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ASARCO LLC v. Atlantic Richfield Co., LLC

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**ASARCO LLC v. Atlantic Richfield Co., LLC, 975 F.3d 859
(9th Cir. 2020)**

Taylor A. Simpson

I. INTRODUCTION

In 2001, after over 100 years of operation, ASARCO, LLC (“Asarco”) shut down the East Helena lead smelting facility.¹ After such an extensive and continuous operation, arsenic-laden waste contaminated most of the East Helena site and had leached into the groundwater; however, Asarco was not the sole contributor.² The Anaconda Company (“Anaconda”) operated a zinc fuming plant that processed the arsenic-laden byproducts of the lead smelter for nearly 50 years at the East Helena site.³ Through this process, Anaconda also contributed to the East Helena site’s contamination.⁴

In 2005, Asarco filed for Chapter 11 bankruptcy. As part of this proceeding, Asarco reached a settlement agreement with the Environmental Protection Agency (“EPA”).⁵ Pursuant to the settlement agreement, Asarco paid \$111.4 million for cleanup and remediation of the East Helena site.⁶ Following this payment, in 2012, Asarco brought contribution claims under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) against Anaconda’s successor, Atlantic Richfield (“Atlantic”).⁷

Finally, in September 2020, the United States Court of Appeals for the Ninth Circuit ruled that Atlantic was responsible for contributing 25 percent of Asarco’s incurred response costs. The court vacated the district court’s finding that the full settlement amount of \$111.4 million was an incurred cost.⁸ The court remanded the case back to the district court to determine actual incurred response costs.⁹ The court held that the settlement amount Asarco paid was not eligible for contribution because half of it was not an “incurred” cost.¹⁰ The court stated incurred costs are either costs that have already been spent on remediation or non-speculative future remediation costs, such as the small amount of Asarco funds earmarked for specific purposes.¹¹ However, the court ruled that the district court erred when considering speculative, future costs of remediation that

1. ASARCO, LLC v. A. Richfield Co., LLC, 975 F.3d 859, 862 (9th Cir. 2020).

2. *Id.*

3. *Id.* at 862–63.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 867, 871.

9. *Id.* at 868.

10. *Id.* at 866–67.

11. *Id.* at 866.

would use the remaining unspent \$50 million.¹² In short, the unspent money was not an incurred cost because no concrete plan required using it.

This case is important for entities facing liability and potential contribution claims under CERCLA. It can be used as a framework for determining what costs an entity could potentially be liable for, and what costs it could recoup. The court's decision provides useful guidance to determine if future costs are eligible for contribution claims. However, the court did not analyze if certain response costs were "necessary." By failing to address this, the court leaves uncertainty in whether a speculative, but necessary future cost could be an "incurred" cost and thus eligible for contribution.

This case note will layout the applicable sections of CERCLA, provide a history of the East Helena site, the procedural history of this lengthy case, discuss and analyze the Ninth Circuit's opinion, and finally discuss the potential impacts of this case.

II. CERCLA BACKGROUND

In 1980, Congress enacted CERCLA.¹³ CERCLA's purpose is to investigate and cleanup sites heavily contaminated with hazardous waste, including, but not limited to, heavy metals.¹⁴ CERCLA presents the federal government with two options to avoid or remediate environmental contamination: removal actions and remedial actions.¹⁵ Removal actions are necessary for short term, prompt responses to hazardous waste releases or threatened releases.¹⁶ In contrast, CERCLA designed long term remedial actions to permanently reduce hazardous waste release.¹⁷ Remedial actions are reserved only for sites on the National Priorities List.¹⁸ For a site to be listed, it must be subject to a site inspection and preliminary assessment followed by a remedial investigation and feasibility study.¹⁹

Liability under CERCLA is far-reaching, both in terms of who is liable and how far back that liability extends. The wide net of CERCLA liability is retroactive, joint and several, and strict.²⁰ CERCLA's retroactivity means parties are liable for any act that occurred before

12. *Id.* at 864.

13. 42 U.S.C. §§ 9601–28 (2018).

14. Cornell Law School, *Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*, LEGAL INFORMATION INST., [https://www.law.cornell.edu/wex/comprehensive_environmental_response_compensation_and_liability_act_\(cercla\)](https://www.law.cornell.edu/wex/comprehensive_environmental_response_compensation_and_liability_act_(cercla)) (last visited Oct. 17, 2020).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

CERCLA's enactment.²¹ This retroactivity has survived numerous legal challenges. In *U.S. v. Monsanto*, the Fourth Circuit Court of Appeals held that CERCLA's retroactivity satisfies due process because "its liability scheme is rationally related to [a] valid legislative purpose."²² The Fourth Circuit went on to state that CERCLA justifies retroactivity because it allows the costs of cleanup to spread across all parties "that played a role in creating the hazardous condition."²³

