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ATTORNEYS FOR THE PLAINTIFF AND COUNTERCLAIM DEFENDANT UNITED STATES OF AMERICA AND DEPT. OF JUSTICE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ATLANTIC RICHFIELD COMPANY, Defendants ATLANTIC RICHFIELD COMPANY, Defendant and Counterclaim Plaintiff, vs. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, et al., Counterclaim Defendants.	)	CV-89-39-BU-SEH **SECOND JOINT MOTION OF THE UNITED STATES AND ATLANTIC RICHFIELD FOR LEAVE TO DISCLOSE CERTAIN CONFIDENTIAL SETTLEMENT COMMUNICATIONS TO SUPPORT CONSENT DECREE NEGOTIATIONS**

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Background

1. On December 29, 2003 this Court entered an Amended Confidentiality Order in this case. (Dkt. No. 1052, Dec. 29, 2003; Exhibit A hereto). The Amended Confidentiality Order provides in pertinent part:

> "All settlement discussions among and between the parties and any third parties ("Third Party-Participants") in settlement negotiations conducted pursuant to the Streamside Tailings Consent Decree settlement framework, as well as all documents prepared for settlement purposes or exchanged by the participants in such negotiations, shall be kept confidential both during and after the negotiations and not disclosed to third persons."

2. Under the settlement framework established in the Streamside Tailings Consent Decree (entered on April 19, 1999), the United States, Atlantic Richfield Company ("Atlantic Richfield") and Third Party-Participants (collectively, the "Parties") are engaged in confidential settlement negotiations regarding the Anaconda Smelter National Priorities List Site (the "Anaconda Site" or "Site").

3. The Anaconda Site covers approximately 300 square miles in the southern Deer Lodge Valley. Copper milling and smelting operations were conducted in this area by the Anaconda Company and its predecessors for nearly 100 years, generating milling and smelting wastes that were disposed of within the Site. The smelter closed in 1980 and was dismantled

soon thereafter. Defendant Atlantic Richfield merged with the Anaconda Company in 1981 and was identified as a party with responsibility for milling and smelting waste at the Site.

4. The Third Party-Participants engaged in the Anaconda Site negotiations are: the State of Montana ("State"), Anaconda Deer Lodge County ("ADLC") and Anaconda Local Development Corporation ("ALDC"). The State signed its consent to be bound by the confidentiality orders entered in this case in June 2002. ADLC signed its consent to be bound by the confidentiality orders in July 2015, and ALDC signed its consent on June 6, 2018. Each of the Third Party-Participants in the Anaconda Site negotiations was served with a copy of the Amended Confidentiality Order (Dkt. No. 1052, Dec. 29, 2003), and each confirmed its consent to be bound by the Amended Confidentiality Order, in accordance with the terms of the Amended Confidentiality Order.

5. For many years Atlantic Richfield has been working under the direction of the US Environmental Protection Agency ("EPA") and the Montana Department of Environmental Quality ("DEQ") to investigate and remediate environmental contamination arising from past milling and smelting activities at the Site. During this time much progress has been made in completing EPA's selected remedies for the Site. EPA divided the

site into the following five operable units ("OUs") and selected remedies for each: the Anaconda Regional Water, Waste and Soils Operable Unit ("ARWW&S OU"); the Old Works / East Anaconda Development Area Operable Unit ("OW/EADA OU"); the Community Soils Operable Unit ("CSOU"); the Mill Creek OU and the Flue Dust OU. Remedial action work activities continue today primarily at the ARWW&S OU, OW/EADA OU and CSOU. EPA published a Record of Decision for the OW/EADA OU in 1994 that includes the consolidation and containment of waste and debris from historical smelting and mineral processing operations. EPA published a Record of Decision for the CSOU in September 1996 ("1996 CSOU ROD") describing EPA's selected remedy for cleanup of residential yards and other commercial/industrial properties, with other measures to protect the community. The CSOU ROD was amended in September 2013. EPA published a Record of Decision for the ARWW&S OU in September 1998 ("1998 ARWW&S ROD") describing cleanup actions for soil, groundwater and surface water within the broader Anaconda Site, including institutional controls to protect the remedy. The ARWW&S ROD was amended in September 2011 to update cleanup performance standards and to clarify certain remedy components.

6. Atlantic Richfield has been conducting remedial work to date under a series of Unilateral Administrative Orders issued by EPA pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606. EPA has issued such orders for all of the OUs except the Flue Dust OU, where Atlantic Richfield has implemented EPA's selected remedy under a consent decree between the United States, the State and Atlantic Richfield that was approved by the Court in December 1992 (Flue Dust Consent Decree, Civil Action No. CV-92-76-BU-PGH).

