


1152479 - R8 SDMS

NO: CERCLA VIII-90-27

AGENT: CALIFORNIA GULCH SUPERFUND SITE,
ASARCO INCORPORATED, RESURRECTION
MINING COMPANY

ATTORNEY:

LAW JUDGE:

or
INSPECTION OFFICER:

Date of Document	Description of Document	Date Filed
ADMINISTRATIVE ORDER ON CONSENT		09/28/90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION VIII

SEP 14 PM 3:02
 FILED
 EPA REGION VIII
 HEARINGS CLERK

IN THE MATTER OF:)
)
 CALIFORNIA GULCH SUPERFUND SITE,)
 ASARCO INCORPORATED, RESURRECTION)
 MINING COMPANY, RES-ASARCO JOINT)
 VENTURE,)
 RESPONDENTS.)
)
 PROCEEDING UNDER SECTION 106(A),)
 OF THE COMPREHENSIVE ENVIRONMENTAL)
 RESPONSE, COMPENSATION, AND)
 LIABILITY ACT, AS AMENDED (42 U.S.C.)
 § 9606(A)).)

EPA Docket No. 90-27
Filed 9/28/90

ADMINISTRATIVE ORDER ON CONSENT

<u>TABLE OF CONTENTS</u>		<u>PAGE</u>
I.	Introduction	3
II.	Jurisdiction	3
III.	Parties Bound	3
IV.	Definitions	4
V.	Statement of Purpose	5
VI.	Findings of Fact	5
VII.	Conclusions of Law and Determinations	6
VIII.	Notice to State	7
IX.	Work to be Performed	7
X.	Modification of the Work Plan	7
XI.	Quality Assurance	8
XII.	Progress Reports and Meetings	9
XIII.	Access, Sampling, and Availability of Information	9
XIV.	Designated Project Coordinators	11

XV.	Other Applicable Laws	13
XVI.	Record Preservation	13
XVII.	Dispute Resolution	13
XVIII.	Stipulated Penalties	14
XIX.	Force Majeure	15
XX.	Reimbursement of Response Costs	17
XXI.	Reservations of Rights	18
XXII.	Disclaimers	18
XXIII.	Other Claims.	19
XXIV.	Indemnification	19
XXV.	Effective Date and Subsequent Modification	20
XXVI.	Termination and Satisfaction	20
XXVII.	Signatories	20

Attachments

Exhibit A - Work Plan

Exhibit B - Schedule

I. INTRODUCTION

1. This Administrative Order on Consent (Order) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and Respondents. This Order concerns the performance of certain activities by Respondents and reimbursement of response costs incurred by the United States in connection with that Work at the California Gulch Superfund Site near Leadville, Colorado.

II. JURISDICTION

2. This Order is issued under the authority vested in the President of the United States by § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(a) (1982), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (CERCLA). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12,580, 52 Fed. Reg. 2,923 (1987), and further delegated to Regional Administrators on September 13, 1987, by EPA Delegation No. 14-14-C. This authority has been further delegated to the Director of the Hazardous Waste Management Division.

3. Respondents agree to undertake all actions required by this Order. In any action by the United States to enforce terms of this Order, Respondents consent to and agree not to contest the authority or jurisdiction of EPA to issue or enforce this Order, and agree not to contest the validity of this Order or its terms.

III. PARTIES BOUND

4. This Order shall apply to and be binding upon EPA and shall be binding upon Respondents and their agents, successors, and assigns. Respondents are jointly and severally responsible for carrying out all actions required of them by this Order. No change in the ownership or corporate or other legal status of Respondents or of the facility or site shall alter Respondents' responsibilities under this Order.

5. Respondents shall provide a copy of this Order to any subsequent owners or successors so long as this Order remains in effect. Respondents shall provide a copy of this Order to all contractors, subcontractors, laboratories, and consultants retained to conduct any work under this Order. Respondents shall condition any such contracts upon satisfactory compliance with this Order. Notwithstanding the terms of any contract, Respondents are responsible for compliance with this Order and for requiring that their employees, contractors, consultants, subcontractors, and agents, comply with this Order.

IV. DEFINITIONS

6. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or such regulations. For purposes of this Order, the following terms shall have the meanings set forth below:

"Contractor" means any person, including the contractors, subcontractors, or agents, retained or hired by Respondents to undertake any work under this Order.

"Day" means calendar day, unless otherwise specified. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business on the next working day.

"Deliverable" means any written product, including, but not limited to, technical reports, data reports, technical memoranda, progress reports, or other documents describing the work performed or to be performed, that Respondents are required to submit under the terms of this Order.