Joint and several liability under CERCLA casts a wide net of liability, allowing any potentially responsible party ("PRP") to be liable for an entire site cleanup, even when multiple parties caused contamination.²⁴ CERCLA outlines four types of PRPs: (1) current owners and operators; (2) past owners and operators at the time hazardous waste was disposed; (3) generators and entities who arranged for disposal of hazardous materials; and (4) transporters of hazardous materials who selected a site for disposal.²⁵ PRPs can be responsible for governmental cleanup costs, damages to natural resources, costs of certain health assessments, and injunctive relief (actual cleanup of the site).²⁶

CERCLA allows parties during or following any civil action under CERCLA to seek contribution of costs from any other PRPs.²⁷ A CERCLA facility operator is liable to other operators for "any other necessary costs of response incurred."²⁸ CERCLA enables courts to allocate costs among liable parties by "using such equitable factors as the court determines."²⁹ This gives courts broad discretion in how they allocate costs.³⁰ However, courts typically rely on the six Gore factors,³¹ which include: (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with federal, state, or local officials to prevent any harm to public health or the environment.³²

21. *Superfund Liability*, ENVTL. PROT. AGENCY, <https://www.epa.gov/enforcement/superfund-liability> (last visited Oct. 17, 2020).

22. *U.S. v. Monsanto*, 858 F.2d 160, 173 (4th Cir. 1988).

23. *Id.* at 174.

24. *Superfund Liability*, *supra* note 21.

25. 42 U.S.C. § 9607(a)(1)–(4); *Superfund Liability*, *supra* note 21.

26. *Id.*

27. 42 U.S.C. § 9607.

28. *Id.* § 9607(a)(4)(B) (emphasis added).

29. *Id.* § 9613(f)(1).

30. *TDY Holdings, LLC v. U.S.*, 885 F.3d 1142, 1149 (9th Cir. 2018).

31. *Id.* at 1146.

32. *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992).

III. FACTUAL BACKGROUND

The East Helena smelter site (the “Site”) has a long history of constant and prolific production of lead and zinc. The EPA became involved relatively recently in the Site’s history when, in 1984, the Site was added to the National Priorities List, Asarco entered a settlement agreement, and remediation finally commenced.

A. History of Operations

Asarco’s predecessors began a lead smelting operation in East Helena in 1881.³³ The smelting facility ran continuously until 2001.³⁴ Despite several other smelting operations at the Site, Asarco’s lead smelting operation remained the largest.³⁵ Asarco recovered lead from a myriad of sources such as ores, fluxes, and other non-ferrous, metalbearing materials.³⁶ These sources of lead contained arsenic concentrations as high as 190,000 parts per million.³⁷ Lead smelting creates an arsenic laden waste product called slag which Asarco stored in a giant pile at the Site.³⁸ In addition to the slag, other sources of arsenic included a sludge created by capturing dust and gas to convert into sulfuric acid.³⁹ Due to these prevalent arsenic sources involved in Asarco’s operations, the court found it is undisputed that Asarco’s operations “released significant amounts of arsenic into the environment.”⁴⁰ However, the lead smelter was not the only source of arsenic contamination at the Site.

Anaconda, Atlantic’s predecessor, leased a part of the Site to operate a zinc fuming plant. This plant was operational from 1927 to 1976.⁴¹ Anaconda reprocessed Asarco’s discarded slag to extract zinc; a process which released arsenic. Arsenic sources during the zinc fuming process included, but were not limited to, coal and fly ash byproducts, visible effluent released directly into the atmosphere, and slag waste removal from the furnace.⁴²

B. EPA Involvement

In 1984, the EPA added the Site to CERCLA’s National Priorities List.⁴³ This list serves as a guide for the EPA in “determining which sites

33. *ASARCO*, 975 F.3d at 862.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Answering Br. Pl./Appellee ASARCO LLC at 8, June 12, 2019, No. 18-35934.

40. *ASARCO*, 975 F.3d at 862.

41. *Id.* at 863.

42. Answering Br. Pl./Appellee ASARCO LLC at 4–5, June 12, 2019, No. 18-35934.

43. *ASARCO*, 975 F.3d at 863.

warrant further investigation.”⁴⁴ EPA’s primary concern regarding the Site was arsenic contamination.⁴⁵ In 1990, Asarco entered into a CERCLA consent decree with the EPA, which resolved Asarco’s liability for remediation of the Site’s process ponds, but required Asarco to implement remedial plans related to the process ponds.⁴⁶ By 1997, the EPA had substantially completed remediation of the ponds.⁴⁷

In 2005, Asarco filed for Chapter 11 bankruptcy.⁴⁸ As part of these proceedings, the United States, the State of Montana, and the Montana Department of Environmental Quality filed proofs of claim addressing Asarco’s projected CERCLA liability.⁴⁹ In February and June of 2009, Asarco finally reached two complementary settlement agreements and consent decrees with the United States and Montana.⁵⁰ These consents and decrees resolved Asarco’s environmental liabilities at the Site. However, the June decree required Asarco to pay a substantial amount of money to be used for cleanup and remediation of the Site.⁵¹

Asarco was responsible for the remediation fees of several other sites throughout Montana. For the Site alone, Asarco paid \$111.4 million⁵² in remediation expenses.⁵³ The June decree contained a reversion provision that ensured redirection of any unused money to the cleanup of Asarco’s other contaminated properties in Montana.

