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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA and STATE OF IDAHO Plaintiffs, v. UNION PACIFIC RAILROAD COMPANY and BNSF RAILWAY COMPANY, Defendants.	)	CIVIL ACTION NO. 10-2009-0082

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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, and Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Wallace Yard and Spur Lines Site ("the Site") in Shoshone County, Idaho, together with accrued interest; and (2) performance or funding of response work by the defendants at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Idaho (the "State") on October 1, 2008, of negotiations with potentially responsible parties regarding the implementation of the response action design and response action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

D. The State has also filed a complaint against the defendants in this Court alleging that the defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, the Hazardous Waste Management Act ("HWMA"), Idaho Code Section 39-4401, *et. seq.*, and the Environmental Protection and Health Act ("EPHA") Idaho Code Section 39-101 *et. seq.*, for: (1) reimbursement of costs incurred by the Idaho Department of Environmental Quality for response actions at the Site, and (2) performance or funding of response work by the defendants at the Site.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the U.S. Department of the Interior and the U.S. Department of Agriculture on October 1, 2008, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal trusteeship and encouraged the trustee to participate in the negotiation of this Consent Decree.

F. During the period from 1994 to 1999, the Silver Valley Natural Resource Trustees conducted removals of historic mine wastes at the Site, specifically in several sections of the floodplain in both Ninemile Creek and the East Fork of Ninemile Creek, in the floodplain along five and one-half miles of Canyon Creek, and in portions of the former rail bed along Woodland Park and the Star-Hecla tailings ponds.

G. Defendant Union Pacific Railroad Company ("Union Pacific" or "UPRR") is a party to: (1) a consent decree entered September 12, 1995, in *United States, et al. v. Union Pacific Railroad Co., et al.*, Case No. CV 95-0152-N-HLR, United States District Court, District of Idaho, for the area known as the Bunker Hill Superfund Site; and (2) a consent decree entered August 25, 2000, in *United States, et al. v. Union Pacific Railroad Co.*, Case No. CV 99-0606-N-EJL, United States District Court, District of Idaho, and *Coeur d'Alene Tribe v. Union Pacific*

Railroad Co., et. al., Case No. CV 91-0342-N-EJL, United States District Court, District of Idaho, for performance of response actions on the Wallace-Mullan Branch right-of-way, payment of response costs, and settlement of natural resource damages for the Coeur d'Alene Basin Environment. Under those consent decrees, Union Pacific received, among other things, a full and complete release for all claims for natural resource damages in the Coeur d'Alene Basin Environment. Accordingly, no claims for natural resource damages are asserted against Union Pacific in this case.

H. Except as otherwise provided in this Consent Decree, in signing this Decree, the Settling Defendants deny any and all legal and equitable liability and reserve all defenses under any federal, state, or local statute, regulation, or common law for any claim, endangerment, nuisance, response, removal, remedial or other costs or damages incurred or to be incurred by the United States, the State, or other entities or persons as a result of the release or threatened release of hazardous substances at, in, from, on, or under the Site. Pursuant to 42 U.S.C. § 9622(d)(1)(B), entry of this Consent Decree is not an acknowledgement by Settling Defendants that any release or threatened release of a hazardous substance constituting an imminent and substantial endangerment to human health or the environment has occurred or exists at the Site. Settling Defendants do not admit, and retain the right to controvert, any of the factual or legal statements or determinations made herein in any judicial or administrative proceeding except in an action to enforce this Consent Decree or as provided in Paragraph 100. Settling Defendants do agree, however, to the Court's jurisdiction to enter and enforce this Consent Decree. In any such proceedings to enter or enforce this Consent Decree, the Settling Defendants shall not challenge the terms of this Consent Decree. This Consent Decree shall not be admissible in any judicial or administrative proceeding against the Settling Defendants, over their objections, as proof of liability or as an admission of any fact dealt with herein, but it shall be admissible in an action to enforce this Consent Decree.

I. Pursuant to an Administrative Order on Consent with the United States and the State, Docket No. 10-2002-0138, dated August 22, 2002, the Settling Defendants conducted an Engineering Evaluation/Cost Analysis ("EE/CA") for the Site pursuant to 40 C.F.R. § 300.415.

J. In accordance with the NCP, 40 C.F.R. § 300.415(n)(4), EPA published a notice of availability and brief description of the EE/CA on October 9, 2007, in a major local newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed response action. A copy of the transcript of the public meeting held on November 1, 2007, is available to the public as part of the administrative record upon which EPA based the selection of the response action.

K. The decision by EPA on the response actions to be implemented at the Site is embodied in a final Action Memorandum ("Action Memo"), signed by EPA on March 6, 2008. EPA has determined that the response actions described in the Action Memo and required by this Consent Decree are consistent with "The Bunker Hill Mining and Metallurgical Complex Operable Unit 3 Record of Decision" (September 2002) (the "ROD"). The Action Memo includes a responsiveness summary to the public comments. A copy of the Action Memo is attached as Appendix A.

L. Beginning in 2002, EPA and the State have implemented the preferred alternative Soil Alternative 4 pursuant to the ROD. Pursuant to this and consistent with the Cooperative Agreement for Remedial Action RACA V-970907-01-6, between EPA and the State, the State conducts testing and, if needed, remediation of properties within the Coeur d'Alene Basin. For purposes of the remainder of this Consent Decree, the State's implementation of this portion of the remedy will be referred to as the Basin Property Remediation Program or "BPRP." To the extent that the BPRP has been or will be implemented on properties subject to the actions identified in the EE/CA and selected in the Action Memo, it is incorporated in this Consent Decree as an activity to be conducted by the State and funded by the Settling Defendants pursuant to Paragraph 11 of this Consent Decree.

M. Based on the information presently available to them, EPA and the State believe that the Work will be properly and promptly conducted or funded by the Settling Defendants if conducted or funded in accordance with the requirements of this Consent Decree and its appendices.

N. Solely for the purposes of CERCLA Section 113(j), the response actions selected by the Action Memo and the Work to be performed or funded by the Settling Defendants shall constitute a response action taken or ordered by the President.

O. 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 and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. 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. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and the State and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendants shall provide a copy of this Consent Decree to each contractor they hire to perform any portion of the Work (as defined below) required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work and shall condition all contracts they enter into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors they hire to perform any portion of the Work required by this Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken by Settling Defendants pursuant to this Consent Decree, each of their contractors and subcontractors shall be deemed to be in a contractual relationship with the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). For work on former railroad rights-of-way within the residential yard areas at the Site under the BPRP, the State shall be responsible to inform its contractors and subcontractors of the pertinent requirements of this Consent Decree.

IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"Action Memorandum" or "Action Memo" shall mean the EPA Action Memorandum relating to the Site dated March 6, 2008, and signed by Daniel D. Opalski, Director, Office of Environmental Cleanup, EPA Region 10, and all attachments thereto. A copy of the Action Memo is attached as Appendix A.

"Basin ICP" shall mean the institutional controls program defined by regulations at IDAPA 41.01.01 for the Bunker Hill Superfund Site Operable Unit 3 Institutional Controls Administrative Area, administered by the Panhandle Health Department. The Basin ICP generally includes: (a) general prohibitions on digging or other actions that would diminish the integrity of soil, gravel, vegetated or asphalt barriers placed as part of the Response Action or the BPRP; (b) written instructions for future, physical actions (e.g., construction, landscaping, maintenance) with potential to impair barriers constructed as part of the Response Action or the BPRP; and (c) enforcement authorities.

"Bunker Hill Area of Drilling Concern" shall mean the institutional control program defined by the Idaho Department of Water Resources pursuant to IDAPA 37.03.09.040.

"Canyon Creek" shall mean the former Northern Pacific Railway (NPRy) spur line right-of-way in the Canyon Creek drainage extending from mile marker 0 at the former Wallace-Mullan Branch to approximate mile marker 6.75 near Burke, and the former Washington and Idaho Railroad (WIRR) spur line right-of-way also in the Canyon Creek drainage extending from

mile marker 0 at the former Wallace-Mullan Branch to approximate mile marker 7.25 near Burke.

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

"Coeur d'Alene Basin Environment" shall mean: (1) the watershed of the South Fork and the North Fork of the Coeur d'Alene River, the main stem of the Coeur d'Alene River and its floodplain, including the lateral lakes and associated wetlands, and Lake Coeur d'Alene; (2) the Wallace-Mullan Branch Right-of-Way and all current or historical branches, sidings, spur lines, bridges and structures thereon or connected thereto that are within or adjacent to the area described in subpart (1) of this definition; and (3) all staging areas, Waste Material handling, storage or disposal areas, and other areas used or to be used by Settling Defendants in connection with performance of the Work as described in the statement of work attached to the consent decree entered on August 25, 2000 in *United States, et al. v. Union Pacific Railroad Co.*, Case No. CV 99-606-N-EJL, United States District Court, District of Idaho, and *Coeur d'Alene Tribe v. Union Pacific Railroad Co., et al.*, Case No. CV 91-0342-N-EJL, United States District Court, District of Idaho. The geographic extent of this definition also includes any staging areas, Waste Material handling, storage or disposal areas, and other areas to be used by Settling Defendants in connection with performance of the Work as described in the SOW attached hereto, as well as all staging areas, Waste Material handling, storage or disposal areas, and other areas to be used by the State in connection with implementation of the BPRP on former railroad rights-of-way within residential yard areas at the Site.

"Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday, or a state or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or a state or Federal holiday, the period shall run until the close of business of the next working day.

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

"Engineering Evaluation/Cost Analysis" or "EE/CA" shall mean the EPA engineering evaluation/cost analysis report for the CERCLA response action for the Site, issued by EPA in March 2008, and including all attachments and appendices thereto. The EE/CA is incorporated by reference to this Consent Decree.

"Effective Date" shall be the effective date of this Consent Decree as provided in Paragraph 108.