"NCP" means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated under § 105 of CERCLA, 42 U.S.C. 9605, and codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto.

"Order" means this Order, the exhibits attached to this Order, and all documents incorporated into this Order according to the procedures set forth herein. If there is a conflict between this Order and any documents incorporated into this Order, the terms of the Order shall control.

"Site" means the California Gulch Superfund Site as described in the Complaint, as amended, and the consolidated proceedings therein, Civil Action No. 83-C-2388 (consolidated with 86-C-1675).

"State" means the State of Colorado, by and through the Colorado Department of Health.

"United States" for purposes of this Order means the United States of America and/or the Environmental Protection Agency (EPA).

"Work" means all tasks Respondents are required to perform under this Order.

"Work Plan" means the detailed Work Plan attached hereto as Exhibit A.

V. STATEMENT OF PURPOSE

7. The objectives of EPA and Respondents are for Respondents (a) to perform, with EPA oversight, certain activities listed in this Order consistent with CERCLA and the NCP to protect public health and welfare and the environment, and (b) to reimburse the United States for response costs incurred by the United States in accordance with this Order.

8. The activities to be conducted under this Order are those set forth in the Work Plan, which has been approved by EPA. It is the objective of the parties hereto to undertake the Work Plan in an expeditious and cost effective manner within a limited time frame, recognizing the discrete and focused nature of the activities included in the Work. Given the nature of the Work and EPA's approval of the attached Work Plan for the same, additional activities or materials, beyond those described in the Work Plan, are not required to perform or support the Work.

VI. FINDINGS OF FACT

9. The Site is listed on the National Priorities List and is located near Leadville, Colorado.

10. All or some of the four areas identified in the Work Plan contain various heavy metals which may include cadmium, copper, lead, and zinc. Migration of these metals, which can occur by various means, including surface transport and leaching, may contribute to surface or groundwater contamination at the Site. These heavy metals have potentially toxic effects on human health or aquatic life.

11. The "Garibaldi workings" refers to the Garibaldi Tunnel portal which is an historic mining tunnel located near the head of California Gulch. The Garibaldi Tunnel extends 2,400 feet northeast to the workings of the Sunday II Mine on the west slope of Ball Mountain, and was built to drain such workings. The portal has now collapsed, but seepage from the tunnel continues to drain into California Gulch.

12. The "north Mike workings" are located in the Adelaide group of mines north of California Gulch, between the Adelaide and Mike faults. The workings consist of piles of waste rock covering approximately six acres.

13. The "Oregon Gulch tailing pond" is located in the headwater area of Oregon Gulch. It is one of four major tailing ponds in the California Gulch Superfund area.

14. The "Starr Ditch" takes flow from runoff from Stray Horse Gulch through the town of Leadville and discourages same into California Gulch. The ditch drains approximately 100 acres of Stray Horse Gulch waste piles. The Starr Ditch is in close proximity to Leadville residential areas.

15. ASARCO Incorporated is a New Jersey corporation with its corporate headquarters in the State of New York. Resurrection Mining Company is a Delaware corporation with its corporation headquarters in the State of Colorado. The Res-ASARCO Joint Venture is a joint venture of ASARCO and Resurrection. Respondents own or operate or have owned or operated property within the Site.

16. The Respondents enter into this Administrative Order on Consent to perform the Work identified in the Work Plan to abate the release or threat of release of hazardous substances relative to the four areas at the Site identified above, in order to protect the public health or welfare or the environment.

VII. CONCLUSIONS OF LAW AND DETERMINATIONS

17. Based on the preceding Findings of Fact and the administrative record for the California Gulch Superfund Site, EPA has made the following conclusions of law and determinations:

a. The areas described in the Work Plan meet the definition of "facility" in CERCLA, 42 U.S.C. § 9601(9);

b. Cadmium, cooper, lead, and zinc are "hazardous substances" as defined in § 101(14) of CERCLA, 42 U.S.C. § 9601(14), or constitute "any pollutant or contaminant" that may present an imminent and substantial danger to public health or welfare under § 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1);

c. The presence of hazardous substances at the site or the past, present, or threat of potential future release of hazardous substances described in Article VI of this Order constitutes an actual and/or threatened "release" as defined in § 101(22) of CERCLA, 42 U.S.C. § 9601(22);

d. Respondents are "persons" as defined in § 101(21) of CERCLA, 42 U.S.C. § 9601(21);

e. Respondents have been identified by EPA as Potential Responsible Parties at the Site under sections 104, 107 and 122 of CERCLA, 42 U.S.C. § § 9604 and 9622;

f. The actual or threatened release of hazardous substances may present an imminent and substantial endangerment to public health or welfare or the environment.

g. The actions required by this Order are protective of the public health or welfare or the environment, are in the public interest, are consistent with CERCLA and the NCP, and will minimize litigation.

