Liability

J. By entering into this Consent Decree, AR and the State do not admit to any liability arising out of the transactions or occurrences either that were alleged, or could have been alleged, in the complaints, amended complaint, or counterclaims filed in the State Action or the Federal Action. In addition, AR does not admit or acknowledge that any alleged release or threatened release of Hazardous Substances at or from the Clark Fork Site or the Anaconda Smelter NPL Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

K. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that implementation of this Consent Decree will expedite the cleanup and restoration of the Clark Fork Site, and State Lands

within the ARWW&S OU, and will avoid prolonged and complicated litigation between the Parties and that this Consent Decree is fair, reasonable, in the public interest, and consistent with the goals of CERCLA and CECRA.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

## **II. JURISDICTION**

This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607, and 9613(b). This Court also has supplemental jurisdiction pursuant to 28 U.S.C. § 1367. In addition, this Court has personal jurisdiction over the Parties. Solely for the purposes of this Consent Decree and the underlying complaints, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. Each Party hereby agrees not to oppose entry of this Consent Decree by this Court unless: (a) the United States or the State has notified AR in writing that either the United States or the State no longer supports entry of the Clark Fork Site Consent Decree after consideration of public comment; or (b) the State notifies AR that it no longer supports entry of this Consent Decree after consideration of public comment, as provided in Section XV (Lodging and Opportunity for Public Comment) below.

## **III. DEFINITIONS**

"ARAR" shall mean an applicable or relevant and appropriate requirement, criterion, standard, or limitation of federal or state law within the meaning of Section 121(d)(2) of CERCLA, 42 U.S.C. § 9621(d)(2), identified in the ARWW&S ROD.

"AR" shall mean the Defendant, Atlantic Richfield Company, its divisions and subsidiaries, including ARCO Environmental Remediation L.L.C. (AERL), and any predecessors in interest. It shall also mean any successors in interest to the extent that any such successor's



liability at the Clark Fork Site or the Anaconda Smelter NPL Site derives from the liability of the Atlantic Richfield Company, its divisions and subsidiaries, including AERL, and any predecessors in interest.

“ARWW&S ROD” shall mean the Anaconda Regional Water, Waste and Soils Operable Unit Record of Decision dated September 1998 and any amendments and Explanations of Significant Differences issued thereafter.

"CECRA" shall mean the Montana Comprehensive Environmental Cleanup and Responsibility Act, as amended, §§ 75-10-701 et seq., MCA.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq.

"Certification of Completion of the Remedial Action" shall mean EPA’s certification, in consultation with the State, pursuant to Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), that the remedial action and any modifications thereto have been completed at the ARWW&S OU of the Anaconda Smelter NPL Site in accordance with the requirements of CERCLA, the NCP, and the ARWW&S ROD and any modifications thereto, including certification that performance standards have been attained.

"Clark Fork Site" shall mean: the surface water, streambed sediments, tailings, soils, groundwater, aquatic resources, terrestrial resources, irrigation ditches and related sediment deposition and contaminated property, and air, all located within the 100-year historic floodplain of the Clark Fork River in Montana. The Clark Fork Site shall also include irrigation ditches that historically conveyed contaminated water from the Clark Fork River and related sediment deposition and contaminated property adjacent to the 100-year historic floodplain of the Clark Fork River, as described in the 2004 Clark Fork River Operable Unit Record of Decision. The

Clark Fork Site extends from the confluence of the old Silver Bow Creek channel with the reconstructed lower Mill-Willow bypass to the maximum Milltown Reservoir high pool reservoir level (elevation 3265.5, NAVD 88). A map showing the approximate boundaries of the Clark Fork Site is attached to the Clark Fork Site Consent Decree as Appendix F.

“Clark Fork Site Consent Decree” shall mean the consent decree among the United States, the State and AR and all appendices attached thereto that is lodged in the State Action and the Federal Action contemporaneously with this Consent Decree.

"Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control. This Consent Decree shall also be known as State CD II, and is referred to as such in the Clark Fork Site Consent Decree that is lodged contemporaneously with this Consent Decree.

"DEQ" shall mean the Montana Department of Environmental Quality and any predecessor or successor departments or agencies of the State.

"Effective Date" shall mean 60 days from the date that this District Court enters the Consent Decree, unless an appeal of the entry and judgment is filed during the 60-day period; if an appeal is taken, the Effective Date shall mean the date on which the District Court’s judgment is affirmed.