C. Remediation of the Site

The June decree appointed the Montana Environmental Trust Group (“METG”) as the custodial trustee for the Site.⁵⁴ METG is an “independent, non-profit entity created to clean up, restore, and revitalize the hazardous waste sites once owned by [Asarco] in the state of Montana.”⁵⁵ After years of studies and EPA approval, METG implemented

44. *Superfund Liability*, *supra* note 21.

45. *ASARCO*, 975 F.3d at 863.

46. *Id.*

47. *Id.*

48. Cornell Law School, *Chapter 11 Bankruptcy*, LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/chapter_11_bankruptcy (last visited Oct. 17, 2020) (“Chapter 11 bankruptcy is the formal process that allows debtors and creditors to resolve the problem of the debtor’s financial shortcomings through a reorganization plan.”).

49. *ASARCO*, 975 F.3d at 863.

50. *Id.*

51. *Id.*

52. Broken down, this includes \$99.294 million to the East Helena Custodial Trust Cleanup Account, \$6,402,743 toward the establishment and administration of a custodial trust, \$707,000 to the Department of Interior for both restoration and future oversight costs, and \$5 million to the State of Montana for compensatory damages at the Site. *Id.*

53. *ASARCO*, 975 F.3d at 863.

54. *Id.*

55. Montana Environmental Trust Group, *The Custodial Trust*, MONTANA ENVIRONMENTAL TRUST GROUP, <https://www.mtenvironmentaltrust.org/about-metg/the-custodial-trust> (last visited Oct. 17, 2020).

three remediation projects known as “interim measures.”⁵⁶ The first interim measure reduced movement of contaminated groundwater. The second measure removed contaminated soil to prevent ongoing sources of arsenic contamination. The third and final measure constructed evapotranspiration cover using soil and vegetation over nearly the whole Site.⁵⁷ By the time trial occurred, METG had implemented all three measures and stated that these measures “comprise much of the final remedy for the Site.”⁵⁸ Finally, METG planned to cap the slag pile.⁵⁹

Through the course of remediation, METG spent approximately half of the available \$111.4 million in remediation funds.⁶⁰ It is estimated that capping the slag pile will cost \$3.7 million, and ongoing costs for the Site’s operations and maintenance will cost \$9.2 million.⁶¹ Total cleanup costs, therefore, are estimated to be \$61.4 million.⁶² Despite Atlantic’s 45-year operation at the Site, it had not contributed any funds to the cleanup.⁶³

IV. PROCEDURAL HISTORY

Asarco first brought its CERCLA contribution claim against Atlantic in 2012.⁶⁴ Because Atlantic had not paid any amount in cleanup costs, Asarco sought contribution for the \$111.4 million it paid to the EPA when it settled its liability for the Site.⁶⁵ The district court granted summary judgment in favor of Atlantic.⁶⁶ The district court found that because Asarco sought contribution for remedial work conducted pursuant to the 1998 consent decree, the three-year statute of limitations barred Asarco’s claim.⁶⁷ Asarco appealed to the Ninth Circuit where the court vacated the summary judgment for Atlantic.⁶⁸ The Ninth Circuit concluded that because the language used in the 1998 consent decree did not resolve Asarco’s liability, it did not trigger CERCLA’s statute of limitations.⁶⁹ Therefore, the court remanded the case for a trial on the merits.⁷⁰

On remand, the district court held an eight-day bench trial that was “weighted heavily toward expert testimony.”⁷¹ After the trial concluded,

56. Opening Br. Def./Appellant Atlantic Richfield Co. at 16, May 13, 2019, No. 18-35934.

57. Opening Br. Def./Appellant Atlantic Richfield Co. at 17–18.

58. Opening Br. Def./Appellant Atlantic Richfield Co. at 17.

59. *ASARCO*, 975 F.3d at 864.

60. *Id.*

61. *Id.*

62. *Id.*

63. Answering Br. Pl./Appellee ASARCO at 15.

64. *ASARCO*, 975 F.3d at 864.

65. Opening Br. Def./Appellant Atlantic Richfield Co. at 28; Answering Br. Pl./Appellee ASARCO LLC at 15.

66. *ASARCO*, 975 F.3d at 864.

67. *Id.* at 3; Opening Br. Def./Appellant Atlantic Richfield Co. at 28.

68. *ASARCO*, 975 F.3d at 864.