VIII. NOTICE TO STATE

18. By providing a copy of this Order to the state of Colorado, EPA has notified the State that this Order is being issued and that EPA is the lead agency for coordinating, overseeing, and enforcing the response action required by the Order.

19. Any document, notice, material, or deliverable which Respondents are required under this Order to submit to EPA, shall also be submitted by Respondents to the State. However, this requirement, as it pertains to the State, is not subject to stipulated penalties as contained in Article XVIII herein.

20. The State and its authorized representatives shall be provided the same rights of access to areas listed in the Work Plan as is provided for the EPA in paragraph 29.

IX. WORK TO BE PERFORMED

21. Respondents shall perform the Work set forth in Exhibit A. Respondents shall conduct activities and submit monthly reports as provided by this Order and approved by EPA. All of the Work is to be conducted in accordance with the schedule set forth in Exhibit B of this Order.

22. All of the Work performed under this Order shall be under the direction and supervision of qualified personnel. Respondents shall notify EPA in writing of the names, titles, and qualifications of the personnel, including contractors, subcontractors, consultants, and laboratories, to be used in carrying out the Work. The qualifications of the persons to properly perform the Work for Respondents shall be subject to EPA's review for verification that such persons meet minimum reasonable technical background and experience requirements. If EPA disapproves in writing of any person(s)' technical qualifications, Respondents shall notify EPA of the identity and qualifications of the replacement(s) within seven days of the written notice. During the course of the Work, Respondents shall notify EPA as much in advance as practicable of any changes or additions in the personnel used to carry out the Work, providing their names, titles, and qualifications. EPA shall have the same right to approve changes and additions to personnel as it has hereunder regarding the initial notification.

X. MODIFICATION OF THE WORK PLAN

23. If at any time before termination of this Order, Respondents identify a need for additional activities under the Work Plan, Respondents shall submit a memorandum documenting the need for additional activities to the EPA Project Coordinator. Within seven days of receipt of such memorandum, EPA shall notify

Respondents whether it has approved or disapproved such additional activities. Upon agreement of the parties, such additional activities shall become part of the Work Plan.

24. In the event of unanticipated or changed circumstances at the Site, Respondents shall notify the EPA Project Coordinator by telephone within 24 hours of discovery of the unanticipated or changed circumstances. If the unanticipated or changed circumstances pose an immediate threat to human health or welfare or the environment, Respondents shall notify EPA and the State immediately.

25. If as a result of unanticipated or changed circumstances at the Site, EPA determines that additional activities are necessary to accomplish the Site improvements identified in the Work Plan. In such event, EPA shall request in writing that Respondents agree to perform such additional activities. Respondents will have seven days from receipt of the EPA request to meet with EPA and to confirm their willingness to perform the additional activities or invoke dispute resolution. In the event the parties agree that the additional activities are to be performed by Respondents, such activities shall be completed in accordance to the standards, specifications, and schedule set forth by the parties in written modification to the Work Plan.

XI. QUALITY ASSURANCE

25. Respondents shall assure that work performed, samples taken, and analyses conducted conform to the requirements of this Order. Respondents will assure that their field personnel are properly trained in the use of field equipment and chain-of-custody procedures.

26. To provide quality assurance and maintain quality control, Respondents shall:

a. Use a laboratory which has a documented quality assurance program that complies with EPA guidance;

b. Ensure that such laboratory performs analyses according to EPA-approved methods or methods deemed satisfactory by EPA (if a non-approved method is proposed, Respondents shall submit all protocols to be used for analyses to EPA at least seven days before beginning analyses);

c. Ensure that EPA personnel or authorized representatives are allowed access to such laboratory and personnel; and

d. Upon EPA request, have such laboratory analyze samples submitted by EPA for quality-assurance monitoring.

