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PREVIEW—Asarco LLC v. Atlantic Richfield Company: Allocation of Remediation Costs under CERCLA

Nyles Greer*

The Ninth Circuit Court of Appeals originally scheduled oral arguments in this matter for Tuesday, March 31, 2020, at 9:00 a.m. in the William K. Nakamura Courthouse in Seattle, Washington. Due to the COVID-19 pandemic, the Ninth Circuit has postponed oral arguments in this matter. While still subject to change due to the pandemic, the court has rescheduled oral arguments for April 27, 2020, at 9:00 a.m. in Courtroom 2 of the William K. Nakamura Courthouse in Seattle, Washington. Shannon Wells Stevenson will likely appear on behalf of the Appellant. Gregory Evans will likely appear on behalf of the Appellee.

I. INTRODUCTION

This case presents two issues on appeal. First, the court must determine if an amount paid under a Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)¹ consent decree constitutes an incurred and necessary response cost given that only a portion of the amount paid was used for remediation.² Second, the court must determine whether the district court erred in allocating twenty-five percent of the response costs to the Appellant.³

II. FACTUAL AND PROCEDURAL BACKGROUND

This case revolves around the clean-up costs of a former industrial site (“Site”) located in East Helena, Montana.⁴ Appellee, Asarco LLC (“Asarco”) and its predecessors, operated a lead smelter at the Site from approximately 1888 to 2001.⁵ During this time period, Asarco released a significant amount of arsenic into the surrounding environment through the process by which it smelted ore to recover lead and other products.⁶ Appellant, Atlantic Richfield Company (“Atlantic Richfield”), is the successor-in-interest to the Anaconda Copper Mining Company (“Anaconda”).⁷ Anaconda leased land from Asarco to operate a zinc fluming plant on the Site from 1927 until 1972, when Asarco purchased the plant from Anaconda.⁸ During this time frame, Anaconda also released arsenic

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1. 42 U.S.C. §§ 9601–9675 (2018).
2. Appellee’s Answering Br. at 3, June 12, 2019, No. 18-35934.
3. Appellant’s Opening Br. at 2, May 13, 2019, No. 18-35934.
4. Appellant’s Opening Br. at 3.
5. Appellant’s Opening Br. at 3.
6. Appellee’s Answering Br. at 9 (internal citations omitted).
7. Appellant’s Opening Br. at 6 (internal citations omitted).
8. Appellant’s Opening Br. at 6 (internal citations omitted).

into the environment as a result of its zinc fuming operations, although at a lower amount compared to Atlantic Richfield.⁹

The United States Environmental Protection Agency (“EPA”) added the Site to the National Priorities List in 1984.¹⁰ EPA then sent letters to Anaconda indicating it was a “Potentially Liable Party” for cleanup efforts under CERCLA and requested information such as how Anaconda disposed of waste at the Site.¹¹ Through nefarious means, Anaconda convinced the EPA that it had not contributed to contamination at the Site.¹² Accordingly, the EPA focused its efforts on Asarco’s lead smelter.¹³

In 1990, the EPA and Asarco entered into a CERCLA consent decree that required Asarco to take remedial measures relating to its processing ponds.¹⁴ Asarco completed the required work and subsequently entered into a Settlement Agreement and Consent Decree for claims the EPA brought against it under the Resource Conservation and Recovery Act (“RCRA”).¹⁵ This agreement obligated Asarco to investigate and clean up all hazardous waste relating to its historic operations.¹⁶ Asarco stopped operating its lead smelter in 2001, although this did not affect the agreement.¹⁷

Asarco subsequently filed for Chapter 11 bankruptcy in 2005.¹⁸ Following Asarco’s petition for bankruptcy, the Montana Department of Environmental Quality and the United States filed proofs of claim for joint and several liability under CERCLA.¹⁹ This was to ensure the acquisition of funds needed to finish environmental cleanup at the Site.²⁰ As a result of these proofs of claim, Asarco and the EPA entered into two CERCLA consent decrees, the second of which is at issue in this case.²¹ The second consent decree (“Consent Decree”), entered into in June 2009, focused on Asarco’s environmental liabilities for several sites within Montana.²² It required Asarco to pay a total of \$1.8 billion to settle all its environmental

9. Appellee’s Answering Br. at 9 (internal citations omitted).

10. Appellee’s Answering Br. at 9 (internal citations omitted).

11. Appellee’s Answering Br. at 9 (internal citations omitted).

12. Appellee’s Answering Br. at 10, 16 (“The district court further found Anaconda was “evasive” in answering the EPA’s requests for information, withheld pertinent documents and communications from the EPA, misrepresented its processes to the EPA, and submitted false and misleading statements to the EPA. Based on these findings, the district court concluded Anaconda’s conduct supported an additional one million dollar award under the sixth Gore factor”) (internal citations omitted).