69. *Id.*

70. *Id.*

71. *Id.*

the district court issued judgment in favor of Asarco. The district court found Atlantic liable under CERCLA for 25 percent of Asarco's incurred cleanup costs of \$111.4 million (i.e. \$27,850,936).⁷² Based on the extensive findings from each parties' operations, the district court concluded that Atlantic's zinc fuming plant did release and contribute arsenic into groundwater at the Site.⁷³ Further, the district court reasoned that a 25 percent allocation was warranted based on expert testimony, application of the Gore factors, and the duration of each parties' operations at the Site.⁷⁴

In addition to the 25 percent allocation, the district court awarded Asarco \$1 million because it found Atlantic failed to cooperate with authorities and made multiple misrepresentations to the EPA.⁷⁵ Specifically, Atlantic submitted false and misleading statements and withheld pertinent documents from the EPA regarding its releases at the Site.⁷⁶

Following the district court's ruling, Atlantic moved to alter or amend the judgment, arguing an error in the allocation of 25 percent of the \$111.4 million paid by Asarco.⁷⁷ Atlantic contended that the allocation should be based on how much of Asarco's payment METG had spent on remediation.⁷⁸ The district court rejected this argument and Atlantic appealed.⁷⁹

V. HOLDING

The Ninth Circuit held that the district court erred in including speculative future costs when determining what necessary response costs were eligible for contribution by Atlantic.⁸⁰ CERCLA entitles parties to recover a portion of the "necessary costs of responses incurred."⁸¹ The court ruled that the district court improperly included costs "that had not yet been, and might never be, incurred," as well as costs that were not necessary for protection of human health and the environment.⁸² The court reasoned that the \$111.4 million was not a fully incurred cost and remanded back to the lower court.⁸³

The Ninth Circuit upheld the district court's decision to allocate 25 percent of the response costs to Atlantic.⁸⁴ CERCLA empowers courts to "allocate response costs among liable parties using such equitable

72. *Id.*

73. Answering Br. Pl./Appellee ASARCO at 15.

74. Answering Br. Pl./Appellee ASARCO at 16.

75. *ASARCO*, 975 F.3d at 864.

76. Answering Br. Pl./Appellee ASARCO at 16.

77. Answering Br. Pl./Appellee ASARCO at 16.

78. *ASARCO*, 975 F.3d at 864.

79. *Id.*

80. *Id.*

81. 42 U.S.C. § 9607(a)(4)(B); *ASARCO*, 975 F.3d at 864.

82. *ASARCO*, 975 F.3d at 864.

83. *Id.* at 868.

84. *Id.*

factors as the court determines are appropriate.”⁸⁵ The district court based its analysis on the Gore factors and expert witnesses in order to tabulate each party’s responsibility for contamination. The court affirmed the district court’s decision because it properly assessed the underlying equities and evidence with “sufficient rigor and care.”⁸⁶

VI. CASE ANALYSIS

Parties presented the Ninth Circuit with two issues on appeal: whether the district court erred in including speculative future costs in its calculation of response costs; and whether the district court erred by allocating 25 percent of response costs to Atlantic.

When reviewing a district court’s findings of fact after a bench trial, the court reviews for clear error.⁸⁷ The court reviews conclusions of law and mixed questions of law and fact de novo.⁸⁸ CERCLA gives district courts broad discretion in both the cost allocation for contribution claims and what factors to use in determining the allocation.⁸⁹ Therefore, a reviewing court should “reverse only for an abuse of the discretion to select factors, or for clear error in the allocation according to those factors.”⁹⁰

A. Response Costs Incurred

The first issue the court reviewed was whether the district court properly determined the summation of necessary response costs Atlantic’s allocation of costs should be based on. The allocation costs could be either a portion of the full settlement amount Asarco paid to the EPA (“Total Costs,” i.e. \$111.4 million) or the total amount of money spent on cleanup to date (“Cleanup Costs,” i.e. \$48.5 million). Atlantic wanted allocation based on Cleanup Costs because it would result in lower allocation costs.

CERCLA states that a party is “entitled to recover an allocated proportion of the ‘necessary costs of response incurred.’”⁹¹ Thus, allocation hinges on what response costs are considered “incurred.” Black’s Law Dictionary defines “incur” as “to suffer or bring on oneself (a liability or expense).”⁹² Asarco argued that this broad definition included its Total Costs.

Relying on the Black’s Law definition, Asarco argued that its payment satisfied the definition of an “incurred cost.”⁹³ Asarco suffered

85. *Id.* at 868.

86. *Id.* at 871.

87. *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634 F.3d 1092, 1096 (9th Cir. 2011).

88. *Id.*

89. *U.S. v. Shell Oil Co.*, 294 F.3d 1045, 1060 (9th Cir. 2002).

90. *Id.*

91. *ASARCO*, 975 F.3d at 865 (quoting 42 U.S.C. § 9607(a)(4)(B)).

92. *Incur*, BLACK’S LAW DICTIONARY (10th ed. 2014).