XII. PROGRESS REPORTS AND MEETINGS

27. During the course of the Work performed under this Order, Respondents shall submit the following reports to EPA:

a. In the event EPA determines that a weekly progress report would be necessary or appropriate, EPA may request a meeting in any work week in the schedule set forth in Exhibit B by supplying notice of such requested meeting to Respondents at least three working days prior to the requested date for such meeting. In the absence of such request, weekly meetings shall not be required under this Order.

b. Monthly Progress Reports. The Respondents shall also prepare monthly progress reports containing the following information:

- (1) Actions taken to comply with this Order, including plans and actions completed during the preceding month;
- (2) Activities during the preceding month that deviated from or were carried out in addition to those provided for in the Work Plan;
- (3) All problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays;
- (4) Work planned for the next month with schedules relating such work to the overall project; and
- (5) All results of sampling and tests and all other data collected or received by Respondents.

Respondents shall submit these reports to EPA on or before the 10th day of each month during which this Order is in effect.

c. Final Report. Respondents shall submit a detailed report documenting the Work performed under this Order within 60 days of completion of the activities required by the Work Plan.

XIII. ACCESS, SAMPLING, AND AVAILABILITY OF INFORMATION

28. EPA and its authorized representatives may enter and freely move about all property at the site and off-site areas, if any, where the Work is being performed for the purposes of inspecting conditions, activities, the results of activities, non-privileged records, operating logs, and contracts related to

the Site or Respondents and its contractor(s) pursuant to this Order; reviewing the progress of Respondents in carrying out the terms of this Order; conducting tests as EPA or its authorized representatives deem necessary; using a camera, sound recording device, or other documentary type equipment; and verifying the data submitted to EPA by Respondents. Respondents shall allow these persons to inspect and copy all non-privileged records, files, photographs, documents, sampling and monitoring data, and other writings related to the Work undertaken in carrying out this Order. Nothing herein shall be interpreted as limiting or affecting EPA's right of entry or inspection authority under federal law.

29. If the area needed for performance of the Work is owned in whole or in part by parties other than those bound by this Order, Respondents will obtain, or use their best efforts to obtain, written site access agreements, if necessary, from the owner seven days prior to the time such access is needed. Such agreements shall provide access for EPA and its contractors and oversight officials and the Respondents or their authorized representatives. Such agreements shall specify that Respondents are not EPA's representative with respect to liability associated with Site activities. Copies of such agreements shall be provided to EPA prior to Respondents' initiation of field activities. Respondents' best efforts shall include providing reasonable compensation to any such property owner.

30. If necessary access agreements are not obtained within the time referenced above, Respondents shall promptly notify EPA of their failure to obtain access. EPA may obtain access for the Respondents or terminate the Order in the event that Respondents cannot obtain access agreements. Respondents shall reimburse EPA for all costs and attorney fees incurred by the United States to obtain access for the Respondents in accordance with Article XX of this Order.

31. All results of sampling, tests, modeling, or other data generated by Respondents, or on Respondents' behalf, pursuant to implementation of this Order, shall be submitted to EPA in the monthly progress report as described in Article XII of this Order. EPA will make available to the Respondents validated data generated by EPA unless it is exempt from disclosure by any federal or state law or regulation.

32. In entering into this Order, Respondents waive any evidentiary objections to any data gathered or generated by the Respondents in the performance of the Work under the Work Plan that has been verified according to EPA-approved quality assurance/ quality control procedures.

33. Respondents will notify EPA in writing at least seven days prior to commencement of construction activities at each of the

four areas described in the Work Plan. At EPA's verbal or written request, or at the request of EPA's oversight assistant, Respondents shall allow split or duplicate samples to be taken by EPA (and/or its authorized representatives) of any samples collected by the Respondents in implementing this Order.

34. Respondents shall provide to EPA upon request, copies of all non-privileged documents and information within their possession or control or that of their contractors or agents relating to the implementation of this Order including, but not limited to, sampling, analysis, chain-of-custody records, manifests, trucking logs, receipts, sample traffic routing, non-privileged correspondence, reports, or other documents or information related to the Work.

35. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Order to the extent permitted by § 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Such claims shall be asserted in the manner described by 40 C.F.R. § 2.203(b) and substantiated at the time the claim is made. 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, or if EPA has notified Respondent that the documents or information are not confidential under the standards of § 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), the public may be given access to such documents or information without further notice to Respondents.

36. 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 and materials or information submitted pursuant to this Order.