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

"Federal Action" shall mean *United States v. Atlantic Richfield Company*, No. CV-89-039-SEH (D. Mont.).

“Further Response Costs” shall mean up to \$9.4 million in response costs incurred by EPA and/or the State in developing and implementing the Clark Fork Site work (as “Work” is

defined in the Clark Fork Site Consent Decree), after EPA and/or the State have already incurred \$83.3 million, plus Earnings, in such costs.

"Hazardous Substance" shall mean a hazardous substance within the meaning of Section 101 (14) of CERCLA, 42 U.S.C. § 9601(14), or a hazardous or deleterious substance within the meaning of Section 75-10-701(8), MCA.

"Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral.

"Parties" shall mean the State and AR.

"Remedial Action" shall mean those activities, except for operation and maintenance, undertaken by the State to complete the State Property Remedial Commitments under the terms of the Clark Fork Site Consent Decree.

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

"Smelter Hill Area Uplands Resources Restoration Plan" shall mean the document prepared by the State, and any amendments thereto adopted by the State, entitled the "Draft Conceptual Smelter Hill Area Uplands Resources Restoration Plan." The Smelter Hill Area Uplands Resources Restoration Plan describes performance standards applicable to the State Property Remedial Commitments and the scope of the State Property Remedial Commitments under the Clark Fork Site Consent Decree. Amendments revising the nature and extent of, or the performance standards for, the State Property Remedial Commitments require the concurrence of EPA and, unless deemed unnecessary by EPA, adoption by EPA. The Smelter Hill Area Uplands Resources Restoration Plan and its Appendix G (Consent Decree Obligations of the State), excluding other appendices, is attached as Appendix C to this Consent Decree.

"State" shall mean the State of Montana, including all of its departments, agencies, and instrumentalities.

"State Action" shall mean *State of Montana v. Atlantic Richfield Company*, No. CV-83-317-HLN-SEH (D. Mont.).

"State CD" shall mean the consent decree lodged in the State Action on June 19, 1998, and entered on April 19, 1999.

"State Interest" shall mean the rate equal to the interest yield on the State's Trust Funds Bond Pool ("TFBP") managed by the Montana Board of Investments or any successor agency. This interest shall be calculated from the due date and compounded on a monthly basis, and the interest rate for each month shall be calculated by dividing the interest distribution per share on the TF BP (monthly dividend per share) by the share price (unit price) for the TFBP at the end of that month. Interest for periods of less than a full month shall be calculated based upon the ratio of the number of days during which interest is accruing over the number of calendar days in the particular month.

"State NRD Settlement Amount" shall mean the \$ 72.5 million to be paid by AR to the State pursuant to Paragraphs 16 and 17 of the Clark Fork Site Consent Decree.

"State Lands" means the real property as shown on the map in Appendix A to this Consent Decree.

"State Lands Obligations" shall mean that portion of the Work for State Lands described in Section VII (State Performance of State Lands Obligations), and any modifications thereto, including any additional response actions required to meet performance standards (including ARARs for the ARWW&S ROD), as described in this Consent Decree.

"State-owned Property" shall mean the real property owned by the State, as shown on the maps attached as Appendix B to this Consent Decree. The same maps are attached as Appendix J to the Clark Fork Site Consent Decree.

“State Property Remedial Commitments” shall mean the work, and any modifications thereto, including any additional response actions required to meet performance standards (including ARARs for the ARWW&S ROD), as described in the Clark Fork Site Consent Decree, and said work is enforceable under this Consent Decree. The work for the State Property Remedial Commitments is described in: (1) the Remedial Action Work Plan/Final Design Report for ARWW&S OU Remedial Design Unit 1 – Stucky Ridge (June 15, 2005) concerning State-owned Property in Section 36; and (2) Remedial Action Work Plan / Final Design Report for ARWW&S OU Remedial Design Unit 15 – Mt. Haggin Uplands (November 2007), each as provided for in the Smelter Hill Area Uplands Resources Restoration Plan (Appendix C to this Consent Decree). The Remedial Action Work Plan/Final Design Report for Remedial Design Unit 1 and the Remedial Action Work Plan / Final Design Report for Remedial Design Unit 15 have been approved by EPA in consultation with DEQ and are contained within the site record for the Anaconda Smelter NPL Site and are attachments to the Smelter Hill Area Uplands Resources Restoration Plan.