93. Answering Br. Pl./Appellee ASARCO at 22.

and brought upon itself the Total Costs for recovery.⁹⁴ Asarco used the reversion provision in the settlement offer to demonstrate that the Total Costs were clearly intended to fund the Site’s cleanup.⁹⁵ Asarco argued that because the reversion provision did not allow the return of any funds, the Total Cost was “incurred.”⁹⁶

However, Atlantic noted that the language in CERCLA uses the past tense of “incurred.”⁹⁷ Atlantic reasoned that because the statute uses the past tense, the necessary response costs must have already been suffered to qualify for allocation or contribution.⁹⁸ Atlantic relied heavily on case law to support this distinction.⁹⁹ The Ninth Circuit previously dealt with the meaning of “necessary response costs incurred” several times. Notably, in *In re Dant & Russell, Inc.*,¹⁰⁰ the court stated that CERCLA “permits an action for response costs ‘incurred’—not ‘to be incurred.’”¹⁰¹ Atlantic used this precedent to argue that the money not yet spent on cleanup was not “incurred” since it was not used in remediation efforts.¹⁰² If this money was already spent, or even earmarked for specific use, then it would likely be an “incurred” cost.¹⁰³

Asarco attempted to differentiate itself from the cases Atlantic cited.¹⁰⁴ In *In re Dant & Russell*, Burlington Northern Railroad (“Burlington”) sought contribution on \$1 million already spent on remediation and a further \$13 million in “anticipated” future cleanup costs.¹⁰⁵ Burlington made no concrete commitment of resources for future cleanup, and therefore, the court ruled it was not an incurred cost.¹⁰⁶ Asarco tried to distinguish itself from *In re Dant & Russell* by stating it had both committed and fully paid \$111.4 million in cleanup costs, so these were concrete, incurred costs.¹⁰⁷

Asarco’s reasoning did not persuade the court, and it sided with Atlantic.¹⁰⁸ Similarly, the Ninth Circuit, in *AmeriPride Servs. Inc. v. Texas E. Overseas Inc.*, held that “the full dollar value of a settlement agreement to discharge CERCLA liability is not automatically subject to

94. Answering Br. Pl./Appellee ASARCO at 22.

95. *ASARCO*, 975 F.3d at 865.

96. *Id.*

97. Opening Br. Def./Appellant Atlantic Richfield Co. at 38.

98. Opening Br. Def./Appellant Atlantic Richfield Co. at 38.

99. See e.g. *Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021–22 (9th Cir. 1993); *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1133 (D. Or. 1996).

100. 951 F.2d 246 (9th Cir. 1991).

101. *Id.* at 249–50.

102. *ASARCO*, 975 F.3d at 865.

103. Opening Br. Def./Appellant Atlantic Richfield Co. at 38–39.

104. *ASARCO*, 975 F.3d at 865.

105. *In re Dant & Russell, Inc.*, 951 F.2d at 247.

106. *Id.*

107. Answering Br. Pl./Appellee ASARCO at 24.

108. *ASARCO*, 975 F.3d at 865.

contribution.”¹⁰⁹ While the full settlement amount can be the same as necessary response costs incurred, it is not inherent.¹¹⁰ With this statement, the court reasoned that for a full settlement amount to be incurred, all the available funds must be spent, or earmarked for specific remedial purposes.¹¹¹ Applying this reasoning, the court rejected Asarco’s notion that by paying \$111.4 million, it was an incurred cost and thus subject to contribution.¹¹²

The court further instilled this point when it said, “‘incur’ is sufficiently broad that it does not require an expense already be paid, but is also not so broad that it encompasses future expenses that are mere potentialities.”¹¹³ Importantly, the court concluded that “speculative, potential future response costs” are not recoverable costs for contribution claims.¹¹⁴ Based on this logic, for a full settlement to be incurred and subject to contribution, it either has to be spent or be a concrete, future cost.

The court’s conclusion on speculative, potential future response costs led the court to analyze whether future remediation efforts by METG were speculative or concrete. The court relied heavily on the facts of the case to determine what was a concrete future cost and what was speculative. Asarco’s settlement figure was based largely on the presumption that the Site would require a costly “pump-and-treat” remediation effort.¹¹⁵ However, at the time of this case, METG no longer planned to use the pump-and-treat method. METG stated that the method was “too costly, potentially ineffective, and risky in that it could affect the stability of the arsenic-contaminated groundwater plume.”¹¹⁶ Instead, METG proposed remedies that would only cost \$12.9 million and bring the total Cleanup Costs to \$61.4 million.¹¹⁷ The court held the pump-and-treat system was not a concrete cost.¹¹⁸

Asarco attempted to push back on METG’s plans by offering expert testimony. Asarco’s expert, Margaret Staub, opined that the Site required further remediation work, beyond METG’s cheaper solution, to restore groundwater to acceptable levels.¹¹⁹ Critically, Staub would not definitively say what final remedy would achieve acceptable groundwater levels, only that “something at some point is going to have to be done.”¹²⁰ Staub’s opinion is the exact kind of speculation that the court repeatedly admonished as factors of contribution costs. The court held that because

109. *AmeriPride Services Inc. v. Texas Eastern Overseas Inc.*, 782 F.3d 474, 490 (9th Cir. 2015).

110. *ASARCO*, 975 F.3d at 866.