37. Respondents shall cooperate in EPA's community relations activities as appropriate and necessary for the Site.

38. The contents of the Administrative Record concerning this Order shall be compiled in accordance with applicable law.

XIV. DESIGNATED PROJECT COORDINATORS

39. Documents including reports, approvals, disapprovals, and other correspondence which must be submitted under this Order, shall be hand-delivered, or sent overnight courier, or sent by certified mail, return receipt requested, to the following addressees or to any other addressees which EPA or Respondents designate in writing:

a. Documents to be submitted to EPA shall be sent in triplicate to:

Ken Wangerud (8HWM-SR)
Remedial Project Manager
EPA Region VIII
999 18th Street, Suite 500
Denver, CO 80202-2405

b. Documents to be submitted to Respondents shall be sent to:

Michael G. Lee
Project Manager
Res-ASARCO Joint Venture
P. O. Box 936
Leadville, CO 80461

Marcel DeGuire
President
Resurrection Mining Company
One United Bank Center
1700 Lincoln Street
Denver, CO 80202

c. Documents to be submitted to the State:

Ron Abel
State Project Officer
Colorado Department of Health
Hazardous Materials Waste Management Division
4210 East 11th Avenue
Denver, CO 80220
(Delivery by first-class mail only, three copies;
time critical documents will continue to be delivered
by courier

40. On or before the effective date of this Order, EPA and, collectively, Respondents shall each designate their own Project Coordinator. Each Project Coordinator shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between EPA and Respondents shall be directed to the Project Coordinator by mail, with copies to such other persons as EPA may designate. Communications include, but are not limited to, all documents, reports, approvals, and other correspondence submitted under this Order.

41. EPA and Respondents each have the right to change their respective Project Coordinator. The other party must be notified in writing at least seven days prior to the change.

42. EPA's Project Coordinator shall have the authority vested in the On-Scene Coordinator (OSC) by the NCP, and may be present during the performance by Respondents of the activities described in the attached Work Plan. Notwithstanding the above, the parties herein agree that it is not their intent to use this provision to require work in addition to that required to accomplish the Work Plan, as defined by the terms of this Order. Nevertheless, this provision is not meant to limit the OSC's authority under the NCP, particularly with regards to emergency situations that may present themselves during the implementation of this Order. The responsibilities of the EPA Project Coordinator will consist of recording the status of the Work, verifying that the Work performed is consistent with the Work Plan, and working directly with the Res-ASARCO Project Coordinator in implementing the attached Work Plan.

43. EPA may arrange for assistance in its oversight and review of the Work. The oversight assistant may observe the Work and make inquiries in the absence of EPA Project Coordinator.

XV. OTHER APPLICABLE LAWS

44. All activities undertaken by Respondents shall be in compliance with all Federal, State and local laws and regulations, including permit requirements, unless an exemption is provided by § 121(e) of CERCLA, 42 U.S.C. § 9621. Respondents shall identify and obtain all permits, licenses, and approvals required for performance of the Work in sufficient time to perform the Work as scheduled.

XVI. RECORD PRESERVATION

45. All records and documents in Respondents' possession that relate in any way to the Site shall be preserved while this Order is in effect and for a minimum of six years after commencement of termination of this Decree. Respondents shall acquire and retain copies of all documents that relate to the Site and are in the possession of their employees, agents, accountants, contractors, or attorneys. After this six-year period, Respondents shall notify EPA at least 90 days before the documents are scheduled to be destroyed. If EPA requests that the documents be saved, Respondents shall give EPA the documents or copies of the documents.

XVII. DISPUTE RESOLUTION

46. Any disputes concerning activities or deliverables required under this Order, for which dispute resolution has been expressly provided, shall be resolved as follows: If Respondents object to any EPA notice of disapproval or requirement made pursuant to this Order, Respondents shall notify EPA's Project Coordinator in writing of their objections within seven days of

receipt of the disapproval notice or requirement. Respondents' written objections shall define the dispute, state the basis of Respondents' objections, and be sent certified mail, return receipt requested, to the EPA Project Coordinator. EPA and the Respondents then have an additional seven days to reach agreement. Respondents shall proceed in accordance with EPA's final decision regarding the matter in dispute, unless, within seven days after EPA's final decision is served upon Respondents, Respondents petition the Court-appointed Special Master, Mr. Richard L. Dana, or his designated alternate, to hear the dispute and issue a final determination of the issues in dispute. The parties shall abide by the final decision of the Special Master.

47. Respondents are not relieved of their obligations to perform and conduct activities and submit deliverables on the schedule set forth in the Work Plan, while a matter is pending in dispute resolution. The invocation of dispute resolution does not stay stipulated penalties under this Order.

XVIII. STIPULATED PENALTIES

48. For each day that Respondents fail to complete, by November 30, 1991, the actions required by this Order, or fail to timely submit monthly reports as required in both Article XII, paragraph 26b, and the schedule, Exhibit B; Respondents shall be liable for stipulated penalties, subject to the provision of Article XIX, Force Majeure.