"Element of Work" or "Elements of Work" shall mean one or more of the (1) Wallace Yard Element of Work, (2) Hercules Mill Site Element of Work, (3) Ninemile Element of Work, and (4) Canyon Creek Element of Work, all specified in the SOW attached hereto.

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

"Functional Right of Way Width" or "FROWW" shall mean that portion of the former railroad right-of-way width that is generally accessible by humans and therefore represents an area of probable exposure through direct contact with Mine Waste. For example, FROWW will generally not include the following areas:

- a steep (generally steeper than 2H:1V) slope, cut or hillside;
- a water body;
- dense wooded or hostile vegetation;
- bedrock at the surface;
- surface material that is predominantly rock particles greater than 6 inches in diameter;
- a paved road (exclusive of road shoulders or unpaved roads);
- railroad embankment slopes, on the river or creek side, from the top of slope down to the edge of the water;
- areas that are seasonally submerged;
- areas covered with vegetation that is sufficiently dense to preclude easy access to the area; and/or
- other limitations approved by EPA.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States or the State incurs in connection with the Site in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII (Remedy Review), IX (Access and Institutional Controls) (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV (Emergency Response), and Paragraph 91 of Section XXI (Work Takeover). Future Response Costs shall include costs to be incurred by EPA associated with the State's implementation of the BPRP within the Site. Future Response Costs shall also include all Interim Response Costs, and all Interest on those Past Response Costs Settling Defendants have agreed to reimburse under this Consent Decree that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from January 13, 2009, to the date of entry of this Consent Decree.

"Hercules Mill Site" shall mean the area depicted on Figure 3-1 of the EE/CA.

"Holidays" shall mean days when the offices of the State or Federal Government are closed for normal business.

"Hostile Vegetation" shall mean vegetation that either: (i) forms a dense coverage; or (ii) contains brambles, vines, thorns, or other attributes that discourage human passage.

"Interim Response Costs" shall mean all costs, including direct and indirect costs, (a) paid by the United States or the State in connection with the Site between January 13, 2009 and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

"Maintenance and Repair" or "M&R" shall mean all activities required to maintain the effectiveness of the Response Action in Wallace Yard and the Hercules Mill Site as required under the Maintenance and Repair Plan approved by EPA pursuant to this Consent Decree and the Statement of Work.

"Matters Addressed" in this Consent Decree shall mean all Work under this Decree, all response actions taken or to be taken, and all response costs incurred or to be incurred by the United States, the State, or any other person or entity relating to the presence of Waste Materials at, or the release or threatened release of Waste Materials from the Site. "Matters Addressed" in this Decree do not include those response costs or response actions as to which the Plaintiffs have reserved their rights under this Decree (except for claims for failure to comply with this Decree), in the event that a Plaintiff asserts rights against Settling Defendants within the scope of such reservations.

"Mine Waste" shall include jig and flotation tailings, mine waste rock, ores, and ore concentrates, all of which are derived from mining activities.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to CERCLA Section 105, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Ninemile" shall mean the former Northern Pacific Railway (NPRy) spur line right-of-way running in Ninemile Canyon from mile marker 0 at the former Wallace-Mullan Branch to mile marker 4.75.

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the United States, the State of Idaho, and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through January 13, 2009. Such costs shall include, without limitation, costs incurred by EPA for oversight of work under the Wallace Yard and Spur Lines Administrative Order on Consent, Docket

No. 10-2002-0138, and completion of the EE/CA; costs incurred by EPA for response work completed in connection with the Spur Lines; and Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the BPRP and the Response Action as set forth in the documentation for that program and the SOW, respectively.

"Plaintiffs" shall mean the United States and the State of Idaho.

"Real Property" shall mean any real property, portion of any real property, or interest in any real property that is located within the Site or other areas within the Coeur d'Alene Basin Environment where hazardous substances have come to be located or which is necessary for implementation of the Response Action.

"RCRA" shall mean the Resource Conservation and Recovery Act, as amending the Solid Waste Disposal Act, 42 U.S.C. §§ 6901, *et seq.*

"Response Action" shall mean those activities to be undertaken by the Settling Defendants to implement the Action Memo in accordance with the SOW and the final Response Action Design and Response Action Work Plan and other plans approved by EPA. "Response Action" does not include State implementation of the BPRP on former railroad rights-of-way within residential yard areas at the Site or the Settling Defendants' commitment to fund State implementation of the BPRP in those areas.

"Response Action Work Plan" or "RA Work Plan" shall mean the document developed pursuant to Paragraph 13 of this Consent Decree and approved by EPA, and any amendments thereto.

"Response Action Design" or "RAD" shall mean the final plans and specifications for the Response Action to be performed by the Settling Defendants, specifically the Response Action Design Drawings and Project Material and Placement Specifications – Attachments C and D to the SOW.

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

"Settling Defendants" shall mean Union Pacific Railroad Company and BNSF Railway Company.

"Site" or "Wallace Yard and Spur Lines Site" shall mean: (1) the Wallace Yard, (2) the Hercules Mill Site, and (3) the Spur Lines. The geographic scope of the Site is depicted generally on Figures 1-1 and 1-2 of the EE/CA, copies of which are attached as Appendix B For purposes of the covenants not to sue in Section XXI (Covenants Not to Sue by Plaintiffs), the Site consists of the full geographic extent of the Wallace Yard, the Hercules Mill Site and the Spur Lines including but not limited to: (i) those areas identified in the SOW as being a part of the Work; (ii) those areas in the Ninemile Creek, East Fork of Ninemile Creek and Canyon Creek drainages where the Silver Valley Natural Resources Trustees previously conducted

removals; (iii) former railroad rights-of-way within residential yard areas remediated or to be remediated under the BPRP; and (iv) the 26-foot wide corridor centered on the former main line of the Wallace-Mullan Branch which is now part of the Trail of the Coeur d'Alenes and was previously remediated by Union Pacific under the consent decree entered on August 25, 2000 in *United States, et al. v. Union Pacific Railroad Co.*, Case No. 99-0606-N-EJL, and *Coeur d'Alene Tribe v. Union Pacific Railroad Co.*, Case No. 91-0342-N-EJL, United States District Court, District of Idaho. The Site also includes (i) all staging areas, Waste Material handling, storage and disposal areas, and other areas to be used by Settling Defendants or Plaintiffs in connection with performance of the Work as described in the SOW; and (ii) all staging areas, Waste Material handling, storage and disposal areas, and other areas used or to be used by the State in connection with implementation of the BPRP on former railroad rights-of-way within residential yard areas at the Site.

"Spur Lines" shall mean the three independent former spur line rights-of-way running from the former Wallace-Mullan Branch and extending up Ninemile and Canyon Creek drainages, better described as (a) the former Northern Pacific Railway (NPRy) spur line right-of-way running in Ninemile Canyon from mile marker 0 at the former Wallace-Mullan Branch to mile marker 4.75, (b) the former NPRy spur line right-of-way in the Canyon Creek drainage extending from mile marker 0 at the former Wallace-Mullan Branch to approximate mile marker 6.75 near Burke, and (c) the former Washington and Idaho Railroad (WIRR) spur line right-of-way also in the Canyon Creek drainage extending from mile marker 0 at the former Wallace-Mullan Branch to approximate mile marker 7.25 near Burke. Settling Defendants represent that neither owns any Real Property within the Spur Lines.

"State" shall mean the State of Idaho, together with all departments and agencies thereof.

"Statement of Work" or "SOW" shall mean the statement of work for implementation of the Response Action Design and Response Action at the Site, as set forth in Appendix C to this Decree and any modifications made in accordance with this Consent Decree.

"Supervising Contractor" shall mean the principal contractor retained by the Settling Defendants to supervise and direct the implementation of the Work to be performed by the Settling Defendants under this Consent Decree.

"United States" shall mean the United States of America.

"Wallace Yard" shall mean that area located between mile marker 78.5 and mile marker 79.8 of the former Wallace-Mullan Branch, excluding the Hercules Mill Site. Wallace Yard is generally depicted on Figure 1-1 of the EE/CA, a copy of which is included in Appendix B

"Wallace-Mullan Branch" or "Wallace-Mullan Branch Right-of-Way" shall mean the former railroad right-of-way combination of the Wallace Branch, which extends for 63.8 miles from mile marker 16.6 at Plummer Junction to mile marker 80.4 in Wallace, and the Mullan Branch, which extends 7.6 miles from mile marker 0 at Wallace to the east side of Mullan at mile marker 7.6, together with all sidings, bridges, and structures thereon or connected thereto.

"Wallace-Mullan Branch Special Account" shall mean the special account established by EPA for (1) the Site pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. §9622(b)(3), and (2) Consent Decree Case No. 99-606-N-EJL (Aug. 25, 2000) and First Non-Material Modification (Oct. 20, 2000).

"Waste Material" shall mean (1) Mine Waste; (2) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (3) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (4) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); (5) any hazardous waste under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), or hazardous constituent under 40 C.F.R. 266.10; and (6) any "hazardous material," "hazardous waste," "solid waste" or "toxic" material under applicable Federal or state law.

"Work" shall mean all activities Settling Defendants are required to fund or perform under this Consent Decree, including but not limited to any activities described in the SOW and funding of the State's implementation of the BPRP on former railroad rights-of-way within residential yard areas at the Site. "Work" excludes those activities required by Section XVI (Payments for Response Costs) and Section XXV (Retention of Records).

V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the funding, or the design and implementation, by the Settling Defendants, of response actions at the Site as identified in the EE/CA and the Action Memo in accordance with the SOW, to reimburse response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendants as provided in this Consent Decree.