13. Appellee’s Answering Br. at 11 (internal citations omitted).

14. Appellee’s Answering Br. at 11 (internal citations omitted).

15. Appellant’s Opening Br. at 13 (internal citations omitted); *see* 42 U.S.C. §§ 6901–6992k (2018).

16. Appellant’s Opening Br. at 14 (internal citations omitted).

17. Appellant’s Opening Br. at 14 (internal citations omitted).

18. Appellee’s Answering Br. at 12 (internal citations omitted).

19. Appellee’s Answering Br. at 12 (internal citations omitted).

20. Appellant’s Opening Br. at 14 (internal citations omitted).

21. The first consent decree, entered into in February 2009, required Asarco to pay \$13.2 million to fund soil clean-up on off-site lands in the proximity of the Site. Appellee’s Answering Br. at 12 (internal citations omitted).

22. Appellee’s Answering Br. at 12 (internal citations omitted).

claims in bankruptcy, with \$111.4 million specifically allocated to the Site.²³ The Consent Decree created a custodial trust, which the Montana Environmental Trust Group (“METG”) was appointed to administer, and transferred all of Asarco’s rights, title, and interest in the Site to the METG.²⁴ The Consent Decree ensured that Asarco will not receive any of its money back and, if the cleanup of the Site does not utilize the entire amount, that the remaining money will either be used at other sites within Montana or returned to the Superfund.²⁵

Following its monetary settlement, Asarco filed a contribution claim against Atlantic Richfield in 2012, alleging that Atlantic Richfield contributed to the hazardous waste at the Site.²⁶ The district court found that the applicable statute of limitations barred Asarco’s claim and granted summary judgment to Atlantic Richfield.²⁷ The United States Court of Appeals for the Ninth Circuit reversed the district court’s decision and remanded for trial on the merits.²⁸ Following an eight-day bench trial, the district court held that Atlantic Richfield was liable under CERCLA.²⁹ The district court determined that Atlantic Richfield’s allocable share was twenty five percent of the \$111.4 million Asarco paid under the Consent Decree.³⁰ Atlantic Richfield filed a post-trial motion to amend the district court’s judgment, arguing that Asarco had only established \$61.4 million in response costs.³¹ The district court rejected this argument, concluding that the \$111.4 million which Asarco paid under the Consent Decree qualified as “necessary costs of response incurred” under 42 U.S.C. §9607(a)(4)(B).³² Atlantic Richfield then appealed to the Ninth Circuit.³³

III. SUMMARY OF ARGUMENTS

Atlantic Richfield argues that the district court made an incorrect conclusion of law when calculating the total response cost incurred through the Site’s remediation.³⁴ Atlantic Richfield avers that CERCLA only allows parties to recover from the amount of money they have

23. Appellee’s Answering Br. at 12 (internal citations omitted).

24. Appellee’s Answering Br. at 12 (internal citations omitted).

25. Appellee’s Answering Br. at 12 (internal citations omitted).

26. Appellant’s Opening Br. at 20 (internal citations omitted); *see* 42 U.S.C. § 9613(f)(1) (2018) (“Any person may seek contribution for any other person who is liable or potentially liable under section 9607(a) of this title . . .”).

27. Appellee’s Answering Br. at 15 (internal citations omitted).

28. Appellee’s Answering Br. at 15; *see* *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108 (9th Cir. 2017).

29. Appellee’s Answering Br. at 15 (internal citations omitted); *see* *ASARCO LLC v. Atl. Richfield Co.*, 353 F. Supp. 3d. 916 (D. Mont. 2018).