49. Stipulated penalties for the delays specified in paragraph 47 above are:

a. Monthly Reports.

<u>Period of Failure to Complete</u>	<u>Penalty per Violation/Day</u>
1st through 5th day	\$ 1,000
6th through 10th day	\$ 2,000
11th day and beyond	\$ 3,000

b. Completion of Activities.

<u>Period of Failure to Complete</u>	<u>Penalty per Violation/Day</u>
1st through 14th day	\$2,500
15th through 30th day	\$5,000
31st day and beyond	\$10,000

50. In the event Respondents receive no notice of failure to complete or submit as set forth in above paragraph 48 within 10 days of the date of the alleged failure, then stipulated penalties shall not accrue prior to the date, if any, that EPA

shall supply written notice of the asserted failure to Respondents.

51. In the event of Respondents' obligations to pay stipulated penalties, Respondents shall make payment by cashier or certified check payable to "Hazardous Substance Superfund" to:

Mellon Bank
EPA Region VIII
Attn: Superfund Accounting
P. O. Box 360859M
Pittsburgh, PA 15251

52. Respondents may dispute EPA's assessed penalties by invoking the dispute resolution procedures under Article XVII herein.

53. Respondents shall pay interest on any unpaid balance, which shall begin to accrue at the end of the 30-day period, at the rate established by the Department of Treasury pursuant to 30 U.S.C. § 3717. Respondents shall further pay a handling charge of 1 percent, to be assessed at the end of each 31-day period, and a 6 percent per annum penalty charge, to be assessed if the penalty is not paid in full within 90 days after it is due.

54. The stipulated penalties provisions do not preclude EPA from pursuing any other remedies or sanctions which are available to EPA because of the Respondents' failure to comply with this Order. Payment of stipulated penalties does not alter Respondents' obligation to complete performance under this Order.

XIX. FORCE MAJEURE

55. "Force majeure," for purposes of this Order, is defined as any event arising from causes entirely beyond the control of Respondents and of any entity controlled by Respondents, including their contractors and subcontractors, that delays the timely performance of any obligation under this Order notwithstanding Respondents' best efforts to avoid the delay. The requirement that Respondents exercise "best efforts to avoid the delay" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure event, such that the delay is minimized to the greatest extent practicable. Examples of events that are not force majeure events include, but are not limited to, increased costs or expenses of any work to be performed under this Order, the financial difficulty of Respondents to perform such work, or failure of a contractor or subcontractor to perform Respondents' obligations under this Order. In the specific circumstances of

the date and schedule of the Work under this Order for the Leadville, Colorado area, force majeure may include adverse weather conditions which significantly prevent conduct of any of the Work as set forth in the Schedule and Work Plan.

56. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a force majeure event, Respondents shall notify by telephone the Project Coordinator, or in his or her absence, the Director of the Hazardous Waste Management Division, EPA, Region VIII, within 24 hours of when the Respondents knew that the event might cause a delay. Within 5 days after Respondents knew that the event might cause a delay, Respondents shall provide in writing (a) the reasons for the delay; (b) the anticipated duration of the delay; (c) all actions taken or to be taken to prevent or minimize the delay; (d) a schedule for implementation of any measures to be taken to mitigate the effect of the delay; and (e) a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health; welfare, or the environment. Respondents shall exercise best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of force majeure.

57. If EPA agrees that the delay or anticipated delay is attributable to force majeure, the time for performance of the obligations under this Order that are directly affected by the force majeure event shall be extended by agreement of the parties, pursuant to Article XXV of this Order, for a period of time not to exceed the actual duration of the delay caused by the force majeure event. An extension of the time for performance of the obligation directly affected by the force majeure event shall not, of itself, extend the time for performance of any subsequent obligation.

58. If EPA does not agree in good faith that the delay or anticipated delay has been or will be caused by a force majeure event, or does not agree with Respondents on the length of the extension, the issue shall be subject to the dispute resolution procedures set forth in Article XVII of this Order. In any such proceeding, to qualify for a force majeure defense, Respondents 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 was or will be warranted under the circumstances, that Respondents did exercise or are exercising due diligence by using their best efforts to avoid and mitigate the effects of the delay, and that Respondents complied with the requirements of this article.

59. Should Respondents carry the burden set forth in the previous paragraph, the delay at issue shall be deemed not to be a violation of the affected obligation of this Order.

