

ADMINISTRATIVE RECORD


1239690 - R8 SDMS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

IN THE MATTER OF:

Anaconda Smelter Superfund Site, Old Works/East
Anaconda Development Area Operable Unit

UNDER THE AUTHORITY OF THE
COMPREHENSIVE ENVIRONMENTAL
RESPONSE, COMPENSATION, AND
LIABILITY ACT OF 1980, 42 U.S.C.
§ 9601, et seq., as amended.

AGREEMENT AND COVENANT
NOT TO SUE

EPA Docket No.
CERCLA 94-12

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and among the United States Environmental Protection Agency ("EPA"), the State of Montana ("State"), Anaconda-Deer Lodge County ("ADL"), and the Old Works Golf Course Authority or the Old Works Golf Course, Inc. (the "Authority") (collectively the "Parties").

A. EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. Section 9601, et seq. The State of Montana enters into this Agreement pursuant to the Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code Ann. 75-10-701, et seq.

B. ADL is a consolidated governmental entity organized under the Constitution and laws of the State. The Authority is a nonprofit corporation organized under the Constitution and laws

2170906



437399

of the State. ADL and the Authority, together, are also sometimes referred to herein as Settling Respondents.

C. ADL will acquire from the Atlantic Richfield Company ("ARCO") certain properties located in Deer Lodge County in the State of Montana, which properties are more particularly described in Section III (Statement of Facts), Paragraph 29, hereinafter collectively referred to as the "Properties" and individually as the "Property" or the "Parcel."

D. The Authority may acquire an interest in certain property located within the Golf Course Parcel, as described more particularly in Exhibit A.

E. Unilateral Administrative Order Docket Number VIII-94-08, issued April 7, 1994 ("AO") requires, and ARCO has unconditionally agreed in its letter of April 12, 1994 to implement the Record of Decision ("ROD"), issued March 8, 1994, at the Old Works/East Anaconda Development Area Operable Unit. ARCO also desires to construct the Jack Nicklaus Signature Golf Course and appurtenant facilities and an Old Works Historic Trail on the Properties as dedicated developments.

F. ADL and the Authority will design and intend to construct a Golf Course Clubhouse at a location to be determined by ARCO on the Properties. Subject to approval by EPA of the plans and location of the the Golf Course Clubhouse, and subject to the conditions and requirements set forth in this Agreement and Exhibits to this Agreement, EPA will allow the Clubhouse as a dedicated development within the scope of the Golf Course

dedicated development under the OW/EADA ROD and under the OW/EADA AO.

G. The purpose of this Agreement includes but is not limited to: 1) settle and resolve, subject to reservations and limitations contained in Sections VII (Certification), VIII (Covenant not to Sue), and IX (Reservation of Rights), the potential liability of the Settling Respondents for the Present Contamination at the Properties which would otherwise result from Settling Respondents becoming the owners of the Properties; 2) ensure that ADL implements and enforces Institutional Controls relating to the Properties including the DPS and applicable restrictive covenants; 3) provide for performance by ADL and the Authority of certain operation and maintenance obligations with respect to the ROD on the Properties, as described more specifically herein; 4) establish the conditions of and restrictive covenants for any potential future development which may occur on the Properties; 5) ensure access to and use of the Properties for purposes of implementation, operation and maintenance of the Remedy and any other Response Action, as defined below; and 6) ensure that ADL, the Authority and any other public or private entity that acquires an interest in or develops the Properties not take any action, directly or indirectly, which interferes with, is inconsistent with, hinders, delays, diminishes, or frustrates the effectiveness, purposes or integrity of the Remedy, or any Response Action.

H. The Exhibits to this Agreement are as follows and are hereby incorporated by reference:

- Exhibit A - Certificates of Survey depicting Parcels.
- Exhibit B - Required amendments to Development Permit System.
- Exhibit C - *Operation and Maintenance Plan, Old Works/East Anaconda Development Area Remedial Action, Anaconda Smelter NPL Site; and Anaconda Old Works Golf Course General Operating Plan Summary.*
- Exhibit D - Restrictive Covenants.
- Exhibit E - Department of Justice Concurrence Letter.