“Step 2 Sites” shall mean the following three geographic areas described in the State’s Restoration Determination Plan, dated October 1995, and the natural resources within those areas: (1) Area One Groundwater and Surface Water Resources; (2) Smelter Hill Area Upland Resources; and (3) Clark Fork River Aquatic and Riparian Resources.

“Subparagraph” shall mean a portion of a Paragraph identified by an upper or lower case letter or by a lower case Roman numeral.

“Superfund Memorandum of Agreement” or “SMOA” shall mean the agreement among EPA, the United States Department of Interior, and the State which, in addition to the provisions of the Clark Fork Site Consent Decree, memorializes the manner in which the remedy, federal

restoration, and State restoration will be implemented or coordinated at the Clark Fork Site and the manner in which the State Property Remedial Commitments will be implemented by the State. Only the State and the United States may enforce the terms of the SMOA. Nothing in this Consent Decree shall be deemed to create a right of any other party, including, but not limited to AR or any third party, against the State or the United States to enforce the terms of the SMOA.

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

"Work" shall mean all activities the State is required to perform to complete the State Property Remedial Commitments pursuant to the Clark Fork Site Consent Decree and this Consent Decree, and the State Lands Obligations pursuant to this Consent Decree.

#### **IV. GENERAL PROVISIONS**

1. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are:

a. to document, as between the State and AR, the State's responsibility for payment of any and all Further Response Costs billed to AR by EPA under Paragraph 8 of the Clark Fork Site Consent Decree, unless successfully disputed pursuant to the dispute resolution terms of Clark Fork Site Consent Decree.

b. to document, as between the State and AR, the State's commitment to implement the response actions set forth in and required by the ARWW&S ROD for the State Property Remedial Commitments, as required by the Clark Fork River Consent Decree and also this Consent Decree.

c. to document, as between the State and AR, the State's commitment to implement the response actions required by the ARWW&S ROD for the State Lands Obligations, as required by this Consent Decree.

**V. STATE REIMBURSEMENT OF FURTHER RESPONSE COSTS**

2. If EPA bills AR for any Further Response Costs pursuant to Paragraph 8 of the Clark Fork Site Consent Decree, the State shall pay up to \$9.4 million to AR for Further Response Costs, billed to AR by EPA to the extent such response costs are actually incurred by EPA and paid by AR. Under Paragraph 8 of the Clark Fork Site Consent Decree, AR has the right to dispute costs billed by EPA. The State shall reimburse AR for such Further Response Costs incurred by AR no more than sixty (60) days after the State receives AR's written request for reimbursement of those Further Response Costs. AR's written request for reimbursement shall include the record of payment required pursuant to Subparagraph 8.c of the Clark Fork Site Consent Decree. AR agrees that it may not dispute the payment of any particular Further Response Costs bill, under Paragraph 8 of the Clark Fork Site Consent Decree, after AR has submitted a written request for reimbursement of the costs for such bill to the State pursuant to this Section V of the Consent Decree.

3. If the State, contrary to the terms of this Consent Decree does not reimburse AR for such Further Response Costs within 60 days of receipt of AR's notice requesting reimbursement, the State shall pay State Interest on the amount of Further Response Costs incurred by AR until paid. The State shall pay all such costs and accrued interest, if any, to AR by electronic funds transfer pursuant to directions AR provides to the State for payment to AR.

**VI. STATE PERFORMANCE OF STATE PROPERTY REMEDIAL**

**COMMITMENTS**

4. Paragraphs 4 – 6 of this Consent Decree describe certain State obligations under the Clark Fork Site Consent Decree to perform response actions related to State-owned Property. The State commits to perform the State Property Remedial Commitments on State-owned Property as provided in Paragraph 66 of the Clark Fork Site Consent Decree, including any

additional response actions, monitoring, and operation and maintenance within the “scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Property Remedial Commitments” as that term is defined in Subparagraph 66.b of the Clark Fork Site Consent Decree. AR may enforce the State’s obligation to perform the State Property Remedial Commitments as provided in Paragraph 66 of the Clark Fork Site Consent Decree as Work required under this Consent Decree, subject only to the limitations of Paragraph 7 below.