XX. REIMBURSEMENT OF RESPONSE COSTS

60. Within 60 days from acceptance by EPA of Respondents' final report documenting the Work performed in satisfaction of the requirements of this Order, see Article XXVI, Respondents shall pay to the United States all uncontested response costs.

61. Respondents may contest payment of any cost which they believe to be not recoverable by the United States or the EPA under CERCLA and/or the NCP. The written request for such dispute resolution shall specifically identify the contested costs and provide a detailed explanation of the basis for the objection. Respondents in such event shall bear their burdens of proof or in going forward as governed by applicable law.

62. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall proceed pursuant to the dispute resolution process to resolve the matter. If Respondents do not prevail in all or part of the dispute, Respondent shall pay the response costs plus interest determined through the dispute resolution process. Respondents shall transmit such amounts to EPA within 60 days after the completion of dispute resolution.

63. For all payments under this article, Respondents shall remit a certified or cashier's check, made payable to the "Hazardous Substance Superfund," to the following address:

Mellon Bank
EPA Region VIII
Attn: Superfund Accounting
P. O. Box 360859M
Pittsburgh, PA 15251

or other such address as EPA may designate in writing. Payments must be designated as "Response Costs--California Gulch Site" and shall reference the payor's name and address, the EPA site identification number (Site No. 29), and the docket number of this Order. Copies of the transmittal letter and check shall be sent to the EPA Project Coordinator at the time of payment.

64. If payment is not received by EPA when payment is due, interest shall accrue from the date of the transmittal of the accounting by EPA for the costs specified. Interest shall accrue on the unpaid balance until such costs and accrued interest have been paid in full. The interest rate shall be the rate specified for interest on investments of the Hazardous Substances Superfund

in § 107(a) of CERCLA, 42 U.S.C. § 9607(a). Interest will be compounded annually. On October 1 of each subsequent fiscal year, any unpaid balance will begin accruing interest at a new rate to be determined by the Secretary of the Treasury.

65. The United States reserves its rights to bring an action against the Respondents to enforce the cost reimbursement provisions of this Order and to seek penalties pursuant to § 109 of CERCLA, 42 U.S.C. § 9609. EPA also reserves its rights to recover any past or future costs not reimbursed or accrued under this Order.

XXI. RESERVATIONS OF RIGHTS

66. Except as expressly provided in this Order, each party reserves all rights and defenses it may have. Nothing in this Order shall affect EPA's removal authority or EPA's response or enforcement authorities including, not limited to, the right to seek injunctive relief, stipulated penalties, statutory penalties, and/or punitive damages, nor shall preclude the United States from taking action to enforce this Order, nor from taking any action pursuant to CERCLA or any other available legal authority.

67. Nothing in this Order shall waive or otherwise affect any rights or defenses Respondents have under CERCLA to contest any liability, including but not limited to defenses under 42 U.S.C. § 9607(b), inclusive of all subparagraphs. Further, nothing in this Order waives or otherwise affects the rights of Respondents to seek contribution from any other person who is liable or potentially liable under CERCLA, 42 U.S.C. § 9607(a), as is also set forth in the Act at 42 U.S.C. § 9613(f) and (g), inclusive of all subparagraphs.

68. Upon termination of this Order, Respondents shall have resolved their liability to EPA for the Work performed by Respondents pursuant to this Order. Respondents are not released from liability, if any, for any response actions taken beyond the scope of this Order regarding other removals, other response actions, including but not limited to any remedial action, activities arising pursuant to § 121(c) of CERCLA, 42 U.S.C. § 9621(c), or payment of response costs as provided under this Order.

XXII. DISCLAIMERS

69. The execution and implementation of this Order by Respondents does not necessarily indicate agreement with EPA's Findings of Fact and Conclusions of Law. Furthermore, the participation of Respondents in this Order shall not be considered an admission of liability and is not admissible in evidence against Respondents in any judicial or administrative

proceeding other than a proceeding by the United States, including EPA, to enforce this Order or a judgment relating to it. Respondents retain their rights to assert claims against other potentially responsible parties concerning the Work performed pursuant to this Order.

70. Nothing in this Order is intended to release any claims, causes of action, or demands in law or equity of any party to the Order against any person not subject to this Order for any liability arising out of or in any way relating to the Site.

XXIII. OTHER CLAIMS

71. In entering into this Order, Respondents waive any right to seek reimbursement under § 106(b) of CERCLA, 42 U.S.C. § 9606(b) for the Work. Respondents also waive any right to present a claim under § 111 or § 112 of CERCLA, 42 U.S.C. § 9611 or § 9612 for the Work. This Order does not constitute any decision on preauthorization of funds under § 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2). Respondents further waive any statutory and common law claim against the United States including, but not limited to, contribution and counterclaims, relating to or arising out of performance of the Work.