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The resolution of the potential liability of the Settling Respondents, in exchange for provision by the Settling Respondents to EPA and the State of a benefit that would otherwise not be available to EPA and the State, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations.

1. "ADL" shall mean Anaconda-Deer Lodge County, its officials and representatives.
2. "Administrative Order," "Unilateral Administrative Order" or "AO" shall mean Unilateral Administrative Order, Docket No. CERCLA VIII 94-08, issued by EPA on April 7, 1994. The AO

directs ARCO to implement the Remedy outlined in the ROD for the OW/EADA OU.

3. "Agreement" shall mean this Agreement and Covenant Not to Sue, made and entered into by and among the EPA, the State, ADL, and the Authority.

4. "ARCO" shall mean the Atlantic Richfield Company.

5. "CECRA" shall mean the Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code Ann. 75-10-701, et seq.

6. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 9613 ("SARA").

7. "Development Permit System" or "DPS" shall mean the Anaconda-Deer Lodge Development Permit System adopted on December 2, 1992 by the Anaconda-Deer Lodge Board of Commissioners as the same may be amended from time to time.

8. "EPA" shall mean the United States Environmental Protection Agency and any successor agency or department.

9. "Facility" shall mean the Old Works/East Anaconda Development Area and Mill Creek Operable Units of the Anaconda Smelter Superfund Site and the Properties set forth in Exhibit A, all of which is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

10. "Institutional Controls" shall mean rules, regulations, laws, ordinances, dedicated developments, restrictive covenants, easements, historic preservation and groundwater controls/restrictions that address land use and access for a particular area. Such controls may take the form of covenants, licenses, access agreements, deed restrictions, zoning controls (including the Anaconda-Deer Lodge Master Plan and DPS), and other use or access restrictions.

11. "Mill Creek Operable Unit" or "Mill Creek OU" is an operable unit of the Anaconda Smelter Superfund Site. The Mill Creek OU refers to the 301.8 acres of land located southeast of the OW/EADA OU. The Mill Creek OU is contaminated as indicated in the OW/EADA Remedial Investigation Report, Volume VI, Mill Creek Addendum, September 1993.

12. "Operation and Maintenance" or "O&M" means all activities required under the Operation and Maintenance Plan developed by ARCO pursuant to Administrative Order Docket No. CERCLA VIII-94-08, and approved by EPA, Exhibit C.

13. "Old Works/East Anaconda Development Area Operable Unit" or "OW/EADA OU" is an operable unit of the Anaconda Smelter Superfund Site. The OW/EADA OU refers to the approximately 1,300 acres of land immediately north and east of the original city limits of the City of Anaconda, Montana. The OW/EADA is contaminated as indicated in the OW/EADA OU Remedial Investigation Report, September 1993.

14. "Present Contamination" shall mean any contamination by any hazardous substances, pollutants, or contaminants, or solid waste within the Facility present or existing as of the effective date of this Agreement, including any aggravation thereto solely caused by ARCO's construction of the OW/EADA Remedy by or at the direction of, ARCO its employees, agents, consultants or contractors.

15. "Properties, Property, Parcel and/or Parcels" shall mean the properties described in Section III (Statement of Facts), Paragraph 29.

16. "Release." The past, present, or future migration of hazardous substances from the Facility constitutes an actual or threatened "release" as that term is defined in Section 101(22) of CERCLA, 42 U.S.C. 9601(22).

17. "Remedy" shall mean the Remedy outlined in the ROD for the OW/EADA OU, executed by EPA on March 8, 1994, with concurrence by the State.

18. "Response" action shall have the meaning provided for at CERCLA Section 101(25), 42 U.S.C. § 9601(25), which meaning, for the purpose of this Agreement only, shall also include restoration or other activity resulting from the State's natural resources damages claims under CERCLA Section 107(a) and (f), 42 U.S.C. § 9607(a) and (f).