6. Commitments by Settling Defendants.

a. Settling Defendants shall fund their pro-rata share of the State's performance of the BPRP on properties through which former railroad rights-of-way occur within the Site and perform the remainder of the Work in accordance with this Consent Decree, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse the United States and the State for Past Response Costs and Future Response Costs as provided in this Consent Decree.

b. The obligations of Settling Defendants to fund the State's performance of the BPRP on former railroad rights-of-way within residential yard areas at the Site and to perform the remainder of the Work and to pay amounts owed the United States and the State under this Consent Decree are joint and several. In the event of the insolvency or other failure of any one Settling Defendant to implement the requirements of this Consent Decree, the remaining Settling Defendant shall complete all such requirements.

c. Settling Defendants shall provide funding to the State for long-term funding of the Basin ICP at the Site. Payment shall be made to the State in the amount and manner prescribed in Paragraph 57.e.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. To the extent practicable, considering the exigencies of the situation, the portion of the Work to be performed by the Settling Defendants shall attain applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the EE/CA, the Action Memo and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (*i.e.*, within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work to be performed by the Settling Defendants that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of a portion of the Work to be performed by the Settling Defendants resulting from a failure to obtain, or a delay in obtaining, any permit required for that portion of the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title and Transfer of Real Property.

a. With respect to any Real Property owned or controlled by a Settling Defendant ("Owner Settling Defendant") that is located within the Site, within fifteen (15) days after the entry of this Consent Decree, the Owner Settling Defendant shall submit to EPA for review and approval a proposed notice to be filed with the appropriate land records office of Shoshone County, Idaho, which shall provide notice to all successors-in-title that the Real Property is part of the Site, that EPA selected a response action for the Site on March 6, 2008, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the response action. Such notice shall identify the United States District Court for the District of Idaho, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. The Owner Settling Defendant shall record the notice within ten (10) days of EPA's approval of the proposed notice. The Owner Settling Defendant shall provide EPA with a certified copy of the recorded notice within ten (10) days of recording such notice.

b. At least thirty (30) days prior to the conveyance of any Real Property by an Owner Settling Defendant, including, but not limited to, fee interests, leasehold interests, and mortgage interests, that Owner Settling Defendant shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "environmental covenants"). At least thirty (30) days prior to such conveyance, that Owner Settling Defendant shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or environmental covenants were provided to the grantee.

c. In the event of any such conveyance, the obligations of that Owner Settling Defendant under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, as well as to abide by institutional controls in the Basin ICP, shall continue to be met by that Owner Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of that Owner Settling Defendant to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree.

d. The obligations of an Owner Settling Defendant under this Paragraph are several obligations of only that Owner Settling Defendant and are not joint obligations of all Settling Defendants.

VI. FUNDING OR PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

10. Selection of Supervising Contractor.

a. All aspects of the Work to be performed by Settling Defendants pursuant to Sections VI (Funding or Performance of the Work by Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA after a reasonable opportunity for review and comment by the State. Within ten (10) days after the lodging of this Consent Decree, Settling Defendants shall notify EPA and the State in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Settling Defendants shall demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans

(QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendants propose to change a Supervising Contractor, Settling Defendants shall give such notice to EPA and the State and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendants in writing. Settling Defendants shall then submit to EPA and the State a list of contractors, including the qualifications of each contractor that would be acceptable to them within thirty (30) days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the name(s) of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendants may select any contractor from that list that is not disapproved and shall notify EPA and the State of the name of the contractor selected within twenty-one (21) days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure).

11. Funding of BPRP Program for Former Railroad Rights-of-Way Within Residential Areas at the Site. Settling Defendants shall fund their pro-rata share of response costs incurred by DEQ to implement the BPRP on behalf of EPA on residential properties over which railroad rights-of-way for the Spur Lines formerly existed, according to the following scope and procedures:

a. Not later than ten (10) days prior to commencement of construction on any residential property subject to the BPRP upon which or over which Spur Line railroad rights-of-way formerly existed, DEQ shall provide Settling Defendants a "construction drawing" depicting the property and specifying those areas within the property determined by the DEQ to be within the FROWW.

b. Within ninety (90) days of conclusion of the construction season for each year (December 31), DEQ will provide Settling Defendants' Project Coordinator with three (3) copies of "record drawings" and field reports, as they are completed and submitted to EPA, showing the completed work and documenting the areal extent of remedial action to be charged to each Settling Defendant.

c. Within ninety (90) days of conclusion of the construction season for each year (December 31), DEQ shall provide the Settling Defendants' Project Coordinator with three (3) copies of a report detailing the items included in, and the amount of, the BPRP unit cost for the just concluded construction season. At the same time, DEQ shall provide each Settling Defendant with a report for its share of the cost of the BPRP work implemented on the former Spur Line railroad rights-of-way during the just concluded construction season. The report will

separately list each property on which remedial action was completed. For each property, the report will provide the total area remediated, the portion of the remediated area charged to a Settling Defendant, the unit cost, the total cost, and the portion of the total cost to be charged to a Settling Defendant as response costs under CERCLA ("BPRP Costs").

d. DEQ shall maintain and make available upon request to the Settling Defendants all information and data compiled during design and construction supporting DEQ's determination of the BPRP Costs that each Settling Defendant is charged and the unit cost for each construction season.

e. Settling Defendants shall reimburse EPA for BPRP Costs according to the Schedule stated in Paragraph 57.a of this Consent Decree. A Settling Defendant may object to all or part of a bill including BPRP Costs on the grounds stated in Paragraph 58 and by following the procedures in that Paragraph.

f. *Areas Excluded from BPRP Funding.* For purposes of this Paragraph 11, Settling Defendants' obligation to reimburse response costs incurred under the BPRP does not include costs incurred for work performed by DEQ or EPA in the areas outside the scope of the Action Memo and EE/CA. These areas include, but may not be limited to, the following:

- Segments of the former WIRR right-of-way where the Silver Valley Natural Resource Trustees removed the rail bed embankment, including the segments from Mile Marker ("MM") 0.85 to MM 3.25;
- Paved public roads and shoulder areas along those roads where the paved road coincides with the former WIRR right-of-way and the former rail bed embankment is no longer visible. These paved public road areas include MM 5.06 to MM 5.70.
- The segment from MM 4.4 to MM 4.9 of the former NPRy Canyon Creek right-of-way where the rail bed is no longer visible;
- The former Hecla Mill area segment from MM 6.3 to the end of the former NPRy Canyon Creek right-of-way;
- The segment from MM 2.25 to MM 2.6 of the former NPRy Ninemile right-of-way where the rail bed is heavily vegetated; and
- The segment from MM 3.8 to the end of the former NPRy Ninemile right-of-way where the rail bed is not accessible.

Settling Defendants' funding obligations do not include costs incurred for removal of any abandoned vehicles or equipment that may be found on the former railroad right-of-way area. If DEQ determines that such debris should be removed before it performs work under the BPRP, then it will look to the current owner of the property for removal.

12. Response Action Design. Attached to the Statement of Work as Attachments C and D are the drawings and specifications which constitute the design of the Response Action at the Site ("Response Action Design" or "RAD"). The Response Action Design provides the design of the response actions (other than those included in the BPRP for former railroad rights-of-way within residential yard areas at the Site) set forth in the EE/CA and the Action Memo, in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the Action Memo, this Consent Decree and/or the SOW. The RAD is incorporated into and enforceable under this Consent Decree.

13. Response Action Work Plan.

a. Attached to the Statement of Work as Attachment B is the work plan for the performance of the Response Action (the "Response Action Work Plan" or the "RA Work Plan"). The RA Work Plan provides for construction and implementation of the specific response actions set forth in the EE/CA and the Action Memo that the Settling Defendants will perform and, for those response actions, achievement of the Performance Standards in accordance with this Consent Decree, the Action Memo, the SOW, and the design plans and specifications provided in the RAD. The RA Work Plan shall be incorporated into and become enforceable under this Consent Decree. Within seven (7) days after entry of this Consent Decree, Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field activities required by the RA Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The RA Work Plan includes the following: (1) schedule for completion of the Response Action; (2) method for selection of the contractor; (3) schedule for developing and submitting other required plans for the Response Action; (4) methods for satisfying permitting requirements; (5) methodology for implementation of the Contingency Plan; (6) tentative formulation of the Settling Defendants' Response Action team; and (7) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The RA Work Plan also includes the methodology for implementation of the Quality Assurance Project Plan and identifies the initial formulation of the Settling Defendants' RA Project Team (including, but not limited to, the Supervising Contractor).

c. Settling Defendants shall implement the activities required under the RA Work Plan. The Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved RA Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions).

14. The Settling Defendants shall conduct the Response Action to achieve the Performance Standards.

15. Modification of the SOW or Related Work Plans.

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the response action set forth in the Action Memo, EPA may require that such modification be incorporated in the SOW and/or such work plans, provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the response action selected in the Action Memo.

b. For the purposes of this Paragraph 15 and Paragraphs 52 and 53 only, the "scope of the response action selected in the Action Memo" is the Response Action as defined in Section IV of this Consent Decree. For the purposes of this Paragraph 15 and Paragraphs 52 and 53 only, the "scope of the response action selected in the Action Memo" does not include implementation by the State of the BPRP on former railroad rights-of-way within residential yard areas at the Site.

c. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 70 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendants shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

16. Settling Defendants acknowledge and agree that nothing in this Consent Decree, the SOW, or the RA Work Plan constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW and the RA Work Plan will achieve the Performance Standards. However, the Parties anticipate that compliance with those work requirements in good faith will achieve the Performance Standards.

17. a. Settling Defendants shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed ten (10) cubic yards.

(1) The Settling Defendants shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of

transportation. The Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(2) The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for Response Action construction. The Settling Defendants shall provide the information required by Paragraph 17.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Settling Defendants shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440. Settling Defendants shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

c. Settling Defendants may ship waste material from the Site to the Big Creek Repository at Kellogg, Idaho, and/or to other waste repositories within the Coeur d'Alene Basin Environment as specified by EPA, subject to established waste acceptance criteria.