72. Except as provided in this Order, nothing in this Order shall constitute or be construed as a release from any claim, cause of action, or demand in law or equity against any person, firm, partnership, subsidiary, or corporation for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, pollutants, or contaminants found at, taken to, or taken from the Site.

73. Respondents shall bear their own costs and attorneys fees.

XXIV. INDEMNIFICATION

74. The United States shall not be liable for any injury or damages to persons or property resulting from acts or omissions of the Respondents or their contractors in implementing the requirements of this Order.

75. Respondents agree to indemnify and hold the United States Government, its agencies, departments, agents, and employees harmless from any and all claims or causes of action arising from or on account of negligent acts or omissions of Respondents, their employees, agents, servants, receivers, successors, or assigns, or any persons including, but not limited to, firms, corporations, subsidiaries, and contractors, in carrying out activities under this Order. The United States Government or any agency or authorized representative thereof shall not be held as a party to any contract entered into by Respondents in carrying

out activities under this Order.

XXV. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

76. The effective date of this Order shall be the date it is signed by EPA.

77. This Order may be amended by mutual agreement of EPA and Respondents. Amendments shall be in writing and shall be effective when signed by EPA. EPA Project Coordinators do not have the authority to sign amendments to the Order.

78. No informal advice, guidance, suggestions, assurances, or comments by EPA or its authorized representatives shall modify the terms and conditions of this Order or relieve Respondents of their obligations under this Order, including their obligations to obtain formal approvals. Any deliverables, plans, technical memoranda, reports (other than progress reports), specifications, schedules, and Work required by this Order are, upon written approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved documents shall be considered a violation of this Order.

XXVI. TERMINATION AND SATISFACTION

79. Respondents shall submit the final report to EPA documenting the performance of the work required by the Work Plan and this Order as provided in Article XII. EPA shall notify Respondents of its decision accepting or rejecting such final report. EPA's acceptance of the final report shall terminate this Order. The provisions of this Article XXVI shall not be subject to Article XVII and XVIII herein. EPA's acceptance of the final report shall not, however, terminate Respondents' obligation to comply with Articles II, XVI, XX, XXIII, and XXIV of this order.

80. EPA's decision in approving or disapproving Respondents' final report due under this Order shall be issued promptly but in no event late than six months from the date of receipt of the report.

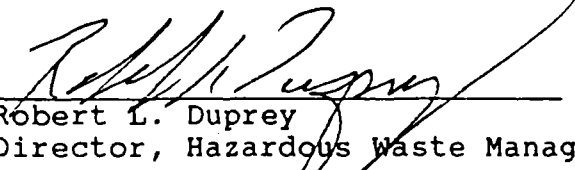
XXVII. SIGNATORIES

81. The undersigned representatives of Respondents certify that they are fully authorized to enter into the terms and conditions of this Order and to execute and legally bind such party to this document.

82. This Order may be executed in any counterparts, each of which when executed and delivered to EPA shall be deemed to be an original, but such counterparts shall together constitute one and the same document.

IT IS SO ORDERED AND AGREED:

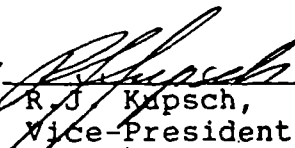
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

By 
Robert L. Duprey
Director, Hazardous Waste Management Division

RESURRECTION MINING COMPANY

By _____
Marcel DeGuire,
President

ASARCO INCORPORATED

By 
R. J. Kupsch,
Vice-President

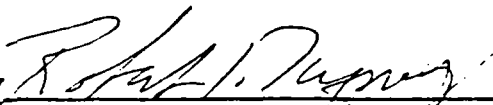
RES-ASARCO JOINT VENTURE

By 
R. J. Kupsch


82. This Order may be executed in any counterparts, each of which when executed and delivered to EPA shall be deemed to be an original, but such counterparts shall together constitute one and the same document.

IT IS SO ORDERED AND AGREED:

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

By 
Robert L. Duprey
Director, Hazardous Waste Management Division

RESURRECTION MINING COMPANY

By 
Marcel DeGuire,
President

ASARCO INCORPORATED

By _____
R.J. Kupsch,
Vice-President

RES-ASARCO JOINT VENTURE

By _____
R.J. Kupsch