19. "Settling Respondents" shall mean Anaconda-Deer Lodge and the Old Works Golf Course Authority. Settling Respondents are "person[s]" as that term is defined in Section 101 (21) of

CERCLA, 42 U.S.C. § 9601 (21) and Settling Respondents, their officers, directors, employees, and agents, are prospective owners of a facility within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. Section 9607(a)(1).

20. "Site" shall mean the Anaconda Smelter Superfund Site, placed on the National Priorities List set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658.

21. "State" shall mean the State of Montana.

22. "Successor in Interest and Assigns" shall mean any "person" as defined in CERCLA Section 101(21), 42 U.S.C. § 9601(21), who is granted, acquires or receives any right, title, or interest, including through sale, lease, sublease, or other disposition, to (i) any of the Properties subsequent to the execution of this Agreement, or (ii) any of the rights, duties, and obligations arising under this Agreement.

III. STATEMENT OF FACTS

23. EPA listed the Anaconda Smelter Site on the National Priorities List ("NPL") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") on September 8, 1983, 48 Fed. Reg. 40658.

24. The Properties are located within the OW/EADA and Mill Creek OUs of the Anaconda Smelter Superfund Site.

25. Under EPA oversight and with EPA approval, ARCO has previously conducted three Response actions within the boundaries of the OW/EADA and Mill Creek OUs. These include: the Mill

Creek Response Action conducted pursuant to Mill Creek Partial Consent Decree, United States of America and the State of Montana v. Atlantic Richfield Company, Civil Action No. 88-32, United States Court for the District of Montana, Butte Division; the Old Works Removal Action, conducted pursuant to Administrative Order on Consent, Docket No. CERCLA VIII-92-11; and the Accelerated Removals Expedited Response Action, conducted pursuant to Administrative Order on Consent, Docket No. CERCLA VIII-92-12.

26. ARCO conducted a remedial investigation/feasibility study (RI/FS) at the OW/EADA OU, and submitted an OW/EADA RI/FS report to EPA pursuant to Administrative Order on Consent, Docket No. CERCLA VIII-88-16, Amendment No. 6, which ARCO and EPA entered into on September 28, 1992. The OW/EADA RI/FS evaluated the nature and extent of contamination at the OW/EADA OU and identified and evaluated remedial alternatives to address such contamination.

27. In September 1993 EPA issued a Proposed Plan for the OW/EADA OU and on March 8, 1994 EPA, with the State's concurrence, executed a ROD, which sets forth the Remedy to be implemented under CERCLA at the OW/EADA OU. The Remedy includes the following components:

(a) Construction of engineered covers over waste materials in recreational and potential commercial/industrial areas exceeding arsenic levels of 1,000 parts per million (ppm);

(b) Treatment of soils exceeding arsenic levels of 1,000 ppm in recreational and potential commercial/industrial areas using innovative revegetation treatment techniques;

(c) Covering or treatment of soils exceeding arsenic levels of 500 ppm in current commercial/industrial areas;

(d) Arranging for future remediation of potential residential or commercial/industrial areas, at the time of development, to the action levels set through the Anaconda-Deer Lodge County (ADL) DPS, as approved by EPA;

(e) Construction of surface controls to manage surface water runoff from Stuckey Ridge, Smelter Hill, and throughout the Site to minimize discharge to Warm Springs Creek;

(f) Upgrading or repairing of levees adjacent to Warm Springs Creek to contain the 100-year peak flood event and prevent erosion of waste materials into Warm Springs Creek; (g) Replacement of bridges or culverts, as necessary, to safely pass the 100-year peak flood event;

(h) Implementation of institutional controls to protect the above engineering controls and manage future land and water use;

(i) Implementation of long term monitoring;

(j) Preservation of historic features in the Old Works Historic District, to the extent practicable; and

(k) Allow dedicated developments. Dedicated developments under the OW/EADA ROD include a Jack Nicklaus Signature Golf Course and the Old Works Historic Trail System.