111. *Id.*

112. *Id.*

113. *Id.*; *see Trimble v. Asarco, Inc.*, 232 F.3d 946, 958 (8th Cir. 2000).

114. *ASARCO*, 975 F.3d at 866.

115. *Id.*

116. *Id.* at 867.

117. *Id.*

118. *Id.* at 866.

119. *Id.* at 867; Answering Br. Pl./Appellee ASARCO at 41–42.

120. *ASARCO*, 975 F.3d at 867.

METG had not paid or assumed an obligation to use the pump-and-treat method, any response costs remain speculative.¹²¹

The court went on to explain that the district court erred in relying on Staub's testimony to conclude that the Total Cost was an incurred cost. In reaching this finding, the district court reasoned that because some future remediation work would still be required, the Total Cost was eligible for contribution.¹²² The court, while agreeing that future remediation efforts are likely needed, concluded that those future remediation efforts were "not adequately tethered to any concrete evidence in the record."¹²³ The court explained the unspent \$50 million was not an incurred cost since it was neither spent nor a concrete, future cost.¹²⁴ Therefore, the court concluded that the full settlement amount of \$111.4 million was improper for the contribution claim. The court ruled that the district court erred in including speculative, future costs when it was determining the necessary response costs eligible for contribution.

The court then remanded the case back to the district court to determine actual incurred response costs.¹²⁵ On remand, the district court will likely calculate the incurred costs based on the \$48.5 million already spent, plus \$12.9 million for capping the slag pile and ongoing operations and maintenance of the Site. The \$12.9 million is a concrete, future cost and will likely be considered incurred. Accordingly, Atlantic may have to contribute a percentage of \$61.4 million, rather than \$111.4 million.¹²⁶

B. Allocation of Response Costs

The second issue the court reviewed was whether the district court properly determined Atlantic's 25 percent allocated portion. Under CERCLA, a district court is able to "allocate response costs among liable parties using such equitable facts as the court determines are appropriate."¹²⁷ Therefore, on appeal, the Ninth Circuit reviews the lower court's choice of what equitable factors to rely on under an abuse of discretion standard.¹²⁸ Then, the court reviews the lower court's application of its chosen factors in determining allocation for clear error.¹²⁹

The court concluded, as an initial matter, that the district court did not abuse its discretion in relying on the six Gore factors for its allocation analysis.¹³⁰ The court explained that the Gore factors are a well-established method of allocation, which the court has previously upheld on multiple

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 868.

126. *Id.*

127. 42 U.S.C. § 9613(f)(1).

128. *ASARCO*, 975 F.3d at 868.

129. *Id.* (citing *TDY Holdings* 885 F.3d at 1146–47).

130. *Id.* at 869.

occasions.¹³¹ The court further stated the district court also acted within its discretion by relying heavily on expert testimony to tabulate each parties' responsibility for contamination.¹³² Much to the protest of Atlantic, the court also held that the district court did not abuse its discretion by determining that allocation did not need to be calculated with mathematical certainty.¹³³ The court asserted the district court was well within its right to rely on "general principles of fairness" instead.¹³⁴ Because the court found no abuse of discretion in the factors the district court chose to employ, it next examined the application of those factors for clear error.¹³⁵

The court, to determine if the district court abused its discretion, examined the district court's application of the Gore factors and its reliance on expert witnesses.

1. Gore Factors

The first Gore factor looks at the ability of each party to demonstrate that a contribution of discharge can be distinguished from each other.¹³⁶ The district court struggled with this factor because of sparse historical records of the Site dealing with "the precise nature and amount of pollutants."¹³⁷ The district court partially credited Atlantic's "longstanding denial of responsibility" with deficiencies in the historical record.¹³⁸ Despite a sparse historic record, the district court concluded the record revealed enough information on each party's historic contributions.¹³⁹

The court merely mentioned the second and third Gore factors, which look at the amount and degree of the hazardous waste's toxicity.¹⁴⁰ The fourth Gore factor examines the degree of involvement from each party in the transportation, treatment, storage, disposal, or generation of hazardous waste.¹⁴¹ The district court, as well as the parties, recognized that Asarco was responsible for the majority of contamination requiring remediation.¹⁴² Still, Atlantic processed vast quantities of arsenic-laden substances and created large amounts of waste at the Site.¹⁴³ The district court acknowledged that it was unable to quantify Atlantic's past releases,

131. *Id.*; *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 899–900 (5th Cir. 1993).

132. *ASARCO*, 975 F.3d at 869.

133. *Id.*

134. *Id.*

135. *Id.*; *see TDY Holdings*, 885 F.3d at 1146–47.

136. *TDY Holdings*, 885 F.3d at 1146 n.1.

137. *ASARCO*, 975 F.3d at 869.

138. *Id.* at 869–70.

139. *Id.* at 870.

140. *TDY Holdings*, 885 F.3d at 1146 n.1.

141. *Id.*

142. *ASARCO*, 975 F.3d at 870.