7. Confidential settlement communications among the United States, State, Atlantic Richfield and ADLC began when ADLC signed its consent to be bound by the confidentiality orders in July 2015. Since that time, the confidential discussions have continued in an effort to reach agreement upon a settlement framework for a Consent Decree in which Atlantic Richfield would complete the remaining remedial actions at the Anaconda Site. ALDC, a landowner and local economic development entity, joined the discussions in June 2018 in an advisory role to ADLC. Confidential negotiations are on-going and will continue after the filing of this Joint Motion. In parallel with the Parties' Anaconda Site negotiations, the United States, the State and Atlantic Richfield must complete their

separate negotiation of two collateral agreements to amend prior consent decrees approved and entered by the Court in this matter.

8. The Parties have made substantial progress in their efforts to agree upon a settlement framework for remedial actions at the Anaconda Site. Under the proposed framework, the United States, the State and Atlantic Richfield would complete the negotiation of a consent decree in which Atlantic Richfield would implement Site-wide remedies, including proposed modifications to EPA's selected remedies for the CSOU and ARWW&S OU. The Parties do not anticipate that either ADLC or ALDC will be a party to the consent decree. However, under the proposed settlement framework and with EPA approval, ADLC may perform some elements of the modified CSOU remedy work, such as institutional controls, with funding provided by Atlantic Richfield. ADLC's role in remedy implementation would be described in the consent decree, and ADLC's commitments regarding the Anaconda Site remedies would be governed by the terms of two additional agreements, one between Atlantic Richfield and ADLC, and another agreement among ADLC, the United States and the State. These ADLC agreements are further described in Paragraph 11 below.

9. EPA, in consultation with the State, plans to propose certain changes to the remedies for the ARWW&S OU and CSOU using EPA's administrative decision-making process. Under CERCLA, federal regulations establish an administrative process for amending a selected remedy and Record of Decision which requires, among other things: an explanation of the proposed remedy modifications to the public; publication of a proposed modified remedy plan and supporting documents for public review and comment; and EPA and State consideration of the public comments that are submitted, and preparation of written responses to such comments, if required. Because EPA and the State wish to be responsive to public concerns and interest in any settlement, they would also provide the public with summaries of the proposed cleanup plans and supporting information, and engage in a dialogue with the community about the proposed plans.

10. To support EPA's proposed amendments to the remedies for the Site, the United States and Atlantic Richfield anticipate that certain information prepared and exchanged in the course of confidential settlement communications would, with the Court's approval, be shared with the public. This information would consist of summaries of proposed cleanup plans for the Site, proposed amendments to existing cleanup work plans for

the Site, related figures and supporting technical assessments, and other relevant information that EPA, DEQ and Atlantic Richfield agree to disclose in writing. While that remedy modification process is underway, the United States, the State and Atlantic Richfield (with input from ADLC) would continue their confidential settlement negotiations in order to reach agreement on additional terms that are needed to complete a proposed consent decree to fund and implement the Anaconda Site remedies.

11. While the consent decree negotiation process is underway, Atlantic Richfield and ADLC would also negotiate a funding agreement that addresses property matters and supports ADLC's role in performing some elements of the modified CSOU remedy work such as institutional controls. The United States, the State and ADLC would also negotiate an amendment to the Agreement and Covenant Not to Sue entered in 1994 (EPA Docket No. CERCLA 94-12) concerning ADLC's ownership of properties conveyed to ADLC in 1994, including the Old Works Golf Course, and ADLC's role in supporting institutional controls at the Anaconda Site. Each agreement would be presented to the ADLC Commission for review and potential approval. As part of that process, under Article II, Division 2 of the Anaconda-Deer Lodge County Code, the proposed agreements must be made available to the public for review and comment, before the ADLC

Commission considers whether to approve them. To support the Commission's consideration of the proposed agreements, the United States, Atlantic Richfield and Third Party-Participants anticipate that certain information prepared and exchanged in the course of confidential settlement communications would, with the Court's approval, be shared with the public. In addition to the agreements themselves that are being negotiated under the confidentiality protections of the Court's Order, this information would consist of summaries of the proposed agreements which describe funding that will be provided to ADLC, ADLC's commitments to perform certain activities and use the funds for designated purposes, and other relevant information that the Parties agree to disclose in writing.

12. For the reasons set forth herein, the United States and Atlantic Richfield seek Court approval to participate with the State and ADLC in a three-step process that will provide the public with certain information about the proposed remedy modifications and related agreements, including information prepared for settlement purposes and exchanged by the participants in settlement negotiations. While much of the technical information to be presented in the steps described below is part of the CERCLA public process, it would be augmented with the settlement materials described below.