30. Appellee’s Answering Br. at 15 (internal citations omitted); *see* *ASARCO LLC v. Atl. Richfield Co.*, 353 F. Supp. 3d. 916 (D. Mont. 2018).

31. Appellant’s Opening Br. at 33 (internal citations omitted).

32. Appellant’s Opening Br. at 33 (internal citations omitted).

33. Appellant’s Opening Br. at 33 (internal citations omitted).

34. Appellant’s Opening Br. at 35.

incurred as response costs for a particular site.³⁵ Thus, it argues that the district court erred in determining that the entire amount Asarco paid under the Consent Decree was incurred as response costs because only a portion of the money was actually spent at the Site and uncertainty exists as to how the remaining money will be used—if at all.³⁶ Additionally, Atlantic Richfield argues that the district court erred in allocating twenty-five percent of the response costs to Atlantic Richfield.³⁷ Atlantic Richfield asserts the district court used an allocation model that did not equitably devise the allocation amounts, given there was undisputed evidence Atlantic Richfield brought only a small percentage of the arsenic to the Site compared to Asarco.³⁸

Asarco argues that because it made an irrevocable payment towards the response cost at the Site, it has incurred that cost as it pertains to CERCLA.³⁹ Asarco contends that the evidence shows the entire amount it paid under the Consent Decree will be needed to fully remediate the Site and, therefore, the full amount is a necessary response cost.⁴⁰ Furthermore, Asarco contends that the district court properly allocated twenty-five percent of the response costs to Atlantic Richfield because district courts have discretion when allocating costs under CERCLA.⁴¹

A. *Atlantic Richfield's Arguments*

Atlantic Richfield argues that the district court erred in determining Asarco's necessary response costs for the Site were \$111.4 million.⁴² Atlantic Richfield states that, under CERCLA, Asarco may only recover the "necessary cost of response incurred."⁴³ The fact that Asarco paid \$111.4 million dollars under the Consent Decree is immaterial as the monetary amount that matters is the amount actually incurred as a necessary cost of response.⁴⁴ From Atlantic Richfield's point of view, its necessary cost of response is \$61.4 million.⁴⁵ This represents the amount established at trial that the METG will spend to remediate groundwater at the Site.⁴⁶

On the merits, Atlantic Richfield's argument regarding the necessary response costs is threefold. First, the company contends that the district court erred in awarding Asarco future costs by attributing the total \$111.4 million toward the necessary response costs.⁴⁷ This argument stems from the notion that \$61.4 million has been incurred as response costs and,

35. Appellant's Opening Br. at 35.

36. Appellant's Opening Br. at 35.

37. Appellant's Opening Br. at 36.

38. Appellant's Opening Br. at 36.

39. Appellee's Answering Br. at 18.

40. Appellee's Answering Br. at 18.

41. Appellee's Answering Br. at 19.

42. Appellant's Reply Br. at 3, May 13, 2019, No. 18-35934.

43. Appellant's Reply Br. at 3 (citing 42 U.S.C. § 9607(a)(4)(B) (2018)).

44. Appellant's Reply Br. at 4.

45. Appellant's Reply Br. at 4.

46. Appellant's Opening Br. at 37.

47. Appellant's Opening Br. at 37.

thus, any excess of that amount must be seen as a future response cost.⁴⁸ Atlantic Richfield states that the statute in question includes the word “incur” in the past tense, meaning that the costs must have already been incurred in order for them to be awarded.⁴⁹ Additionally, Ninth Circuit caselaw makes clear that “CERCLA prohibits awards of future response costs.”⁵⁰

Secondly, Atlantic Richfield contends that the district court erred by determining the entire amount paid in the Consent Decree was recoverable as a necessary response cost.⁵¹ In the context of money paid in a settlement agreement, a party is only entitled to seek the costs that were “necessary response costs incurred”⁵² Thus, just because Asarco paid \$111.4 million does not mean the entirety of that money was a necessary response cost and therefore recoverable.⁵³

Lastly, Atlantic Richfield argues that the district court erred in allocating the entire \$111.4 million as a necessary response cost because the entire amount will not be used to remediate the Site and is not necessary.⁵⁴ A response cost is considered “necessary” when “there is an actual threat to human health or the environment.”⁵⁵ Atlantic Richfield notes that the district court did not find a “necessary” response exceeding \$61.4 million.⁵⁶ Rather, the district court found that remediation at the Site would protect human health and the environment at completion without the need of additional money.⁵⁷ Furthermore, Atlantic Richfield states that Asarco’s argument that more will have to be done to ensure a safe environment is unfounded and surrounded by uncertainty, and thus the district court’s judgment cannot stand.⁵⁸