143. Answering Br. Pl./Appellee ASARCO at 4–7.

but the court noted the City of Helena repeatedly complained to Atlantic about the amount of fly ash and coal being released into the air.¹⁴⁴

The fifth Gore factor examines the degree of care each party used when dealing with hazardous waste.¹⁴⁵ The district court analyzed how each party attempted to protect the environment as well as failures to do so.¹⁴⁶ The district court noted that Asarco adopted intensive preventative measures towards the end of its operations.¹⁴⁷

The court analyzed the sixth and final Gore factor, which examines the cooperation between the parties and federal, state, or local officials to prevent environmental harm.¹⁴⁸ This factor did not weigh in Atlantic's favor. The district court noted that Atlantic had "repeatedly evaded responsibility for any environmental contamination at the Site, flagrantly misled the EPA regarding its releases at the Site, and made ongoing misrepresentations throughout the course of the litigation."¹⁴⁹ Because of Atlantic's deceptive behaviors, and pursuant to the sixth Gore factor, the district court awarded a \$1 million uncertainty premium.¹⁵⁰ Atlantic, unsurprisingly, took issue with this on appeal. The court, however, upheld the district court's decision, saying that it was not only consistent for the district court to award those costs for egregiousness pursuant to the sixth Gore factor, but also that the district court was right to factor in Atlantic's non-cooperation when weighing other aspects of allocation.¹⁵¹

2. Battle of the Experts

In addition to the six Gore factors, the district court relied heavily on expert testimony in determining allocation. Asarco's expert proposed three liability allocation strategies for the district court to consider. These strategies proposed allocation percentages ranging from 25 percent to 41 percent of remediation costs.¹⁵² The district court found Asarco's expert's testimony "to be compelling and persuasive."¹⁵³ The district court was less persuaded by Atlantic's expert testimony which focused on challenging Atlantic's liability and asserting that Atlantic should have no responsibility for cleanup. Atlantic's expert largely left Asarco's expert's opinions unchallenged because the expert placed his efforts on asserting Atlantic had no legal cleanup responsibilities.¹⁵⁴

144. *ASARCO*, 975 F.3d at 870.

145. *TDY Holdings*, 885 F.3d at 1146 n.1.

146. *ASARCO*, 975 F.3d at 870.

147. *Id.*

148. *TDY Holdings*, 885 F.3d at 1146 n.1.

149. *ASARCO*, 975 F.3d at 870.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 871.

154. *Id.*

Ultimately, the district court rejected Atlantic's proposed zero percent allocation and Asarco's higher 41 percent allocation instead opting for Asarco's proposed 25 percent allocation.¹⁵⁵ The district court found the 25 percent allocation to be the most appealing because it factored in the varying time periods of ownership.¹⁵⁶

To rebut Atlantic's argument that the district court's decision was insufficient in its reasoning, the Ninth Circuit noted that the district court's 95-page decision "is expansive and detailed, and it thoughtfully grapples with a challenging case."¹⁵⁷ Citing *Traxler v. Multnomah County*,¹⁵⁸ the court noted that decisions "need not be articulated with perfection" to meet the standards set in case law.¹⁵⁹ Since the Ninth Circuit did not find the district court erred in determining Atlantic's allocation responsibility, it affirmed that Atlantic is responsible for 25 percent of the incurred cost.¹⁶⁰

VII. IMPACTS OF THE CASE

This case is important for entities facing liability and potential contribution claims under CERCLA when determining potential cost liabilities and opportunities to recover costs. The Ninth Circuit's decision will provide useful guidance to determine if future costs are eligible for contribution claims. However, some remaining uncertainties could make it difficult for parties to determine what costs are in play under a CERCLA contribution claim. These uncertainties include the court's dismissal of the term "necessary" in determining incurred costs.

A. "Necessary" Response Costs

The court failed to address whether a pump-and-treat system would be a *necessary* response cost.¹⁶¹ This leaves an amount of uncertainty for future CERCLA contribution claims. The court had previously dismissed the "necessary" requirement in other Ninth Circuit opinions such as *Stanton Road*, where the court held that if a cleanup has not taken place, a party planning the cleanup "cannot establish that it incurred expenses that were 'necessary' response costs eligible for contribution."¹⁶²

In this case, the court aligned its ruling with *Stanton Road* by stating that it did not need to address whether a pump-and-treat system

155. *Id.*

156. *Id.*

157. *Id.* at 872.

158. 596 F.3d 1007 (9th Cir. 2010).

159. *Id.* at 872 (citing *Traxler v. Multnomah County*, 596 F.3d 1007, 1016 (9th Cir. 2010)).

160. *Id.*

161. *Id.* at 867.

162. Opening Br. Def./Appellant Atlantic Richfield Co. at 39 (citing *Stanton Road Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021 (9th Cir. 1993)).

would be necessary because “such costs have not been incurred.”¹⁶³ By refusing to address the necessity of the pump-and-treat system, the court removed “necessary” from the incurred cost analysis. Under the district court’s holding and Asarco’s argument, an incurred cost can either be a cost that has already been spent, or a *necessary* future cost. The Ninth Circuit rejected this notion by stating “because such costs have not been incurred, they cannot be awarded even if they satisfy the remaining requirements for contribution eligibility.”¹⁶⁴ Under the court’s view, incurred costs are only those that have already been spent on cleanup or that are non-speculative, ear-marked future costs. This will create difficulty when companies try to determine the percentage of allocation.