28. On April 7, 1994 EPA issued a Unilateral Administrative Order under Section 106 of CERCLA, 42 U.S.C. § 9606, to ARCO, Docket No. CERCLA VIII-94-08, which requires the implementation and operation and maintenance of the Remedy selected in the OW/EADA ROD. On April 12, 1994 ARCO issued a letter to EPA in which it committed to implement the Remedy in accordance with the ROD and OW/EADA AO. The Remedy will be conducted on the Properties ADL will acquire from ARCO.

29. (a) ADL will acquire the following Properties from ARCO, which Properties are the subject of this Agreement:

(1) Old Works Trail System Parcel. The Old Works Trail System Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel.

(2) Golf Course Parcel. The Golf Course Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel and a legal description for the Parcel.

(3) Ballfields/Industrial Park Parcel. The Ballfields/Industrial Park Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel and a legal description for the Parcel.

(4) Red Sands/Arbiter Parcel. The Red Sands/Arbiter Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel and a legal description for the Parcel.

(5) East Anaconda Yards Parcel. The East Anaconda Yards Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel and a legal description for the Parcel.

(6) Drag Strip Parcel. The Drag Strip Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel and a legal description for the Parcel.

(7) Mill Creek Parcel. The Mill Creek Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel.

(8) Stuckey Ridge Parcel. The Stuckey Ridge Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel.

(9) Lumber Yard Parcel. The Lumber Yard Parcel is more particularly described in Exhibit A. Exhibit A consists of a map which depicts the location of this Parcel.

(b) Authority Property. The Authority may acquire from ARCO an interest in certain property located within the Golf Course Parcel, as described more particularly in Exhibit A.

30. The Settling Respondents represent, and for the purposes of this Agreement, EPA and the State rely on those representations, that the Settling Respondents have had no involvement with the the Facility such that they are "covered persons" under CERCLA Section 107, 42 U.S.C. § 9607.

31. Based on the facts and conditions described herein, EPA and the State have determined that prompt settlement with the Settling Respondents is practicable and in the public interest.

IV. CONSIDERATION

32. In consideration of and in exchange for the Covenant Not to Sue herein, Settling Respondents shall perform or cause to have performed the obligations set forth below. The performance of these obligations shall be governed by all final performance standards and institutional controls provided for in the ROD or other Remedial decision documents, including without limitation the DPS, and any activities implemented or maintained on the Properties shall be implemented or maintained in accordance with such performance standards and institutional controls.

(a) Development Permit System. ADL has adopted the DPS which, among other things, provides restrictions on the use and development of the Properties. ADL and the Authority shall comply with the terms of and ADL shall enforce the DPS provisions relating to the Properties, in accordance with Exhibit B and all appendices thereto, to ensure that the Properties are used or developed only in compliance with the restrictions of the DPS, this Agreement and the applicable environmental laws. The DPS shall:

- i. Assure that future land and water use at the Site is consistent with EPA's determination of the health and environmental risks posed by contaminants left the on Site;

- ii. Provide for the preservation and maintenance of Superfund remedial structures on the Site, including, but not limited to caps, berms, waste repositories, and vegetated areas;
- iii. Require that future development at the Site employ construction practices that are consistent with the protection of public health and the environment, as determined by Superfund remedial actions;
- iv. As development occurs at the Site, implement the remediation of soil arsenic contamination levels appropriate for the intended use, as determined by Superfund remedial actions;
- v. Provide for implementation of other laws applicable to development, such as subdivision and floodplain requirements; and
- vi. Be amended such that Chapters XXVI (Superfund Planning Area Overlay District) and XXX (Definitions), substantially adopt the form set forth in Exhibit B, including all Appendices thereto, subject to EPA and State approval, and thereafter, Chapters XXVI and XXX, and any other portions of the DPS which affect the implementation of Chapters XXVI and XXX, shall not be amended without approval of EPA and the State. EPA and the State shall approve or disapprove any proposed amendment within a reasonable period of time.