VII. REMEDY REVIEW

18. Periodic Review. Settling Defendants shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of the areas of the Site where hazardous substances remain to determine whether the Response Action in those areas is protective of human health and the environment at least every five years, consistent with Section 121(c) of CERCLA and any applicable regulations. This five-year period will be coordinated with other periodic reviews carried out for remedial actions within the Bunker Hill Mining and Metallurgical Complex Operable Unit 3.

19. EPA Selection of Further Response Actions. If EPA determines, at any time, that the Response Action is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

20. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

21. Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions for the Site, the Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 86 or Paragraph 87 (United States' and State's reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendants may invoke the procedures set forth in

Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 86 or Paragraph 87 of Section XXI (Covenants Not To Sue by Plaintiffs) are satisfied, (2) EPA's determination that the Response Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to whether the Response Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 70 (record review).

22. Submissions of Plans. If Settling Defendants are required to perform the further response actions pursuant to Paragraph 21, they shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section VI (Funding or Performance of the Work by Settling Defendants) and shall implement the plan approved by EPA in accordance with the provisions of this Decree.

VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

23. Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all design, compliance and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001), "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendants shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree; however, upon approval by EPA, after opportunity for review and comment by the State, the Settling Defendants may use other analytical methods which are as stringent as or more stringent than the CLP-approved methods. Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendants shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001), or equivalent documentation as determined by EPA. EPA

may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

24. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Settling Defendants shall notify EPA and the State not less than fourteen (14) days in advance of any sample collection activity unless shorter notice is agreed to by the EPA Project Coordinator. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary. Upon request, EPA and the State shall allow the Settling Defendants to take split or duplicate samples of any samples they take as part of the Plaintiffs' oversight of the Settling Defendants' implementation of the Work.

25. Settling Defendants shall submit to EPA and the State copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless the EPA Project Coordinator agrees otherwise.

26. Notwithstanding any provision of this Consent Decree, the United States and the State hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

IX. ACCESS AND INSTITUTIONAL CONTROLS

27. For any Real Property owned by any of the Settling Defendants on the date of lodging of this Consent Decree, where access or land/water use restrictions are needed to implement this Consent Decree, each Owner Settling Defendant shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States, the State, and their representatives, including EPA and its contractors, with access at all reasonable times to such Real Property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

(1) Monitoring the Work;

(2) Verifying any data or information submitted to the United States or the State;

(3) Conducting investigations relating to contamination at or near the Site;

(4) Obtaining samples;

(5) Assessing the need for, planning, or implementing additional response actions at or near the Site;

(6) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;

(7) Implementing the Work pursuant to the conditions set forth in Paragraph 91 (Work Takeover);

(8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information);

(9) Assessing Settling Defendants' compliance with this Consent Decree; and

(10) Determining whether the Site or other Real Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree.

b. commencing on the date of lodging of this Consent Decree, refrain from using such Real Property in any manner that would pose an unacceptable risk to human health from exposure to hazardous substances or interfere with or adversely affect the implementation, integrity, or protectiveness of the Response Action to be performed by Settling Defendants pursuant to this Consent Decree. Consistent with the Basin ICP and the Bunker Hill Area of Drilling Concern as extended pursuant to the ROD, such restrictions include, but are not limited to, the following:

(1) general prohibition on the use of groundwater within the area of the Wallace Yard for drinking water or other purposes involving direct human contact;

(2) general prohibitions or limitations on digging or other actions that would diminish the integrity of soil, gravel, or vegetated barriers placed as part of the Response Action; and

(3) compliance with written instructions for future, physical actions (e.g., construction, landscaping, maintenance) with potential to impair barriers constructed as part of the Response Action.

c. execute and record in the appropriate land records office of Shoshone County, State of Idaho, an environmental covenant, running with the land, for such Real Property that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 27.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 27.b of this Consent Decree, or other restrictions that EPA determines are necessary to implement,

ensure non-interference with, or ensure the protectiveness of the Response Action to be performed pursuant to this Consent Decree. Such Owner Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the other Settling Defendants and their representatives, and/or (iv) other appropriate grantees. Owner Settling Defendants shall, within forty-five (45) days of entry of this Consent Decree, submit to EPA for review and approval with respect to such Real Property:

(1) a draft environmental covenant, in substantially the form attached hereto as Appendix D that is enforceable under the Uniform Environmental Covenants Act and other applicable laws of the State of Idaho, and

(2) a current title insurance commitment or some other evidence of title acceptable to EPA, which shows title to the land described in the covenant to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

Within fifteen (15) days of EPA's approval and acceptance of the environmental covenant and the title evidence, such Owner Settling Defendants shall record the environmental covenant with the appropriate land records office of Shoshone County. Within thirty (30) days of recording the environmental covenant, Owner Settling Defendants shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded covenant showing the clerk's recording stamps. If the covenant is to be conveyed to the United States, the covenant and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 3111.

28. If the Site, or any other Real Property where access is needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants, Settling Defendants shall use best efforts to secure from such persons an agreement to provide access thereto for Settling Defendants, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 27.a of this Consent Decree. However, the State will obtain any access required for implementation of the BPRP. For purposes of this Paragraph 28, "best efforts" includes the payment of reasonable sums of money in consideration of access. If any access agreement required by this paragraph is not obtained within ninety (90) days of the date of entry of this Consent Decree, Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with this paragraph. The United States may, as it deems appropriate, assist Settling Defendants in obtaining access. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Payments for Response Costs), for all costs

incurred, direct or indirect, by the United States in obtaining such access, including, but not limited to, the cost of attorney time and the amount of just compensation actually paid by the United States.

29. Any Real Property on which Settling Defendants will perform or fund Work under this Consent Decree is subject to the requirements of the Basin ICP and the Bunker Hill Area of Drilling Concern as extended by the ROD.

30. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls in addition to the Basin ICP and the Bunker Hill Area of Drilling Concern as extended by the ROD are needed to implement the response actions selected in the Action Memo, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls.

31. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

X. REPORTING REQUIREMENTS

32. In addition to any other requirement of this Consent Decree, Settling Defendants shall prepare and submit written reports as set forth in the SOW. Settling Defendants shall submit copies of the reports set forth in the SOW to EPA and to the State according to the schedule set forth in the SOW. If requested by EPA or the State, Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work.

33. The Settling Defendants shall notify EPA of any change in the schedule described in any report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven (7) days prior to the performance of the activity.

34. Upon the occurrence of any event during performance by the Settling Defendants of the Work that they are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), Settling Defendants shall within twenty-four (24) hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Unit, Region 10, U.S. EPA. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

35. Within twenty (20) days of the onset of such an event, Settling Defendants shall furnish to Plaintiffs a written report, signed by the Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response

thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

36. Settling Defendants shall submit three (3) copies of all plans, reports, and data required by this Consent Decree, the SOW, the RA Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendants shall simultaneously submit two (2) copies of all such plans, reports and data to the State. Upon request by EPA, Settling Defendants shall submit in electronic form all portions of any report or other deliverable Settling Defendants are required to submit pursuant to the provisions of this Consent Decree.

37. All reports and other documents submitted by Settling Defendants to EPA (other than the reports set forth in the SOW) which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendants who may be the Settling Defendants' Project Coordinator.

XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

38. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within fourteen (14) days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

39. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Subparagraphs 38(a), (b), or (c), Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Subparagraph 38(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

40. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Subparagraph 38(d), Settling Defendants shall, within fourteen (14) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX (Stipulated Penalties), shall accrue during the fourteen (14)-day or otherwise specified period but shall not

be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 41 and 42.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Subparagraph 38(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties) as to any deficient portion.

41. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item to the extent such modification or development is consistent with the response actions to be performed by Settling Defendants that are identified in the EE/CA, selected in the Action Memo, and specified in the SOW. Settling Defendants shall implement any such plan, report, or item as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XIX (Dispute Resolution).

42. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX (Stipulated Penalties).

43. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

XII. PROJECT COORDINATORS

44. Within twenty (20) days of lodging of this Consent Decree, Settling Defendants, the State, and EPA will notify each other, in writing, of the names, addresses and telephone numbers of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendants' Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for any of the Settling

Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during response activities.

45. Plaintiffs may designate other representatives, including, but not limited to, EPA and State employees, and federal and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

46. The Project Coordinators will meet, at a minimum, on a monthly basis. Those meetings may be telephone conferences.

XIII. PERFORMANCE GUARANTEE

47. In order to ensure the full and final completion of the Work to be performed by Settling Defendants, they shall establish and maintain a Performance Guarantee for the benefit of EPA in the amount of $ 7,000,000 (hereinafter "Estimated Cost of the Work") in one or more of the following forms, which must be satisfactory in form and substance to EPA:

a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institutions (i) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee (i) that has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency;

d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (b) whose insurance operations are regulated and examined by a U.S. State agency;

e. A demonstration by one or more Settling Defendants that each such Settling Defendant meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to fifty

percent (50%) of the Estimated Cost of the Work [i.e., $3.5 million], provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied;

f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (i) a direct or indirect parent company of a Settling Defendant, or (ii) a company that has a "substantial business relationship" as defined in 40 C.F.R. § 264.141(h)) with at least one Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee hereunder;

g. An escrow account whose funds are dedicated to the performance of the Work, with disbursements based on completion of specified activities; or

h. Any other performance guarantee mechanism suggested by Settling Defendants and acceptable to EPA.