(a) Step 1. In step 1, summaries of proposed updates to cleanup plans, including narrative descriptions of the work, drawings and figures, and other information related to proposed changes to the CSOU and ARWW&S OU remedies would be provided to the public. Information regarding the technical practicability of meeting certain in-stream surface water performance standards for cleanup would be included, along with protocol updates for residential yard cleanups and residential attics. The proposed schedule for public input and comment on EPA's proposed modifications to the 1996 CSOU ROD (as amended) and the 1998 ARWW&S ROD (as amended) would be provided and explained. The United States, through EPA, would take the lead in providing the public with information related to the remedy modifications by the winter of 2019, with the cooperation, support and participation of Atlantic Richfield and the Third Party-Participants. Also in 2019, EPA, in consultation with the DEQ, would release one or more proposed plans that describe the proposed changes to the remedies and related amendments to the 1996 CSOU ROD (as amended) and the 1998 ARWW&S ROD (as amended). The proposed plan (or plans) will describe the proposed cleanup actions and seek public comment on the proposed changes to each remedy as appropriate to support EPA's administrative decision-making process. Pursuant to CERCLA and

the National Contingency Plan, 40 C.F.R. Part 300, the United States will consider and respond to significant public comments received on any proposed plans.

(b) Step 2. The proposed funding agreement between ADLC and Atlantic Richfield, and the amended Agreement and Covenant Not to Sue among ADLC, the United States and the State, would be disclosed in Step 2, after the parties have completed their respective negotiations, and drafted proposed agreements that are ready to present to the public for comment, and to the ADLC Commission for review and potential approval. However, the United States and Atlantic Richfield may mutually agree to release discrete information concerning these agreements to the public prior to completion of the respective negotiations, if the Parties agree in writing and collectively determine that the need to know such information at an earlier date is critical to the acceptance of the agreements by the ADLC Commission and the general public.

(c) Step 3. EPA will complete its administrative decision-making process for modification of the selected remedies for the ARWW&S OU and the CSOU in coordination with efforts to negotiate a proposed consent decree to fund and implement the final Site remedies. The proposed consent decree would include the final Statement of Work for all remaining remedial

design and remedial actions, and other attachments that are negotiated to support implementation of the Site remedies. Once the parties have reached agreement on a proposed consent decree, it will be lodged with the Court, and the U.S. Department of Justice, along with the State of Montana, will then seek public comment on the lodged Consent Decree. After public comments on the proposed consent decree have been considered, the United States, joined by the DEQ, will present the Court with a motion to either modify the consent decree, withdraw the consent decree, or approve and enter a final consent decree that is accepted by the United States, the State and Atlantic Richfield.

13. The parties seek to complete the steps needed to lodge the proposed Anaconda Site-wide consent decree with the Court by December 31, 2019. The Parties will seek to obtain ADLC Commission approval for the two ADLC agreements by August 31, 2019, and EPA will seek to substantially complete the remedy modification process by December 31, 2019.

14. The Parties' ability to lodge a proposed consent decree with the Court in 2019 depends on their ability to reach agreement on two ADLC agreements described above, the consent decree terms required to fund and implement the modified Anaconda Site remedies, and completion of EPA's

process to select modified remedies for the Site. If the Parties reach an impasse at any point during the course of the three-step process described in Paragraph 12, or conclude that a consent decree will not be lodged with the Court by December 31, 2019, the United States and Atlantic Richfield will provide the Court with a further report on the status of the settlement negotiations.

15. The United States and Atlantic Richfield filed a similar motion to allow disclosure of certain confidential settlement communications related to consent decree negotiations for the Butte Priority Soils Operable Unit (BPSOU) site (Dkt. No. 1166; May 17, 2018). This Court granted that motion on May 22, 2018 (Dkt. No. 1167). The relief requested by the United States in the present Motion is similar to the relief ordered by the Court for the BPSOU Site and is requested to support settlement negotiations for the Anaconda Site.

Motion

For the reasons explained above, the United States and Atlantic Richfield hereby move the Court for an order granting leave to the United States and Atlantic Richfield, in cooperation with the Third Party-Participants, to share the above-described information with the public, including certain information and supporting documents prepared under the

Amended Confidentiality Order (Dkt. No. 1052, Dec. 29, 2003), consisting of summaries of potential cleanup plans, proposed amendments to existing cleanup work plans, related figures, and supporting technical assessments. In addition, summaries of proposed agreements regarding ADLC's support and participation in remedy implementation, proposed agreements that provide funding for ADLC and describe ADLC's commitments related to remedy implementation for public review and ADLC Commission approval, and other relevant information critical to the acceptance of the agreements by the ADLC Commission and the general public may be shared with the ADLC Commission and the public as the Parties collectively agree to disclose in writing.

During the time when such information is provided to the public, the United States, Atlantic Richfield and the Third Party-Participants will continue their confidential negotiations under the protections of the Amended Confidentiality Order (Dkt. No. 1052, Dec. 29, 2003) to reach agreement upon all of the terms that are needed to complete the two ADLC agreements and proposed Anaconda Site consent decree for presentation to the public and the Court.

If the Parties reach an impasse at any point during the course of the three-step process described in Paragraph 12, or conclude that a proposed

consent decree will not be lodged with the Court by December 31, 2019, the United States and Atlantic Richfield will provide the Court with a further report on the status of the negotiations.

Respectfully submitted this 4th day of December, 2018.

/s/ Kyle A. Gray
Holland & Hart LLP

/s/ John W. Sither
United States Department of Justice