5. Certification of Completion for the State Property Remedial Commitments Remedial Action. The State shall timely complete and submit to EPA a draft Certification of Completion for the State Property Remedial Commitments Remedial Action for review and comment, pursuant to Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), in accordance with EPA regulations and guidance, upon completion of all construction and upon attaining all applicable ARWW&S ROD performance standards for a period of at least 2 years.

a. The State shall attempt to incorporate or resolve all EPA comments and shall notify EPA of the disposition of their comments prior to completing the final document. The State acknowledges and agrees that EPA may request that the State perform any additional response actions, if EPA determines that the Remedial Action or any portion thereof: (i) has not been completed in accordance with the Clark Fork Site Consent Decree or SMOA; or (ii) that applicable ARWW&S performance standards have not been achieved for a period of at least two years. The State shall perform any additional activities required to obtain final Certification of Completion of the State Property Remedial Commitments Remedial Action from EPA to the extent that such additional work is consistent with the “scope of the remedy selected in the ARWW&S



OU ROD to be implemented by the State Property Remedial Commitments” as that term is defined in Subparagraph 66.b of the Clark Fork Site Consent Decree.

6. Certification of Completion for the State Property Remedial Commitments Work.

The State shall prepare and timely submit to EPA for review and comment a draft Certification of Completion for the State Property Remedial Commitments Work, after concluding that all operation and maintenance activities have been performed by the State in accordance with the ARWW&S ROD, the Clark Fork Site Consent Decree, and the SMOA, and that operation and maintenance is no longer necessary.

a. The State shall attempt to incorporate or resolve all EPA comments and shall notify EPA of the disposition of its comments prior to completing the final document. The State acknowledges and agrees that EPA may request that the State perform additional response actions if EPA determines: (i) that operation and maintenance or any portion thereof has not been completed in accordance with the ARWW&S ROD, the Clark Fork Site Consent Decree, the SMOA, and operation and maintenance plans. The State shall perform any additional activities that are consistent with the “scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Property Remedial Commitments” as that term is defined in Subparagraph 66.b of the Clark Fork Site Consent Decree.

7. Except as provided in Section V and Section VII, this Consent Decree imposes no obligation or requirement upon the State to perform response actions or pay costs of response for actions outside of State-owned Property, and imposes no obligation or requirement upon the State to:

(a) perform response actions or pay costs of response for actions outside the “scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Property Remedial Commitments.” The “scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Property Remedial Commitments” means the stabilization and revegetation of soils, in accordance with reclamation ARARs, and stormwater best management practices and controls on State-owned Property;

(b) perform response actions or pay costs of response for actions that are required pursuant to any Pre-Certification or Post-Certification reservations for new information / unknown conditions, as set forth in the Clark Fork Site Consent Decree, this Consent Decree and any future order or future consent decree; or

(c) perform response actions or pay costs of response for actions that arise under Paragraph 115 (United States’ General Reservations of Rights), Paragraph 125 (State’s General Reservations of Rights as to AR) of the Clark Fork Site Consent Decree, or any General Reservation of Rights in any future order or future consent decree, except as to Subparagraphs 115.g and 125.g of the Clark Fork Site Consent Decree, the State shall perform as Work under this Consent Decree those actions or reimburse those costs for actions on State-owned Property that are within the “scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Property Remedial Commitments” as that term is defined in Subparagraph 66.b of the Clark Fork Site Consent Decree.

## **VII. STATE PERFORMANCE OF STATE LANDS OBLIGATIONS**

8. Paragraphs 8 through 14 describe the scope of the State Lands Obligations of the State to AR pursuant to which the State shall perform response actions and pay response costs, if

any, pertaining to State Lands as part of the Work required under this Consent Decree. If either EPA or any agency of the State seek to compel AR to perform any response action for State Lands, including any emergency response, or to recover the costs of such response actions, the State is required under this Consent Decree to promptly perform and pay for such response actions, subject to the limitations of Paragraph 9. The State shall reimburse AR for any costs of such response actions AR incurs and any penalties AR pays due to the State's failure to timely perform such response actions, subject to the limitations of Paragraph 9.