Atlantic Richfield next argues that the district court erred in allocating it twenty-five percent of the response costs for two distinct reasons.⁵⁹ First, Atlantic Richfield contends the district court abused its discretion by “disregarding the most relevant evidence and failing to explain its reasoning.”⁶⁰ Secondly, it argues that the allocation was erroneous

48. Appellant’s Opening Br. at 37.

49. Appellant’s Opening Br. at 38 (citing *AmeriPride Services, Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474, 490 (9th Cir. 2015)).

50. Appellant’s Opening Br. at 42 (quoting *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021 (9th Cir. 1993)).

51. Appellant’s Opening Br. at 44.

52. Appellant’s Reply Br. at 5 (quoting *AmeriPride Services, Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474, 490 (9th Cir. 2015)).

53. Appellant’s Reply Br. at 5.

54. Appellant’s Reply Br. at 13.

55. Appellant’s Reply Br. at 13 (quoting *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001)).

56. Appellant’s Reply Br. at 13.

57. Appellant’s Reply Br. at 13 (internal citations omitted).

58. Appellant’s Reply Br. at 17.

59. Appellant’s Reply Br. at 17.

60. Appellant’s Reply Br. at 20.

because it was “scientifically impossible for Anaconda to have contributed that amount.”⁶¹

According to Atlantic Richfield, the district court did not adequately explain how it determined its allocation because, while the district court noted the period of ownership and made references to the “Gore factors,” it did not explain how those factors connected to facts or how they influenced the final allocation.⁶² Additionally, Atlantic Richfield contends that a district court abuses its discretion when it “fails to consider a relevant factor that should have been given significant weight.”⁶³ Here, the district court failed to consider the toxicity of the different materials each party brought to the Site.⁶⁴ This, Atlantic Richfield argues, hindered it substantially given that Asarco brought significantly more toxic materials to the Site.⁶⁵ Finally, Atlantic Richfield claims the evidence demonstrated it was scientifically impossible for Atlantic Richfield to have contributed twenty-five percent of the hazardous waste at the Site.⁶⁶ Therefore, Atlantic Richfield requests the Ninth Circuit reverse the district court’s twenty-five percent allocation and remand with instructions on how to properly consider the evidence.⁶⁷

B. Asarco’s Arguments

Asarco rebuts the arguments made by Atlantic Richfield and contends the amount paid under the Consent Decree was a necessary response cost.⁶⁸ Asarco argues that it proved Atlantic Richfield was responsible for a portion of the response costs associated with the Site and, as a result, it is entitled to “the necessary cost of response incurred . . . contingent with the National Contingency Plan.”⁶⁹

First, Asarco contends that it has in fact “incurred” the necessary response costs associated with remediation.⁷⁰ While Asarco concedes that a party has not incurred response costs when there is no binding commitment on the party to pay for remediation in the future, Asarco notes that it has already paid for the response costs associated with the Site and has, therefore, incurred the cost.⁷¹ Furthermore, Asarco states the response

61. Appellant’s Reply Br. at 27.

62. Appellant’s Reply Br. at 20; *see* *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503 508 (7th Cir. 1992).

63. Appellant’s Reply Br. at 20 (citing *K.C.1986 Ltd. P’ship v. Reade Mfg.*, 472 F.3d 1009, 1017 (8th Cir. 2007)).

64. Appellant’s Reply Br. at 25.

65. Appellant’s Opening Br. at 62.

66. Appellant’s Opening Br. at 62.

67. Appellant’s Opening Br. at 64.

68. Appellee’s Answering Br. at 21 (internal citations omitted).

69. Appellee’s Answering Br. at 21 (citing 42 U.S.C. § 9607(a)(4)(b)).

70. Appellee’s Answering Br. at 24.

71. Appellee’s Answering Br. at 24 (citing *In re Dant & Russell, Inc.*, 951 F.2d 246, 248–49 (9th Cir. 1991)).

costs it paid in the Consent Decree constitute costs it has already fully paid, not costs it may have to pay in the future.⁷²