Both parties argued about the importance of what a *necessary* response cost entailed. Atlantic focused on CERCLA’s language, declaring the phrase “necessary response costs” a “term of art.”¹⁶⁵ Both Atlantic and Asarco stated that a “touchstone” in determining if a response cost is necessary is whether there is an actual threat to the environment.¹⁶⁶ A response cost is *necessary* if it will remedy a threat to the environment.¹⁶⁷ Asarco referred to expert testimony that groundwater at the Site needed to be restored to “health-based water quality standards.”¹⁶⁸ Asarco argued that this standard and the associated pump-and-treat system, is one of the reasons that prompted its \$111.4 million payment. Asarco pointed out that this goal of clean water has still not been achieved and that METG’s current plans will not meet those goals.¹⁶⁹ Therefore, Asarco argued that the entire \$111.4 million was a *necessary* response cost to achieve the goal of health-based water standards. The district court agreed with Asarco and concluded that Atlantic’s releases of arsenic at the Site “caused Asarco to incur ‘necessary’ response costs.”¹⁷⁰

By eliminating “necessary response costs” from an analysis of incurred response costs, the Ninth Circuit removed a tool that may provide clarification on what a non-speculative future cost is. It stands to reason that a cost which is necessary in remediating a site would be non-speculative. It would be a necessary cost if it was known to all parties involved that a certain goal had to be met in remediation to stop an environmental threat. It would be a non-speculative future cost if there was a concrete method to achieve this goal. If the goal had to be met, but there was uncertainty on how to best achieve that goal, under the court’s current view, this would be a speculative, future cost. However, by allowing an

163. *ASARCO*, 975 F.3d at 867.

164. *Id.* at 868.

165. Opening Br. Def./Appellant Atlantic Richfield Co. at 39.

166. Opening Br. Def./Appellant Atlantic Richfield Co. at 39; *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 867 (9th Cir. 2001).

167. *Carson Harbor*, 270 F.3d at 867.

168. Answering Br. Pl./Appellee ASARCO at 42.

169. *Id.* at 39.

170. *ASARCO LLC v. A. Richfield Co.*, 353 F. Supp. 3d 916, 949 (D. Mont. 2018), *aff’d in part, vacated in part, remanded sub nom. ASARCO, LLC v. A. Richfield Co., LLC*, 975 F.3d 859, 862 (9th Cir. 2020).

analysis of whether the response cost was *necessary* to achieve that goal, the costs could still be incurred and be eligible for contribution.

Based on the court's holding in this case and cases such as *Stanton Road*, it appears likely that Ninth Circuit wants to avoid any speculation when it comes to contribution claims. The response costs must be incurred insofar that it has already been spent or that it is a concrete, future cost. By removing "necessary" from the incurred cost analysis, the court is keeping out speculative costs, even though the costs might be necessary for remediation. This favors CERCLA policy over a company's bottom line and creates greater financial burdens on those companies.

B. Contribution Claims in the Future

While this opinion provides guidance to determine if future costs are eligible for contribution claims, the remaining uncertainties make specificity incredibly important in settlement agreements and contribution claims. To receive contribution from other PRPs, parties must make sure they are aware of what costs are actually "incurred." This entails knowing with some certainty what future costs are concrete and non-speculative. The Gore factors continue to be one of the best methods to help determine allocation. However, because the Gore factors allow for discretion from the court, there is still a layer of uncertainty in their application.

By the court's holding that speculative, future costs will not be considered "incurred," parties will likely be incentivized to wait until the last possible moment to bring a contribution claim. Waiting until cleanup is finished is the only guaranteed way to know what a party's incurred costs truly are. However, this could mean that parties seeking contribution will, initially, pay out-of-pocket for all remediation expenses since filing a contribution claim early could result in future costs not being "incurred." For smaller companies, this could be economically infeasible because the company might have to risk seeking contribution before it is certain what its incurred costs actually are. Further, because the court held mathematical certainty is not required in determining allocation proportions, it could be difficult for parties to whom contribution is sought to determine just how much money they will have to pay.

VIII. CONCLUSION

ASARCO v. Atlantic Richfield provides a useful guide for entities to determine what costs they could either recoup or be responsible for under a CERCLA contribution claim. While the Ninth Circuit created some ambiguity around whether response costs are "necessary," parties in contribution claims should more clearly be able to determine what future costs are considered "incurred" and eligible for contribution. CERCLA can be an effective tool in providing the appropriate funds for the cleanup of contaminated sites. This case continues to uphold CERCLA's far reaching liability while allowing potentially responsible parties to recover a portion of the cleanup costs from other responsible entities.