If Settling Respondents fail to comply with the terms of and if ADL fails to enforce the DPS provisions relating to the Properties in accordance with Exhibit B and all appendices thereto, the Covenant Not to Sue in Section VIII shall be null and void and EPA and the State reserve all rights they have.

(b) O&M Requirements. ADL and the Authority shall implement, maintain and enforce the O&M requirements set forth in Exhibit C. In the event ADL or the Authority subsequently convey any interest in the Properties, ADL and the Authority shall continue to be liable for the O&M requirements on the Properties. If ADL and/or the Authority fail to implement, maintain and enforce the O&M requirements set forth in Exhibit C, the Covenant Not to Sue in Section VIII shall be null and void and EPA and the State reserve all rights they have.

(c) Restrictive Covenants. (i) The Parties acknowledge that the Properties will be conveyed to ADL by quit claim deeds from ARCO (the "Quit Claim Deeds"). The Quit Claim Deeds will include the restrictive covenants generally described in Exhibit D. Settling Respondents and Successors in Interest and Assigns of Settling Respondents shall comply with and strictly enforce the restrictive covenants in the Quit Claim Deeds. In the event either Settling Respondent or any Successor in Interest or Assign of either Settling Respondent fails to comply with, implement, or enforce any restrictive covenant, then as to such Settling Respondent, or such Successor in Interest or Assign of such Settling Respondent, the Covenant Not to Sue in Section VIII

shall be null and void and EPA and the State reserve all rights they have.

(ii) The Parties acknowledge that the Quit Claim deeds will contain additional and supplemental provisions relating to the operation, implementation, and enforcement of the restrictive covenants. Accordingly, to the extent that the terms and conditions of the restrictive covenants set forth in the Quit Claim Deeds conflict with the terms and conditions of the restrictive covenants generally described in Exhibit D, the terms and conditions of the restrictive covenants in the Quit Claim Deeds shall control.

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST AND ASSIGNS

33. Settling Respondents hereby grant to EPA and the State, their authorized officers, employees, representatives, and all other persons performing Response actions under EPA or State oversight, an irrevocable immediate right of access to the Properties and to any other property to which access is required for the implementation of Response actions at the Site, to the extent access to such other property is controlled by the Settling Respondents, for the purposes of performing Response actions at the Facility under federal or State law. EPA and the State agree to provide to Settling Respondents reasonable notice of the timing of Response actions to be undertaken at the Properties. Notwithstanding any provision of this Agreement, EPA and the State retain all of their access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Resource Conservation and Recovery Act, 42 U.S.C. 6901, et. seq., CECRA, and any other applicable statute or regulations.

34. Within 15 days after the effective date of this Agreement, the Settling Respondents shall record a certified copy of this Agreement, with the Recorder's Office, Deer Lodge County, State of Montana. Thereafter, each deed, title, or other instrument conveying an interest in the Properties shall contain a notice stating that the particular Property is subject to this Agreement.

35. Nothing in this Agreement shall in any manner restrict or limit the nature or scope of Response actions which may be

taken by EPA or the State in fulfilling their responsibilities under federal or State law. The Settling Respondents recognize that the implementation of Response actions at the Facility may interfere with their use of the Properties. The Settling Respondents shall fully cooperate with EPA and the State in the implementation of Response actions at the Properties and shall not interfere with such Response actions. EPA and the State agree, consistent with their responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondents' operations by such entry and response.

36. The Settling Respondents shall ensure that any Successor in Interest or Assign of the Properties shall provide the same access and cooperation. The Settling Respondents shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Properties at the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Properties are consistent with Section X (Parties Bound/Transfer of Covenant).

VI. DUE CARE

37. Nothing in this Agreement shall be construed to relieve the Settling Respondents of their duty to exercise due care at the Properties with respect to the hazardous substances concerned, or their duty to comply with all applicable State and federal laws and regulations.