In the event that a portion of the \$111.4-million payment under the Consent Decree is considered a future response cost, Asarco contends it is still recoverable.⁷³ Asarco notes that other circuits have held “response costs for future work governed by the EPA or state oversight may be allocated in a CERCLA contribution claim.”⁷⁴ Moreover, Asarco claims that allowing a party to recover future response costs fits better with CERCLA’s purpose of having parties come forward and pay to remediate their environmental harms.⁷⁵

Additionally, Asarco argues the full \$111.4 million paid represents a necessary response cost.⁷⁶ Asarco cites the fact that EPA ordered the cleanup of the Site as strong evidence of a threat to the environment and human health.⁷⁷ Furthermore, EPA recognized the arsenic in the groundwater near the Site was a hazard to human health and the environment. Asarco also states the experts at trial indicated that “a 99 million dollar pump and treat system [is] necessary to remediate the off-site ground water plume at East Helena Site.”⁷⁸ Additional evidence indicates that the amount of arsenic in the water exceeds national standards and that additional restoration measures are needed.⁷⁹ Thus, it is likely Asarco’s entire payment will be needed to continue remediation work at the Site in order to achieve a safe environment.⁸⁰

As to the issue of allocation, Asarco argues the twenty-five percent apportionment to Atlantic Richfield is a correct use of the district court’s discretion.⁸¹ Under CERCLA, the district court has broad discretion in allocating response costs.⁸² Furthermore, Asarco states the district court can allocate costs “based on any equitable factors that it determines are appropriate.”⁸³ Asarco argues the district court followed these principles when it applied the Gore factors in determining the allocation amount.⁸⁴ Additionally, Asarco contends that the district court explained

72. Appellee’s Answering Br. at 27 (internal citations omitted).

73. Appellee’s Answering Br. at 28 (internal citations omitted).

74. Appellee’s Answering Br. at 29 (citing *Am. Cyanamid Co. Capuano*, 381 F.3d 6 (1st Cir. 2004); *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552 (6th Cir. 2007)); *see also PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 104 F. Supp. 3d 729, 743 (D.S.C. 2015).

75. Appellee’s Answering Br. at 32 (citing *Am. Cyanamid Co. Capuano*, 381 F.3d 6, 27 (1st Cir. 2004)).

76. Appellee’s Answering Br. at 36.

77. Appellee’s Answering Br. at 36 (citing *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 872 (9th Cir. 2001)).

78. Appellee’s Answering Br. at 36 (internal citations omitted).

79. Appellee’s Answering Br. at 7 (internal citations omitted).

80. Appellee’s Answering Br. at 42.

81. Appellee’s Answering Br. at 43.

82. Appellee’s Answering Br. at 19 (citing *TDY Holdings, LLC v. United States*, 885 F.3d 1142, 1149 (9th Cir. 2018)).

83. Appellee’s Answering Br. at 43 (citing 42 U.S.C. § 9613(f)(1) (2018)).

84. Appellee’s Answering Br. at 52.

its reasoning and use of the Gore factors⁸⁵ and, in doing so, the district court also reasonably chose an allocation method based on expert testimony.⁸⁶ Furthermore, Asarco contends the district court properly rejected Atlantic Richfield's impossibility argument. Asarco states the evidence demonstrated Anaconda contributed enough hazardous materials on its own to trigger CERCLA liability.⁸⁷ Thus, Asarco argues the district court did not commit any error and the circuit court should affirm the decision.⁸⁸

IV. ANALYSIS

The court will likely begin its analysis by interpreting the statute at issue. Here, the statute states that a person shall be liable for "any other costs of response incurred by any other person consistent with the national contingency plan."⁸⁹ The parties focus their attention on the word "incurred," which means "[t]o suffer or bring on oneself (a liability or expense)."⁹⁰ By the very definition of the term, the statute seems to favor Asarco's arguments. It has literally brought a liability or expense on itself by coming forward and addressing the environmental cleanup at the Site. It paid \$111.4 million under the Consent Decree, and for that reason it has surely incurred that expense.