9. Except as provided in Section V, this Consent Decree imposes no obligation or requirement upon the State to perform response actions or pay costs of response for actions outside of State Lands, and imposes no obligation or requirement upon the State to:

(a) perform response actions or pay costs of response for actions outside the "scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Lands Obligations" For purposes of this Subparagraph, the "scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Lands Obligations" means the stabilization and revegetation of soils, in accordance with reclamation ARARs, and stormwater best management practices and controls on State Lands;

(b) perform response actions or pay costs of response for actions that are required pursuant to any Pre-Certification or Post-Certification reservations for new information / unknown conditions, as set forth in the Clark Fork Site Consent Decree, this Consent Decree or any future order or future consent decree; or

(c) perform response actions or pay costs of response for actions that arise under Paragraph 115 (United States' General Reservations of Rights), Paragraph 125 (State's General Reservations of Rights as to AR) of the Clark Fork Site Consent Decree,

or any General Reservation of Rights in any future order or future consent decree; except as to Subparagraphs 115.g and 125.g of the Clark Fork Site Consent Decree, the State shall perform as Work under this Consent Decree those actions or reimburse those costs for actions on State Lands that are within the “scope of the remedy selected in the ARWW&S OU ROD to be implemented by the State Lands Obligations” as that term is defined in Subparagraph 9.a of this Consent Decree.

10. The State’s commitment to perform Work under this Consent Decree and carry out the State Lands Obligations includes the State’s commitment to AR to perform all response actions and pay all costs of response for actions on State-owned Property that are within the “scope of the remedy selected in the ARWW&S ROD to be implemented by the State Property Remedial Commitments,” as that term is defined in Subparagraph 66.b of the Clark Fork Site Consent Decree. Further, the State is obligated to perform such actions and pay such costs under this Consent Decree notwithstanding any limitation on the work obligations of the State agreed upon by the State and EPA in the Clark Fork Site Consent Decree regarding the scope of work or the performance standards for the work described in the Smelter Hill Area Uplands Restoration Plan.

11. The State shall cooperate with EPA in completion of any review of any response actions for State Lands that is completed by EPA in accordance with Section 121(c), 42 U.S.C. §9621(c), and any applicable regulations. The State shall cooperate with EPA in its efforts to conduct the review described in this Paragraph through the provision of data, records, and similar materials.

12. If EPA determines that the State Lands Obligations response actions for State Lands are not protective of human health or the environment, the State shall, as between AR and

the State, implement any additional response actions for State Lands selected by EPA, subject to the limitations of Paragraph 9 above.

13. As between AR and the State, the State is responsible for and will carry out any community relations plan or activities required by EPA that explain or relate to performance of the State Property Remedial Commitments and the State Lands Obligations, and satisfy any EPA reporting, record keeping, and access and institutional controls requirements related to performance of the State Property Remedial Commitments and the State Lands Obligations.

14. Within 60 days of the State's receipt of AR's notice requesting reimbursement of response costs recoverable by AR under this Consent Decree, the State shall reimburse AR for those response costs, and any such response costs that are not paid within this 60 day period shall accrue State Interest. The State shall pay all such costs and accrued interest, if any, to AR by electronic funds transfer pursuant to directions AR provides to the State for payment to AR.

#### **VIII. DISPUTE RESOLUTION**

15. In the event a dispute should arise solely between AR and the State regarding the interpretation or implementation of this Consent Decree, AR and the State shall make a good faith effort to resolve the dispute prior to invoking the continuing jurisdiction of the Court. Prior to invoking the Court's jurisdiction to resolve a dispute, the State or AR shall deliver to the other a written statement detailing the matters in dispute and proposing terms to resolve the dispute. Except where the party seeking to invoke the Court's jurisdiction can demonstrate a significant need for a more prompt resolution, such statement of the dispute must be delivered to the other party at least fifteen (15) days prior to filing any motion or application for relief from the Court.

#### **IX. COVENANTS AND RESERVATIONS**

16. This Consent Decree is without prejudice to AR's and the State's covenants and reservations set forth in Sections XXIII and XXIV of the Clark Fork Site Consent Decree. The

covenants and reservations of the Parties below supplement the AR and State covenants and reservations set forth in the Clark Fork Site Consent Decree.