If at any time during the effective period of this Consent Decree, the Settling Defendants provide a Performance Guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 47.e or Paragraph 47.f above, such Settling Defendants shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f) and 40 C.F.R. § 264.151(h)(1) relating to these methods unless otherwise provided in this Consent Decree, including but not limited to (i) the initial submission of required financial reports and statements from the relevant entity's chief finance officer ("CFO") and independent certified public accountant ("CPA"), in the form prescribed by EPA in its financial test sample CFO letters and CPA reports available at: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/fa-test-samples.pdf; (ii) the annual re-submission of such reports and statements within ninety (90) days after the close of each such entity's fiscal year; and (iii) the prompt notification of EPA after each such entity determines that it no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1) and in any event within ninety (90) days after the close of any fiscal year in which such entity no longer satisfies such financial test requirements. For purposes of the Performance Guarantee method specified in this Section XIII, references in 40 C.F.R. Part 264, Subpart H, to "closure," "post-closure," and "plugging and abandonment" shall be deemed to refer to the Work required under this Consent Decree, the terms "current closure cost estimate," "current post-closure cost estimate," and "current plugging and abandonment cost estimate" shall be deemed to refer to the Estimated Cost of the Work, the terms "owner" and "operator" shall be deemed to refer to each Settling Defendant making a demonstration under Paragraph 47.e, and the terms "facility" and "hazardous waste facility" shall be deemed to include the Site.

48. Settling Defendants have selected, and EPA has approved, as an initial Performance Guarantee, a demonstration pursuant to Paragraph 47.e, in the form attached hereto as Appendix E. Within ten (10) days after entry of this Consent Decree, Settling Defendants shall execute or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee legally binding in a form substantially identical to the documents attached hereto as Appendix E and such Performance Guarantees shall thereupon be

fully effective. Within thirty (30) days of entry of this Consent Decree, Settling Defendants shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee legally binding to the EPA Regional Financial Management Officer in accordance with Section XXVI (Notices and Submissions) of this Consent Decree, with a copy to Clifford J. Villa, Esq., U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900, ORC-158, Seattle, Washington 98101, and to the United States and EPA and the State as specified in Section XXVI (Notices and Submissions).

49. In the event that EPA determines at any time that a Performance Guarantee provided by any Settling Defendant pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, or in the event that any Settling Defendant becomes aware of information indicating that a Performance Guarantee provided pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, Settling Defendant(s), within thirty (30) days of receipt of notice of EPA's determination or, as the case may be, within thirty (30) days of any Settling Defendant becoming aware of such information, shall obtain and present to EPA for approval a proposal for a revised or alternative form of Performance Guarantee listed in Paragraph 47 of this Consent Decree that satisfies all requirements set forth in this Section XIII. In seeking approval for a revised or alternative form of Performance Guarantee, Settling Defendants shall follow the procedures set forth in Paragraph 51.b(2) of this Consent Decree. Settling Defendants' inability to post a Performance Guarantee for completion of the Work shall in no way excuse performance of any other requirements of this Consent Decree, including, without limitation, the obligation of Settling Defendants to complete the Work in strict accordance with the terms hereof.

50. The commencement of any Work Takeover pursuant to Paragraph 91 of this Consent Decree shall trigger EPA's right to receive the benefit of any Performance Guarantee(s) provided pursuant to Paragraph 47, and at such time EPA shall have immediate access to resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, as needed to continue and complete the Work assumed by EPA under the Work Takeover. If for any reason EPA is unable to promptly secure the resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, necessary to continue and complete the Work assumed by EPA under the Work Takeover, or, in the event that the Performance Guarantee involves a demonstration of the financial test criteria pursuant to Paragraph 47.e, Settling Defendants shall immediately upon written demand from EPA deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by EPA.

51. Modification of Amount and/or Form of Performance Guarantee.

a. Reduction of Amount of Performance Guarantee. If Settling Defendants believe that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 47 above, Settling Defendants may, on any six-month anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, petition EPA in

writing to request a reduction in the amount of the Performance Guarantee provided pursuant to this Section so that the amount of the Performance Guarantee is equal to the estimated cost of the remaining Work to be performed. Settling Defendants shall submit a written proposal for such reduction to EPA that shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval for a revised or alternative form of Performance Guarantee, Settling Defendants shall follow the procedures set forth in Paragraph 51.b(2) of this Consent Decree. If EPA decides to accept such a proposal, EPA shall notify the petitioning Settling Defendants of such decision in writing. After receiving EPA's written acceptance, Settling Defendants may reduce the amount of the Performance Guarantee in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, Settling Defendants may reduce the amount of the Performance Guarantee required hereunder only in accordance with a final administrative or judicial decision resolving such dispute. No change to the form or terms of any Performance Guarantee provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraph 49 or Paragraph 51.b of this Consent Decree.

b. Change of Form of Performance Guarantee.

(1) If, after entry of this Consent Decree, Settling Defendants desire to change the form or terms of any Performance Guarantee(s) provided pursuant to this Section, Settling Defendants may, on any six-month anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, petition EPA in writing to request a change in the form of the Performance Guarantee provided hereunder. The submission of such proposed revised or alternative form of Performance Guarantee shall be as provided in Paragraph 51.b(2) of this Consent Decree. Any decision made by EPA on a petition submitted under this Paragraph 51.b(1) shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by Settling Defendants pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.

(2) Settling Defendants shall submit a written proposal for a revised or alternative form of Performance Guarantee to EPA which shall specify, at a minimum, the estimated cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of Performance Guarantee, including all proposed instruments or other documents required in order to make the proposed Performance Guarantee legally binding. The proposed revised or alternative form of Performance Guarantee must satisfy all requirements set forth or incorporated by reference in this Section. Settling Defendants shall submit such proposed revised or alternative form of Performance Guarantee to the EPA Regional Financial Management Officer in accordance with Section XXVI (Notices and Submissions) of this Consent Decree, with a copy to Clifford J. Villa, Assistant Regional Counsel, U.S. EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101. EPA shall notify Settling Defendants in writing of its decision to accept or reject a revised or alternative Performance Guarantee submitted pursuant to this Paragraph. Within ten (10) days after receiving a written decision approving the proposed revised or alternative Performance Guarantee, Settling Defendants shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal, and such Performance

Guarantee(s) shall thereupon be fully effective. Settling Defendants shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding to the EPA Regional Financial Management Officer within thirty (30) days of receiving a written decision approving the proposed revised or alternative Performance Guarantee in accordance with Section XXVI (Notices and Submissions) of this Consent Decree and to the United States and EPA and the State as specified in Section XXVI.

c. Release of Performance Guarantee. If Settling Defendants receive written notice from EPA in accordance with Paragraph 53 hereof that the Work has been fully and finally completed in accordance with the terms of this Consent Decree, or if EPA otherwise so notifies Settling Defendants in writing, Settling Defendants may thereafter release, cancel, or discontinue the Performance Guarantee(s) provided pursuant to this Section. Settling Defendants shall not release, cancel, or discontinue any Performance Guarantee provided pursuant to this Section except as provided in this Paragraph. In the event of a dispute, Settling Defendants may release, cancel, or discontinue the Performance Guarantee(s) required hereunder only in accordance with a final administrative or judicial decision resolving such dispute.

XIV. CERTIFICATION OF COMPLETION

52. Completion of the Response Action.

a. Within forty-five (45) days after Settling Defendants conclude that an independent portion of the Response Action, namely the Element of Work for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, has been fully performed and the Performance Standards have been attained, Settling Defendants may schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA, and the State. If, after the pre-certification inspection, the Settling Defendants still believe that the Element of Work has been fully performed and the Performance Standards have been attained, they may submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer and the Settling Defendants' Project Coordinator shall state that the Element of Work for which certification has been requested, has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of each Settling Defendant or the Settling Defendants' Project Coordinator:

> To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity for review and comment by the

State, determines that the Element of Work for which certification is requested, or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Element of Work for which certification has been requested, and achieve the Performance Standards; provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the response action selected in the Action Memo," as that term is defined in Paragraph 15.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

c. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Element of Work for which certification has been requested, has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendants. This certification shall constitute a Certification of Completion of the Response Action for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiffs). A Certification of Completion of the Response Action shall not affect Settling Defendants' obligations under this Consent Decree.

53. Completion of the Work.

a. For purposes of this paragraph, any Element of Work for which EPA has issued a Certification of Completion of Response Action under Paragraph 52.c above shall be deemed complete and fully performed, and no further inspections or reports shall be required for such Elements in order to satisfy the requirements of this Paragraph 53.

b. With respect to Work other than that described in Paragraph 53.a above, within ninety (90) days after Settling Defendants conclude that all phases of the Work have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA and the State. If, after the pre-certification inspection, the Settling Defendants still believe that the Work has been fully performed, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of each Settling Defendant or the Settling Defendants' Project Coordinator:

> To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for

submitting false information, including the possibility of fine and imprisonment for knowing violations.

c. If, after review of the written report, EPA, after reasonable opportunity for review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work; provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the response action selected in the Action Memo," as that term is defined in Paragraph 15.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

d. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

XV. EMERGENCY RESPONSE

54. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to the following Paragraph, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendants shall notify the EPA Emergency Response Unit, Region 10. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendants fail to take appropriate response action as required by this Section, and EPA or, as appropriate, the State takes such action instead, Settling Defendants shall reimburse EPA and the State all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs).

55. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, or the State, (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or (b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent,

abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not to Sue by Plaintiffs).