Atlantic Richfield argues Asarco has not incurred the cost because the full amount has not been used at the Site, and thus the unused portion of the amount Asarco paid should be considered a future cost.⁹¹ The court will likely find this argument unconvincing. The caselaw Atlantic Richfield relies on, which indicates future costs cannot be awarded in a CERCLA contribution claim, is flawed to the extent that it shows only that a party that is not bound to pay future remediation costs cannot be awarded those future damages.⁹² This situation is factually different. Asarco paid the \$111.4 million in the Consent Decree knowing that money would be used to remediate the Site. And Asarco cannot recover any of the money it paid under the Consent Decree. Thus, the amount Asarco incurred at the moment it entered into the Consent Decree was a response cost incurred at that time. It bound Asarco to pay \$111.4 million dollars, and thus represents the amount Asarco incurred.

Furthermore, even if court views a portion of the \$111.4 million as a future cost, it will likely determine that Asarco can still recover from the entire amount paid under the Consent Decree. Although not binding,

85. Appellee's Answering Br. at 57.

86. Appellee's Answering Br. at 58.

87. Appellee's Answering Br. at 60 (internal citations omitted).

88. Appellee's Answering Br. at 60.

89. 42 U.S.C § 9607(a)(4)(B) (2018).

90. Appellant's Opening Br. at 38 (citing *Incur*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

91. Appellant's Opening Br. at 38 (citing *AmeriPride Services, Inc. v. Texas E. Overseas Inc.*, 782 F.3d 474, 490 (9th Cir. 2015)).

92. See Appellee's Answering Br. at 24 (citing *In re Dant & Russell, Inc.*, 951 F.2d 246, 248–49 (9th Cir. 1991)).

Asarco highlights compelling caselaw from other jurisdictions.⁹³ For example, *American Cyanamid Company v. Capuano* showed that a party may recover anticipated response costs in a CERCLA contribution claim.⁹⁴ Making a party wait to recover contribution claims until all the remediation has been completed would “favor a non-settling [Potential Responsible Party] over a [Potential Responsible Party], the antithesis of what CERCLA was enacted to achieve.”⁹⁵ Based on this reasoning, the court will likely also determine that forcing a party to wait until the cleanup is complete would frustrate the purposes of CERCLA. Thus, the court will probably hold that the portion of Asarco’s Consent Decree payment not yet used is recoverable.

Additionally, the court will likely find the cost was, and remains, necessary. Asarco’s arguments on this matter are compelling.⁹⁶ The arsenic levels in the groundwater near the Site have long exceeded safety limits and the EPA has taken remediation actions.⁹⁷ This shows that there is a danger to human health and the environment, qualifying the response costs as necessary.⁹⁸ Atlantic Richfield’s arguments on this point are less persuasive. Atlantic Richfield argues there are institutional controls that stop people from drinking the ground water and thus there is no harm to people.⁹⁹ If the court accepts this argument, a party could simply claim their hazardous waste is safe because there are laws that stop people from coming into contact with it. It does nothing to show that the amount of hazardous waste in the area is at a requisite amount to be considered safe. Nor does this argument explain how the still-contaminated ground water is safe for the environment. Furthermore, although curiously not argued by the parties, CERCLA itself mandates that “remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act.”¹⁰⁰ Asarco’s evidence that the arsenic levels at the Site exceed drinking water standards demonstrates threats to human health still exist and remedial work at the Site cannot possibly be finished.¹⁰¹ Accordingly, the court should view additional remediation work to fully restore the groundwater should be viewed as a necessary response cost. The district court found the full \$111.4 million will likely be needed to remediate the Site.¹⁰² Thus, the court should find that the full \$111.4 million was a necessary response cost.

93. See Appellee’s Answering Br. at 28.

94. 381 F.3d at 27.

95. Appellee’s Answering Br. at 31 (citing *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 27 (1st Cir. 2004)).

96. See generally Appellee’s Answering Br. at 36–42.

97. Appellee’s Answering Br. at 37 (internal citations omitted).

98. See *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 872 (9th Cir. 2001).

99. Appellant’s Opening Br. at 40.

100. 42 U.S.C § 9621(d)(2)(A)(ii) (2018).