17. State's Covenant Relating to the State Lands Obligations. Subject to the reservations in Paragraphs 18, 19, 20 and 21 of this Consent Decree and Paragraph 125 (State's General Reservations of Rights as to AR) of the Clark Fork Site Consent Decree, the State covenants not to sue or to take administrative action against AR and its respective officers, directors and employees, to the extent that the liability of such officers, directors, and employees arises solely from their status as officers, directors, and employees, pursuant to Sections 106, 107(a)(4)(A), (B), and (D), and 113(f) of CERCLA, Sections 3004(u) and (v), 3008 and 7002 of RCRA, Sections 309(a), 311, 504, and 505 of the Clean Water Act, Sections 601, 602, 611, 613, 614 (except with respect to enforcement of an emergency order under 75-5-621), 615, 617, 631, and 635 of the Montana Water Quality Act, and Sections 711, 715(2)(A), and 722 of CECRA, including injunctive relief or costs, related to the State Property Remedial Commitments and the State Lands Obligations. The covenant shall be effective upon the State's receipt of State NRD Settlement Amount, with interest, pursuant to Paragraphs 16 and 17 of the Clark Fork Site Consent Decree, and conveyance of the Beck Ranch pursuant to Paragraph 18 of the Clark Fork Site Consent Decree. These covenants extend only to AR and their respective officers, directors, and employees and do not extend to any other person.

18. State's Pre-Certification Reservations Relating to Response Actions for the State Property Remedial Commitments. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel AR:

a. to perform further response actions relating to State Property Remedial Commitments; or

b. to reimburse the State for additional costs of response relating to the State Property Remedial Commitments

if, prior to certification of completion of the remedial action for the State Property Remedial Commitments:

(i) Conditions relating to the State Property Remedial Commitments, previously unknown to the State, are discovered, or

(ii) information, previously unknown to the State, is received, in whole or in part, and these previously unknown conditions or information together with any other relevant information indicate that the remedial action for the State Property Remedial Commitments is not protective of human health or the environment.

19. State's Post-Certification Reservations Relating to Response Actions for the State Property Remedial Commitments. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel AR:

a. to perform further response actions relating to the State Property Remedial Commitments; or

b. to reimburse the State for additional costs of response relating to the State Property Remedial Commitments

if, subsequent to certification of completion of the remedial action for the State Property Remedial Commitments:

(i). conditions relating to the State Property Remedial Commitments, previously unknown to the State, are discovered, or

(ii). information, previously unknown to the State, is received, in whole or in part, and these previously unknown conditions or this information together with other relevant information indicate that the remedial action for the State Property Remedial Commitments is not protective of human health or the environment.

20. State's Pre-Certification Reservations Relating to the State Lands Obligations.

Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel AR:

a. to perform further response actions relating to the State Lands Obligations; or

b. to reimburse the State for additional costs of response relating to the State Lands Obligations

if, prior to Certification of Completion of the Remedial Action:



(i). conditions relating to the State Lands Obligations, previously unknown to the State, are discovered, or

(ii). information, previously unknown to the State, is received, in whole or in part, and these previously unknown conditions or information together with any other relevant information indicate that the remedial action for the State Lands Obligations is not protective of human health or the environment.

21. State's Post-Certification Reservations Relating to the State Lands Obligations.

Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel AR:

a. to perform further response actions relating to the State Lands Obligations;

or

b. to reimburse the State for additional costs of response relating to the State Lands Obligations

if, subsequent to Certification of Completion of the Remedial Action:

(i). conditions relating to the State Lands Obligations, previously unknown to the State, are discovered, or

(ii). information, previously unknown to the State, is received, in whole or in part, and these previously unknown conditions or this information together with other relevant information indicate that the remedial action for the State Lands Obligations is not protective of human health or the environment.

22. Information and Conditions Known to the State Relating to the State Property Remedial Commitments and the State Lands Obligations. For purposes of Paragraph 18 (State's

Pre-Certification Reservations Relating to Response Actions for the State Property Remedial Commitments) and Paragraph 20 (State's Pre-Certification Reservations Relating to the State Lands Obligations), the information and the conditions known to the State shall include only that information and those conditions known to the State as of the date of lodging of this Consent Decree that are described or contained in any of the documents or other records identified in Paragraph 123 of the Clark Fork Site Consent Decree. For purposes of Paragraph 19 (State's Post-Certification Reservations Relating to Response Actions for the State Property Remedial Commitments) and Paragraph 21 (State's Post-Certification Reservations Relating to the State Lands Obligations), the information and the conditions known to the State shall include only that information and those conditions known to the State as of Certification of Completion of the Remedial Action and described or contained in any of the documents or other records identified in Paragraph 123 of the Clark Fork Site Consent Decree.