XVI. PAYMENTS FOR RESPONSE COSTS

56. Payments for Past Response Costs.

a. Within thirty (30) days of the Effective Date, Settling Defendants shall pay to EPA $227,870 in payment for Past Response Costs. In addition, in full resolution of Past Response Costs related to the Spur Lines, within thirty (30) days of the Effective Date, Settling Defendants shall make payments to EPA individually as follows:

UPRR: $655,094

BNSF: $427,000

Payments shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing EPA Site/Spill ID Number 109J, and DOJ Case Number 90-11-3-09488. Payments shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Idaho following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

b. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVI (Notices and Submissions).

c. The total amount to be paid by Settling Defendants pursuant to Paragraph 56.a shall be deposited in the Wallace-Mullan Branch Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Coeur d'Alene Basin Environment, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

57. Payments for Future Response Costs.

a. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan, including BPRP Costs. On a periodic basis, the United States will send Settling Defendants a bill requiring payment that includes a Superfund Cost Organization Recovery Package Imaging Online System ("SCORPIOS") report or similar cost summary in scope and detail which includes direct and indirect costs incurred by EPA and its contractors (including DEQ when it acts as EPA's contractor for the BPRP). For BPRP costs, this report or cost summary will be the DEQ report described in Paragraph 11.c. Settling Defendants shall make all payments within forty-five (45) days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 58. Settling Defendants shall make all payments required by this Paragraph by a certified or cashier's check or checks

made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, EPA Site/Spill ID Number 109J, and DOJ Case Number 90-11-3-09488. Settling Defendants shall send the check(s) to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, Missouri 63197-9000

b. At the time of payment, Settling Defendants shall send an email to the EPA Project Coordinator and to acctsreceivable.cinwd@epa.gov providing notice that payment has been made. Notice shall also be mailed to the following addresses:

EPA Cincinnati Finance Office
MS-NWD
26 Martin Luther King Drive
Cincinnati, Ohio 45268

c. The total amount to be paid by Setting Defendants pursuant to Paragraph 57.a shall be deposited in the Wallace-Mullan Branch Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Coeur d'Alene Basin Environment, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

d. Settling Defendants shall reimburse the State for all State Future Response Costs not inconsistent with the National Contingency Plan. The State will send Settling Defendants a bill requiring payment that includes a standard State-prepared cost summary, which includes direct and indirect costs incurred by the State and its contractors on a quarterly basis. Settling Defendants shall make all payments within forty-five (45) days of Settling Defendants' receipt of each bill requiring payment, except as otherwise provided in Paragraph 58. Settling Defendants shall make all payments to the State required by this Paragraph by electronic funds transfer in accordance with the Electronic Remittance Guide prepared by the Idaho State Treasurer's Office. Questions concerning payment should be directed to:

DEQ Fiscal Office
1419 N Hilton St.
Boise, ID 83706
(208) 373-0520

e. Within 30 days of the Effective Date of this Consent Decree, Settling Defendants shall pay to the State the sum of $ 500,000 for use by the State in implementing the Basin ICP at the Site. Such payment shall be made to the State in the manner provided immediately above.

f. The Parties acknowledge that in implementing this Decree, each Plaintiff intends to perform oversight of the Settling Defendants' performance of the Work. In carrying out their oversight responsibilities under this Decree, EPA and the State shall coordinate with one another and make good faith efforts not to duplicate oversight and other response activities for which they may seek reimbursement of costs under this Paragraph. By avoiding the unnecessary duplication of activities, the Plaintiffs intend to reduce the incurrence of Future Response Costs.

58. Settling Defendants may contest payment of any Future Response Costs, including BPRP Costs, under Paragraph 57 if they determine that the United States or the State has made an accounting error, if they allege that a cost item that is included represents costs that are inconsistent with the NCP, or if they allege that a cost item that is included represents work performed by DEQ or EPA in areas outside the scope of the Action Memo and EE/CA as referenced in Paragraph 11.f or this Consent Decree. Such objection shall be made in writing within forty-five (45) days of receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) or the State (if the State's accounting is being disputed) or to both (if BPRP cost accounting is being disputed) pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within the forty-five (45) day period pay all uncontested Future Response Costs to the United States or the State in the manner described in Paragraph 57. Simultaneously, the Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Idaho and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendants shall send to the United States and the State, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States (or the State, if State costs are disputed) prevails in the dispute, within five (5) days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued interest) to the United States (or the State, if State costs are disputed) in the manner described in Paragraph 57. If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States (or the State, if State costs are disputed) in the manner described in Paragraph 57; Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the United States and the State for their Future Response Costs.

59. In the event that the payments required by Paragraph 56.a are not made within thirty (30) days of the Effective Date or the payments required by Paragraph 57 are not made within forty-five (45) days of the Settling Defendants' receipt of the bill, Settling Defendants

shall pay Interest on the unpaid balance. The Interest to be paid on Past Response Costs under this Paragraph shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Settling Defendants' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendants' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Section XX. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 57.

XVII. INDEMNIFICATION AND INSURANCE

60. Settling Defendants' Indemnification of the United States and the State.

a. The United States and the State do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendants shall defend, indemnify, save and hold harmless the United States, the State, and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay the United States and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. No Party or any of its contractors shall be considered an agent of any other Party.

b. The United States and the State shall give Settling Defendants notice in writing of any claim for which the United States or the State, respectively, plans to seek indemnification pursuant to Paragraph 60 no later than thirty (30) days after receipt of such claim. Settling Defendants shall have the right to participate in the investigation and defense of any indemnified claim and as to any settlement to be paid by Settling Defendants. The United States and the State shall provide reasonable cooperation as may be needed for investigation and defense by Settling Defendants concerning all indemnified claims.

61. Settling Defendants waive all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In

addition, Settling Defendants shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

62. Insurance.

a. No later than fifteen (15) days before commencing any on-site Work, Settling Defendants' contractors shall secure, and shall maintain until the first anniversary of EPA's last Certification of Completion of the Response Action for the Wallace Yard, Hercules Mill, Ninemile and Canyon Creek Elements of Work pursuant to Section XIV (Certification of Completion), comprehensive general liability insurance with limits of one million dollars, combined single limit, and automobile liability insurance with limits of one million dollars, combined single limit, naming the United States and the State as additional insureds. In addition, for the duration of this Consent Decree, Settling Defendants' contractors shall satisfy, or shall ensure that their subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Settling Defendants' contractors shall provide to EPA and the State certificates of such insurance and a copy of each insurance policy. Prior to the issuance of the last Certificate of Completion of the Response Action, Settling Defendants' contractors shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date.

XVIII. FORCE MAJEURE

63. "Force Majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

64. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Environmental Cleanup Office, EPA Region 10, within seventy-two (72) hours of when Settling Defendants first knew that the event might cause a delay. Within seven (7) days thereafter, Settling Defendants shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of

the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors knew or should have known.

65. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendants in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

66. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), they shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 63 and 64 above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

XIX. DISPUTE RESOLUTION

67. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

68. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed twenty (20) days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

69. Statements of Position.

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within fourteen (14) days after the receipt of written notice from EPA that the informal negotiation period has ended, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 70 or Paragraph 71.

b. Within fourteen (14) days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 70 or 71. Within fourteen (14) days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 70 or 71, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. However, if the Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 70 and 71.

70. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the Action Memo's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Environmental Cleanup Office Division Director, EPA Region 10, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 70.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraphs 70.c and 70.d.

c. Any administrative decision made by EPA pursuant to Paragraph 70.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendants with the Court and served on all Parties within fourteen (14) days after receipt by Settling Defendants of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Environmental Cleanup Office Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 70.a.

71. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law shall be governed by this Paragraph.

a. Following receipt of Settling Defendants' reply to EPA's Statement of Position submitted pursuant to Paragraph 69, the Environmental Cleanup Office Division Director, EPA Region 10, will issue a final decision resolving the dispute. The Division Director's decision shall be binding on the Settling Defendants unless, within fourteen (14) days after receipt by Settling Defendants of the decision, the Settling Defendants file with the Court and serve on the Parties a motion for judicial review of the decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

72. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending final resolution of the dispute as provided in this Section. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendants do not

prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

XX. STIPULATED PENALTIES

73. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 74 and 75 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

74. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 74.b:

Penalty Per Violation Per Day	Period of Noncompliance
$1000	1st through 14th day
$3000	15th through 30th day
$5000	31st day and beyond

b. Compliance Milestones.

(1) Submission of deliverables

(2) Initiation of construction

(3) Failure to meet deadlines in Section 5 of the SOW

75. Stipulated Penalty Amounts - Reports.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 32-37 and the SOW:

Penalty Per Violation Per Day	Period of Noncompliance
$500	1st through 14th day
$1500	15th through 30th day
$2500	31st day and beyond

76. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 91 of Section XXI (Covenants Not to Sue by Plaintiffs), Settling Defendants shall be liable for a stipulated penalty in the lesser amount of three times the cost to perform the portion of the Work at issue or $500,000.

77. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency; (2) with respect to a decision by the Environmental Cleanup Office Division Director, EPA Region 10, under Paragraph 70.b or 71.a of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

78. Following EPA's determination that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendants written notification of the same and describe the noncompliance. EPA may send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendants of a violation.

79. All penalties accruing under this Section shall be due and payable to the United States within thirty (30) days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution).

a. All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," and shall be mailed to the following address:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, Missouri 63197-9000

The total amount to be paid by Setting Defendants pursuant to this Subparagraph shall be deposited in the Wallace-Mullan Branch Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Coeur d'Alene Basin Environment, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

b. Payments pursuant to the preceding Paragraph shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 109J,

the DOJ Case Number 90-11-3-09488, and the name and address of the party making payment. At the time of payment, Settling Defendants shall send notice that payment has been made by email to acctsreceivable.cinwd@epa.gov. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and Submissions), and to the following addresses:

EPA Cincinnati Finance Office
MS-NWD
26 Martin Luther King Drive
Cincinnati, Ohio 45268

Regional Financial Management Officer
U.S. EPA Region 10
MS OMP-146
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

80. The payment of penalties shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

81. Penalties shall continue to accrue as provided in Paragraph 77 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within fifteen (15) days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA within sixty (60) days of receipt of the Court's decision or order, except as provided in Paragraph 81.c below;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendants to the extent that they prevail.