101. Appellee’s Answering Br. at 37 (internal citations omitted).

102. Appellee’s Answering Br. at 42.

The court will also likely find the district court did not abuse its discretion by allocating twenty-five percent of the response costs to Atlantic Richfield. District courts retain wide discretion to allocate the percent of response costs in a CERCLA contribution action.¹⁰³ The fact that district courts can “allocate costs based on any equitable factors that it determines are appropriate” weighs in favor of Asarco’s arguments.¹⁰⁴ Atlantic Richfield’s arguments that the district court erred by not considering the most relevant factors and by not explaining the factors it did consider is without merit.¹⁰⁵ The evidence shows the district court considered the Gore factors and, in doing so, considered the amount of contamination attributed to each party.¹⁰⁶ The district court explained it weighed the last Gore factor—the degree of cooperation of the parties with different government entities—heavily in this case.¹⁰⁷ That weighing was within the district court’s discretion, and the fact that this factor weighed against Atlantic Richfield does not mean that the court erred in allocating costs. The evidence showed Atlantic Richfield had been, and still was, highly uncooperative with governmental officials.¹⁰⁸ Furthermore, the district court adequately articulated its reasoning in how it came to its conclusion and how the relevant factors led to its decision.¹⁰⁹

Additionally, the court will likely hold the district court did not err in rejecting Atlantic Richfield’s impossibility argument. Atlantic Richfield contends its evidence proved that it was impossible for the company to have contributed twenty-five percent of the response costs because it brought a much lower amount of arsenic to the Site as compared to Asarco.¹¹⁰ However, the district court heard testimony from both parties regarding allocation strategies.¹¹¹ The district court decided to employ Asarco’s expert’s allocation strategy as it included the respective periods of ownership, which the district court viewed as relevant.¹¹² Moreover, the district court believed Asarco’s expert to have a more complete understanding of historic use at the Site.¹¹³ The district court was also unconvinced by Atlantic Richfield’s expert analysis as to allocation because, under each of the expert’s strategies, Atlantic Richfield’s allocation was essentially zero.¹¹⁴ The district court noted that it understood Asarco was responsible for a majority of the contamination; however, there was also evidence that Atlantic Richfield’s contribution would have triggered

103. Appellee’s Answering Br. at 43 (quoting *TDY Holdings, LLC v. United States*, 885 F.3d 1142, 1149 (9th Cir. 2018)).

104. Appellee’s Answering Br. at 43 (citing 42 U.S.C. § 9613(f)(1)).

105. Appellant’s Opening Br. at 52 (internal citations omitted).

106. Appellant’s Opening Br. at 45 (internal citations omitted).

107. Appellee’s Answering Br. at 49–40 (internal citations omitted).

108. Appellee’s Answering Br. at 52 (internal citations omitted).

109. Appellee’s Answering Br. at 52.

110. Appellant’s Reply Br. at 27.

111. Appellee’s Answering Br. at 56. (internal citations omitted).

112. *ASARCO LLC*, 353 F. Supp. 3d at 42–43.

113. *Id.* at 944.

114. *Id.*

CERCLA liability standing alone.¹¹⁵ That finding is important because a party cannot claim zero responsibility for cleanup costs if their actions alone would have triggered a cleanup process. Thus, the district court chose the expert allocation strategy it deemed the most reasonable and that accounted for important factors in the allocation strategy. This does not constitute clear error as Atlantic Richfield argues, but rather represents a district court properly exercising its discretion.

V. CONCLUSION

This case will decide how the Ninth Circuit will view response costs in CERCLA actions moving forward. Allowing Asarco to recover from the full amount it paid to restore the Site would indicate that amounts paid under consent decrees are presently incurred and do not incur at the point when the restoration actually takes place. This could potentially incentivize parties to take responsibility for contamination as they would be able to recover from other liable parties prior to the completion of restoration activities. This case also has the potential to expand upon the meaning of necessary response cost under CERCLA. The court could delineate whether a response cost is only necessary at the period of time in which it accrues or, alternatively, if the total estimated amount of restoration equates a necessary response cost. Additionally, the decision will indicate the amount of deference a district court receives when determining the allocable share of response costs. Ultimately, this case will shed light on how the Ninth Circuit views CERCLA contribution claim recovery as it relates to CERCLA's overall purpose.

115. Appellee's Answering Br. at 59 (internal citations omitted).