23. AR's Covenant Not to Sue the State Regarding State Property Remedial Commitments and the State Lands Obligations. Subject to the reservations in Paragraph 131 (AR's Reservation of Rights) of the Clark Fork Site Consent Decree and conditioned upon satisfactory performance by the State of its obligations under this Consent Decree, AR hereby covenants not to sue and agrees not to assert any past, present, or future claims or causes of action against the State, its agencies, instrumentalities, officials, employees, agents, and contractors relating to the State Property Remedial Commitments and the State Lands Obligations, as defined herein, including:

a. any direct or indirect claim related to the State Property Remedial Commitments and the State Lands Obligations for reimbursement from the Environmental Quality Protection Fund (established pursuant to MCA 75-10-704), the

Orphan Share Account (established pursuant to MCA 75-10-743), or any other provision of law;

b. any claims under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 and 9613; RCRA Sections 3004(u) and (v), 3008, and 7002, 42 U.S.C. §§ 6924(u) and (v), 6928, and 6972; Sections 311, 504, and 505 of the Clean Water Act, 42 U.S.C. §§ 1321, 1364, and 1365; and under CECRA Sections 711, 715, 719, 722, 724, and 726, MCA 75-10-711, 75-10-715, 75-10-719, 75-10-722, 75-10-724, 75-10-726, and any other theory of recovery or provision of law related to the State Property Remedial Commitments and the State Lands Obligations.

c. any claims arising out of response or restoration actions for the State Property Remedial Commitments and the State Lands Obligations, including claims based on selection or implementation of response or restoration actions, oversight of response or restoration actions, or approval of plans for such actions. Provided, however, this covenant does not apply to response costs or response actions related to the State's Work obligations as described in Section VI and Section VII of this Consent Decree, in the event any administrative or judicial claim is asserted against AR for response costs or response actions related to the State's obligations as described in this Consent Decree.

24. AR's Reservation of Rights. AR reserves, and this Consent Decree is without prejudice to:

a. claims against the State under Chapter 9 of Title 2 of Montana Code Annotated for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the State while acting within the scope of his office or employment under circumstances where the State,

if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not an employee, as that term is defined in 2-9-101, MCA; nor shall any such claim include a claim based on EPA's selection or implementation of response actions or the State's selection of response or restoration actions. The foregoing applies only to claims which are brought pursuant to any Federal or State statute other than CERCLA or CECRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or CECRA;

b. defenses to any claim asserted by the State against AR under Paragraph 18 (State's Pre-Certification Reservations Relating to Response Actions for the State Property Remedial Commitments), Paragraph 20 (State's Pre-Certification Reservations Relating to the State Lands Obligations), Paragraph 19 (State's Post-Certification Reservations Relating to Response Actions for the State Property Remedial Commitments) and Paragraph 21 (State's Post-Certification Reservations Relating to the State Lands Obligations), but only for defenses arising from the same matters, transactions, and occurrences that are raised in or directly related to the State's claims against AR.

#### **X. NOTICES AND SUBMISSIONS**

25. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to or upon another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Except as otherwise

specifically provided, written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to the State and AR, respectively.

**As to the State:**

Robert Collins  
Mary Capdeville  
Greg Mullen  
State of Montana  
Office of the Attorney General  
Natural Resource Damage Program  
1301 East Lockey Avenue  
P.O. Box 201425  
Helena, Montana 59620-1425

**As to AR:**

Robin Bullock  
Trey Harbert  
ARWW&S OU Project Coordinator  
Atlantic Richfield Company  
317 Anaconda Road  
Butte, Montana 59701

Jean A. Martin  
Atlantic Richfield Company  
4101 Winfield Road  
Canterra 3 MC412E  
Warrenville, Illinois 60555

**XI. STATE ACCOUNTS ESTABLISHED UNDER  
CLARK FORK SITE CONSENT DECREE**

26. Pursuant to Section IX (Establishment, Maintenance and Operation of Accounts) of the Clark Fork Site Consent Decree, the State will establish, operate and maintain seven separate State accounts for various purposes, as provided under the terms of the Clark Fork Site Consent Decree. The availability of funds in the Smelter Hill Area Uplands Restoration Account established by the State pursuant to Subparagraph 27.b of the Clark Fork Site Consent Decree

shall not limit the State's obligations under Section VI (State Performance of State Property Remedial Commitments) and Section VII (State Performance of State Lands Obligations) of this Consent Decree.