82. If Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 79.

83. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or

sanctions available by virtue of Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA; provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

84. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XXI. COVENANTS NOT TO SUE BY PLAINTIFFS

85. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 86, 87, 89 and 90 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA for the recovery of response or removal costs or the performance of response or removal actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Site. In consideration of actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 86, 87, 89 and 90 of this Section, the State covenants not to sue or to take action against the Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the Hazardous Waste Management Act (HWMA), Idaho Code Section 39-4401, et seq., the Environmental Protection and Health Act (EPHA), Idaho Code Section 39-101, et seq., or any other applicable statutory or common law provision to recover costs or damages or obtain the performance of actions relating to the presence of or the release or threatened release of Waste Materials at, in, from, on, or under the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 56.a of Section XVI (Payments for Response Costs). With respect to future liability, these covenants not to sue shall take effect for each of Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek upon Certification of Completion of the Response Action for that Element of Work and portion of the Site by EPA pursuant to Paragraph 52.c of Section XIV (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

86. United States' and State's Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, 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 Settling Defendants

a. to perform further response actions relating to each of Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, individually, or

b. to reimburse the United States and State for additional costs of response for each of Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, individually,

if, prior to Certification of Completion of the Response Action for that Element of Work and portion of the Site:

(1) conditions at that portion of the Site, previously unknown to Plaintiffs, are discovered, or

(2) information, previously unknown to Plaintiffs, is received, in whole or in part, with respect to that portion of the Site,

and these previously unknown conditions or information, together with any other relevant information, indicate that the Response Action for that portion of the Site is not protective of human health or the environment. Except as otherwise provided in this Paragraph or elsewhere in this Consent Decree, the Settling Defendants reserve all defenses they may have with regard to any actions taken by Plaintiffs under this Paragraph.

87. United States' and State's Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, 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 Settling Defendants

a. to perform further response actions relating to each of Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, individually, or

b. to reimburse the United States and the State for additional costs of response for each of Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, individually,

if, subsequent to Certification of Completion of the Response Action for that Element of Work and portion of the Site:

(1) conditions at that portion of the Site, previously unknown to Plaintiffs, are discovered, or

(2) information, previously unknown to Plaintiffs, is received, in whole or in part, with respect to that portion of the Site,

and these previously unknown conditions or information, together with any other relevant information, indicate that the Response Action for that portion of the Site is not protective of human health or the environment. Except as otherwise provided in this Paragraph or elsewhere in this Consent Decree, the Settling Defendants reserve all defenses they may have with regard to any actions taken by Plaintiffs under this Paragraph.

88. For purposes of Paragraph 86, the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of lodging of this Consent Decree. For purposes of Paragraph 86, information and

conditions known to Plaintiffs shall include information and conditions: (i) included in the EE/CA for the Site and its attachments, the Action Memo for the Site, the administrative record supporting the Action Memo, the administrative record and site files for the Wallace-Mullan Branch Right-of-Way and associated recreational trail, the administrative record and site files for the Bunker Hill Superfund Site, the administrative record and site files for the Basin Wide RI/FS and ROD, and any written information submitted to and received by the Plaintiffs' Project Coordinators prior to the date of lodging of this Consent Decree; (ii) included in or developed or reviewed pursuant to the natural resource damages assessment(s) conducted by the United States and/or the Coeur d'Alene Tribe (including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment); (iii) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment(s) and/or the Basin Wide RI/FS and ROD; (iv) included in the SOW; (v) submitted to the Surface Transportation Board to satisfy the environmental conditions referenced in Paragraph 13 of the Consent Decree in *U.S. v. Union Pacific Railroad*, (D. Idaho), Case No. CV 99-606-N-EJL, and *Coeur d'Alene Tribe v. Union Pacific Railroad, et al.*, (D. Idaho), Case No. CV 91-0342-N-EJL; (vi) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in *U.S. v. ASARCO Inc., et al.*, (D. Idaho), Case No. CV 96-0122-N-EJL, or *Coeur d'Alene Tribe v. Union Pacific Railroad, et al.*, (D. Idaho), Case No. CV 91-0342-N-EJL; (vii) included in data from reports and records of the State's BPRP; or (viii) included in reports or data from the Silver Valley Natural Resource Trustees' removals in the Ninemile Creek and the Canyon Creek drainages. For purposes of Paragraph 87, the information and the conditions known to Plaintiffs shall include only that information and those conditions known to Plaintiffs as of the date of the respective Certification of Completion of the Response Action for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek. For purposes of Paragraph 87, information and conditions known to Plaintiffs shall include information and conditions: (i) included in the EE/CA for the Site and its attachments, the Action Memo for the Site, the administrative record supporting the Action Memo, the administrative record and site file(s) for the Site as of the latest date of the Certifications of Completion of the Response Action for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, the administrative record and site files for the Wallace-Mullan Branch Right-of-Way and associated recreational trail, the administrative record and site files for the Bunker Hill Superfund Site, the administrative record and site files for the Basin Wide RI/FS and ROD, and any written information submitted to and received by the Plaintiffs' Project Coordinators pursuant to the requirements of this Consent Decree prior to the latest of the Certifications of Completion of the Response Action for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek; (ii) included in or developed or reviewed pursuant to the natural resource damages assessment(s) conducted by the United States and/or the Coeur d'Alene Tribe as of the latest date of the Certificates of Completion of the Response Action for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek (including but not limited to preassessment screen(s), assessment plan(s), injury determination(s), injury quantification(s), restoration plans, damages analyses or determinations, or report(s) of assessment); (iii) included in expert reports or in the administrative record(s) or site file(s) for the natural resource damages assessment(s) and/or the Basin-Wide RI/FS and ROD; (iv) included in the SOW; (v) submitted to the Surface Transportation Board to satisfy the environmental conditions referenced in Paragraph 13 of the Consent Decree in *U.S., et al. v. Union Pacific Railroad*, (D. Idaho), Case No. CV 99-606-N-

EJL, and *Coeur d'Alene Tribe v. Union Pacific Railroad, et al.*, (D. Idaho), Case No. CV 91-0342-N-EJL; (vi) obtained by Plaintiffs through depositions, written interrogatories, or requests for admission in *U.S. v. ASARCO Inc., et al.*, (D. Idaho), Case No. CV 96-0122-N-EJL, or *Coeur d'Alene Tribe v. Union Pacific Railroad, et al.*, (D. Idaho), Case No. CV 91-0342-N-EJL; (vii) included in data from reports and records of the State's BPRP; or (viii) included in reports or data from the Silver Valley Natural Resource Trustees' removals in the Ninemile Creek and the Canyon Creek drainages.

89. General reservations of rights against BNSF. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against BNSF with respect to all matters not expressly included within Plaintiffs' covenant not to sue. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against BNSF with respect to:

a. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;

b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;

c. liability based upon the Settling Defendants' operation of the Site, or upon the Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the Action Memo, the Work, this Consent Decree, the SOW, or as otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendants;

d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

e. criminal liability;

f. liability for violations of federal or state law which occur during or after implementation of the Response Action; and

g. liability, prior to the respective Certification of Completion of the Response Action for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, for additional response actions at each such portion of the Site that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 15 (Modification of the SOW or Related Work Plans).

90. General Reservation of Rights Against Union Pacific. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Union Pacific with respect to

a. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;

b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;

c. liability based upon the Settling Defendants' operation of the Site, or upon the Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the Action Memo, the Work, this Consent Decree, the SOW, or as otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendants;

d. criminal liability;

e. liability for violations of federal or state law which occur during or after implementation of the Response Action; and

f. liability, prior to the respective Certification of Completion of the Response Action for Wallace Yard, Hercules Mill Site, Ninemile or Canyon Creek, for additional response actions at each such portion of the Site that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 15 (Modification of the SOW or Related Work Plans).

This reservation excludes any liability previously released under (i) the consent decree entered on September 12, 1995, in *United States, et al. v. Union Pacific Railroad Co., et al.*, Case No. CV 95-0152-N-HLR, United States District Court, District of Idaho, for the area known as the Bunker Hill Superfund Site, and (ii) the consent decree entered on August 25, 2000, in *United States, et al. v. Union Pacific Railroad Co.*, Case No. CV 99-0606-N-EJL, and *Coeur d'Alene Tribe v. Union Pacific Railroad Co., et. al.*, Case No. CV 91-0342-N-EJL, United States District Court, District of Idaho, for performance of response actions on the Wallace-Mullan Branch right-of-way, payment of response costs, and settlement of natural resource damages for the Coeur d'Alene Basin Environment;

91. Work Takeover.

a. In the event EPA determines that Settling Defendants have (i) ceased implementation of any portion of the Work, or (ii) are seriously or repeatedly deficient or late in their performance of the Work, or (iii) are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may issue a written notice ("Work Takeover Notice") to the Settling Defendants. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Settling Defendants a period of fourteen (14) days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the fourteen (14)-day notice period specified in the preceding Paragraph, Settling Defendants have not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portions of the Work as EPA deems necessary ("Work Takeover"). EPA shall notify Settling Defendants in writing (which writing

may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph.

c. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 69, to dispute EPA's implementation of a Work Takeover under the preceding Paragraph 91.b. However, notwithstanding Settling Defendants' invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 91.b until the earlier of (i) the date that Settling Defendants remedy, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice or (ii) the date that a final decision is rendered in accordance with Section XIX (Dispute Resolution), requiring EPA to terminate such Work Takeover.

d. After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any performance guarantee(s) provided pursuant to Section XIII of this Consent Decree. If and to the extent that EPA is unable to secure the resources guaranteed under any such performance guarantee(s) and the Settling Defendants fail to remit a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed, any unreimbursed costs incurred by EPA in performing Work under the Work Takeover shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Payments for Response Costs).

92. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

XXII. COVENANTS BY SETTLING DEFENDANTS

93. Covenant Not to Sue. Subject to the reservations in Paragraph 94, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States or the State with respect to the Site or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site; or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State of Idaho Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

Except as provided in Paragraph 100 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States or the State brings a cause of action or

issues an order pursuant to the reservations set forth in Paragraphs 86, 87, 89.b-89.d, and 89.g, or 90.b-90.c and 90.f, but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

94. The Settling Defendants reserve, and this Consent Decree is without prejudice to:

a. any claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, 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 United States while acting within the scope of his office or employment under circumstances where the United States, 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 a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities except as provided by the preceding sentence. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA;

b. any claims, causes of action or defenses the Settling Defendants may have against the United States, the State, or any Idaho county, city or local government entity in the event one or more of the Plaintiffs assert a claim against one or both of the Settling Defendants pursuant to the provisions of Paragraph 86 (pre-certification reservations), 87 (post-certification reservations), or 89 and 90 (general reservations), within the scope of the claims so asserted by the Plaintiffs; and

c. any claims, causes of action or defenses the Settling Defendants may have against one another.

95. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

96. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which that Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Each of the Settling Defendants expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that Settling Defendant may have

with respect to any matter, transaction, or occurrence relating in any way to the Site against the other Settling Defendant.

97. The Parties agree, and by entering this Consent Decree this Court finds, that each of the Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for Matters Addressed in this Consent Decree, except that such protection does not extend to contribution actions or claims that a Settling Defendant may seek to assert against the other Settling Defendant.

98. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree, they will notify the United States and the State in writing no later than sixty (60) days prior to the initiation of such suit or claim.

99. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree, they will notify in writing the United States and the State within ten (10) days of service of the complaint on them. In addition, Settling Defendants shall notify the United States and the State within ten (10) days of service or receipt of any motion for summary judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

100. Waiver of Claim Splitting Defenses. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiffs).

XXIV. ACCESS TO INFORMATION

101. Settling Defendants shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

102. Business Confidential and Privileged Documents.

a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b) or state law as applicable. Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege or protection recognized by federal or state law ("privilege"). If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no final (including the most recent draft where there is no "final" version) documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

103. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

XXV. RETENTION OF RECORDS

104. Until ten (10) years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 52.c or 53.d of Section XIV (Certification of Completion), each Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work; provided, however, that Settling Defendants who are potentially liable as owners or operators of the Site must retain, in addition, all documents and records that relate to the liability of any other person under CERCLA with respect to the Site. Each Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the

aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

105. At the conclusion of this document retention period, each Settling Defendant shall notify the United States and the State at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States or the State, that Settling Defendant shall deliver any such records or documents to EPA or the State. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal or state law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no final (including the most recent draft where there is no "final" version) documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

106. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. § 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XXVI. NOTICES AND SUBMISSIONS

107. 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 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 Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the State, and the Settling Defendants, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DOJ # 90-11-3-09488

and

Director, Environmental Cleanup Office
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

As to EPA:

Ed Moreen
EPA Project Coordinator
U.S. Environmental Protection Agency
Coeur d'Alene Field Office
1910 Northwest Boulevard, Suite 208
Coeur d'Alene, Idaho 83814
Phone: (208) 664-4588
Email: moreen.ed@epa.gov

Clifford J. Villa
U.S. Environmental Protection Agency
1200 Sixth Ave., Suite 900, ORC-158
Seattle, Washington 98101
Phone: (206) 553-1185
Email: villa.clifford@epa.gov

As to the Regional Financial Management Officer:

U.S. EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

As to the State:

Nick Zilka
State Project Coordinator
Idaho Dept. of Environmental Quality
Kellogg Superfund Project Office
1005 W. McKinley
Kellogg, ID 83837
Phone: (208) 783-5781
Email: Nicholas.Zilka@deq.idaho.gov

As to the Settling Defendants:

Sara Handy
Settling Defendants' Project Coordinator
Arcadis
1687 Cole Blvd., Suite 200
Lakewood, CO 80401
Phone: (303) 231-9115, ext. 126
Fax: (303) 231-9571
Email: Sara.Handy@arcadis-us.com

and

Union Pacific Railroad Company

Gary L. Honeyman
Union Pacific Railroad Company
221 Hodgeman
Laramie, WY 82072
Phone: (402) 233-1007
Fax: (307) 745-3042
Email: glhoneym@up.com

Robert C. Bylsma
Union Pacific Railroad Company
10031 Foothills Blvd., Suite 200
Roseville, CA 95747-7101
Phone: (916) 789-6229
Fax: (916) 789-6227
Email: rcbylsma@up.com

Robert W. Lawrence
Gail L. Wurtzler
Davis Graham & Stubbs LLP
1550 Seventeenth Street, Suite 500
Denver, CO 80202
Phone: (303) 892-9400
Fax: (303) 893-1379
Email: robert.lawrence@dgslaw.com
gail.wurtzler@dgslaw.com

and

BNSF Railway Company

Bruce Sheppard
BNSF Railway Company
2454 Occidental Ave., #1A
Seattle, WA 98134-1451
Phone: (206) 625-6035
Fax: (206) 625-6007
Email: bruce.sheppard@bnsf.com

Pamela Nehring
BNSF Railway Company
2500 Lou Menk Drive, AOB3
Fort Worth, TX 76131-2828
Phone: (817) 352-3469
Fax: (817) 352-2398
Email: pamela.nehring@bnsf.com

Craig Trueblood
K&L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Phone: (206) 370-8368
Fax: (206) 623-7022
Email: craig.trueblood@klgates.com

XXVII. EFFECTIVE DATE

108. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXVIII. RETENTION OF JURISDICTION

109. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants 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 at any time 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 XIX (Dispute Resolution) hereof.

XXIX. APPENDICES

110. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is the Action Memorandum
"Appendix B" is the map of the Site, comprised of EE/CA Figures 1-1 and 1-2
"Appendix C" is the Statement of Work
"Appendix D" is the draft environmental covenant
"Appendix E" is the Performance Guarantee

XXX. COMMUNITY RELATIONS

111. Settling Defendants shall propose to EPA and the State their participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA and the State in providing information regarding the Work to the public. As requested by EPA or the State, Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA or the State to explain activities at or relating to the Site.

XXXI. MODIFICATION

112. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Settling Defendants. All such modifications shall be made in writing.

113. Except as provided in Paragraph 15 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendants, and the Court, if such modifications fundamentally alter the basic features of the selected response action within the meaning of 40 C.F.R. 300.435(c)(2)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected response actions within the meaning of 40 C.F.R. 300.435(c)(2)(ii), may be made by

written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

114. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

115. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

116. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXXIII. SIGNATORIES/SERVICE

117. Each undersigned representative of a Settling Defendant to this Consent Decree, the undersigned representative of the State, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies 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.

118. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

119. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. The parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXXIV. FINAL JUDGMENT

120. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

121. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 19 DAY OF April, 2009.

Edward J. Lodge
United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States and State of Idaho v. Union Pacific Railroad Company and BNSF Railway Company*, relating to the Wallace Yard and Spur Lines Site.

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

12/19/09

W. BENJAMIN FISHEROW
Deputy Chief
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice

12/23/09

SARAH D. HIMMELHOCH
Senior Attorney
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044-7611
202-514-0180 (phone)
202-514-4180 (facsimile)
Sarah.himmelhoch@usdoj.gov

THOMAS E. MOSS
United States Attorney
District of Idaho
800 Park Blvd., Suite 600
Boise, Idaho 83712
(208)334-1211

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States and State of Idaho v. Union Pacific Railroad Company and BNSF Railway Company, relating to the Wallace Yard and Spur Lines Site.

FOR THE UNITED STATES OF AMERICA

Date

John Cruden
Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date

[Name]
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Date

[Name]
Assistant United States Attorney
District of Idaho
U.S. Department of Justice
[Address]

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY

11/30/09
Date

Edward J. Kowalski, Director
Office of Compliance and Enforcement
U.S. EPA Region 10
1200 Sixth Ave., Suite 900
Seattle, WA 98101

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States and State of Idaho v. Union Pacific Railroad Company and BNSF Railway Company*, relating to the Wallace Yard and Spur Lines Site.

11/23/09
Date

~~Daniel D. Opalski, Director~~ Lori Cohen, Acting Director
Environmental Cleanup Office,
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

11/23/09
Date

Clifford L. Villa
Assistant Regional Counsel
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900, ORC-158
Seattle, Washington 98101

Date

FOR THE STATE OF IDAHO

Darrell G. Early
Deputy Attorney General
Office of the Idaho Attorney General
Natural Resources Division
Environmental Quality Section
1410 N. Hilton
Boise, ID 83706

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States and State of Idaho v. Union Pacific Railroad Company and BNSF Railway Company*, relating to the Wallace Yard and Spur Lines Site.

_____
Date

_____
Daniel D. Opalski, Director
Environmental Cleanup Office,
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

_____
Date

_____
Clifford J. Villa
Assistant Regional Counsel
U.S. EPA Region 10
1200 Sixth Avenue, Suite 900, ORC-158
Seattle, Washington 98101

11/20/09
Date

FOR THE STATE OF IDAHO

For DGE

Darrell G. Early
Deputy Attorney General
Office of the Idaho Attorney General
Natural Resources Division
Environmental Quality Section
1410 N. Hilton
Boise, ID 83706

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States and State of Idaho v. Union Pacific Railroad Company and BNSF Railway Company*, relating to the Wallace Yard and Spur Lines Site.

FOR UNION PACIFIC RAILROAD COMPANY

November 18, 2009
Date

Name (print): J. Michael Hemmer
Title: Senior Vice President-Law & General Counsel
Address: 1400 Douglas Street, Stop 1580
Omaha, Nebraska 68179

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Robert W. Lawrence
Legal Counsel
Davis Graham & Stubbs LLP
1550 Seventeenth St., Suite 500
Denver, CO 80202
Phone: (303) 892-9400

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States and State of Idaho v. Union Pacific Railroad Company and BNSF Railway Company*, relating to the Wallace Yard and Spur Lines Site.

FOR BNSF RAILWAY COMPANY

9/11/09
Date

Name (print): CARL ICE
Title: COO
Address: 2600 LOU MENK DR
FT. WORTH, TX 76131

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Craig Trueblood
Legal Counsel
K&L Gates
925 Fourth Ave., Suite 2900
Seattle, WA 98104-1158
Phone: (206) 623-7580