27. The Parties expect that the special revenue accounts established by the State to hold funds paid by AR under the Clark Fork Site Consent Decree will meet the requirements of a settlement fund under Section 468B of the Internal Revenue Code of 1986, as amended 26 U.S.C. 468B. The State has or will establish the special revenue accounts described in the Clark Fork Site Consent Decree under state law, and will continue to maintain these accounts as provided in the Clark Fork Site Consent Decree.

## **XII. RETENTION OF JURISDICTION**

28. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section VIII (Dispute Resolution) hereof. This Consent Decree does not in any way expand or grant further rights to the State or AR under the Clark Fork Site Consent Decree. This Consent Decree does not authorize either Party to apply to the Court under the Clark Fork Site Consent Decree for an order, direction, or relief as to this Consent Decree. Nothing in this Paragraph 28 impairs the right of either Party to apply to the Court for any order, direction or relief as provided under this Consent Decree. Nothing in this Consent Decree shall be deemed to create a right of any other party, including, but not limited to, the United States or any third party, against AR or the State to enforce the terms of this Consent Decree.

### **XIII. APPENDICES**

29. The following appendices are attached to and incorporated into this Consent

Decree:

Appendix A – Map of State Lands

Appendix B – Maps of State-owned Property

Appendix C - Smelter Hill Area Uplands Resources Restoration Plan

### **XIV. MODIFICATION**

30. Modifications. Except as expressly set forth in this Consent Decree, there shall be no modification of this Consent Decree, either before or after its entry by the Court without written agreement of the State and AR and approval by the Court.

31. Retention of Court's Authority Over Modifications. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

### **XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

32. Lodging and Entry of the Decree. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. This Consent Decree is lodged with the Court concurrently with the Clark Fork Site Consent Decree. In addition and concurrently, the State shall submit for public comment its restoration plans for the three Step 2 Sites. The State reserves its right to withdraw from or withhold its consent to this Consent Decree if the comments regarding this Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. AR consents to the entry of this Consent Decree without further notice. In addition, the State reserves its right to withdraw from or withhold its consent to this Consent Decree if the comments regarding its restoration plans for the three Step 2 Sites disclose facts or considerations which indicate that the plans are inappropriate, improper, or inadequate. Each Party hereby agrees not to oppose entry

of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the State has notified AR in writing that it no longer supports entry of this Consent Decree, or the United States or the State has notified AR in writing that either the United States or the State no longer support entry of the Clark Fork Site Consent Decree.

33. Effect of State Withdrawal of Consent Decree. Should the State withdraw from or withhold its consent to entry of this Consent Decree as provided in Paragraph 32, the State and AR shall advise the Court in writing of the State's withdrawal or withholding of its consent, and the State shall advise the United States in writing that the State no longer supports entry of the Clark Fork Site Consent Decree.

34. Effect of Court's Decision to Not Approve Decree. If for any reason the Court should decline to approve this Consent Decree or the Clark Fork Site Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of either Party, and the terms of this Consent Decree may not be used as evidence in any litigation between the Parties.

#### **XVI. SIGNATORIES/SERVICE**

35. The undersigned representatives of AR and the State of Montana each certify that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.



**XVII. ENTRY OF FINAL JUDGMENT**

36. Upon the Court's approval of this Consent Decree, the Decree shall be entered as a final judgment under Fed. R. Civ. P. 54(b). The Court expressly determines that there is no just reason for delay in entering this judgment.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2008.

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UNITED STATES DISTRICT COURT JUDGE

**FOR THE STATE OF MONTANA:**

Date:

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The Honorable BRIAN SCHWEITZER  
Governor of Montana  
State Capitol  
Helena, Montana 59620-0801

Date:

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MIKE McGRATH  
Attorney General

Date:

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ROBERT G. COLLINS  
Supervising Assistant Attorney General  
MARY CAPDEVILLE  
Assistant Attorney General  
Montana Department of Justice  
Natural Resource Damage Program  
1301 Lockey Avenue  
P.O. Box 201425  
Helena, Montana 59620-1425

**FOR ATLANTIC RICHFIELD COMPANY:**

Date:

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LUKE KELLER  
President  
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MC 27  
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Date:

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WILLIAM J. DUFFY  
Davis Graham & Stubbs LLP  
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Date:

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Approved as to Form and Content:

Date:

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