VII. CERTIFICATION

38. The Settling Respondents certify that to the best of their knowledge and belief they have fully and accurately disclosed to EPA and the State all information currently in their possession or control and in the possession or control of their officers, directors, employees, contractors and agents which relates in any way to any contamination or potential contamination at the Properties and to their qualification for this Agreement. The Settling Respondents also certify that to the best of their knowledge and belief they have not caused or contributed to a release of hazardous substances at the Properties. If EPA and the State determine that information provided by Settling Respondents is not materially accurate and complete, the Covenant Not to Sue in Section VIII shall be null and void and EPA and the State reserve all rights they may have.

VIII. COVENANT NOT TO SUE

39. Subject to the Reservation of Rights in Section IX, of this Agreement, upon satisfactory performance and completion of the obligations outlined in this Agreement, the United States and the State covenant not to sue or take any other civil or administrative action against Settling Respondents for any and all civil liability for:

(a) injunctive relief or reimbursement of Response costs pursuant to CERCLA Section 106 or 107(a), 42 U.S.C. § 9606 or 9607(a); and Mont. Code Ann. 75-10-701, et seq. with respect to the Present Contamination at the Properties; and,

(b) any claims of the State for natural resources pursuant to Sections 107(a) and (f) of CERCLA, 42 U.S.C §§ 9607(a) and (f), with regard to any Present Contamination of the Properties as of the effective date of this Agreement.

With respect to ADL, the covenants set forth in this Paragraph shall be effective only if and when ADL takes title to the Properties described in Section III (Statement of Facts), Paragraph 29. With respect to the Authority, the covenants set forth in this Paragraph shall be effective only if and when the Authority takes title to the Property within the Golf Course Parcel as set forth in Exhibit A.

40. In consideration of the Covenant Not to Sue in Paragraph 39, the Settling Respondents agree not to assert any claims or causes of action against the United States or the State, their authorized officers, employees, representatives, or the Hazardous Substance Superfund pursuant to 42 U.S.C. § 9606(b)(2), arising out of contamination at the Facility or Properties at the time that Settling Respondents acquire the Properties, or for reimbursement of funds expended, expenses incurred, payments made, or work performed relating to the Facility or the Properties, or to seek any other costs, damages, or attorney's fees from the United States, the State, or their contractors or employees arising out of Response activities at the Facility or the Properties. This covenant not to sue shall include all claims or causes of action for interference with contracts, business relations and economic advantage. Nothing

herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. Section 307.14.

41. This Covenant Not to Sue is not a general release under federal law nor the law of any state.

42. With respect to any claim or cause of action asserted by the United States and/or the State, the Settling Respondents shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to contamination which existed prior to the effective date of this Agreement.

IX. RESERVATION OF RIGHTS

43. Notwithstanding the Covenant Not to Sue set out in Section VIII above, nothing in this Agreement is intended to be nor shall it be construed to be a release or covenant not to sue for any claim or cause of action, administrative or judicial, at law or in equity, which the United States or the State has against the Settling Respondents for:

(a) Any liability as a result of failure to provide access, notice and cooperation, or failure to otherwise comply with Section V (Access and Notice to Successors In Interest and Assigns);

(b) Any liability as a result of failure to exercise due care with respect to hazardous substances at the Properties;

(c) Any liability as a result of failure to perform the obligations outlined under this Agreement;

(d) Any liability resulting from past releases of hazardous substances at the Properties caused or contributed to by Settling Respondents, their lessees or sublessees;

(e) Any liability resulting from past or future exacerbation by the Settling Respondents, their lessees and sublessees, their Successors In Interest and Assigns, of the release or threat of release of hazardous substances from the Properties;

(f) Any liability resulting from the creation of new releases or threats of release of hazardous substances at the Properties after the effective date of this Agreement, except what is defined as Present Contamination;

(g) Failure to cooperate and/or interference with EPA, the State, their Response action contractors, or other persons conducting Response activities under EPA or State oversight in the implementation of Response actions at the Properties;

(h) Future transportation or disposal of hazardous substances from the Properties;

(i) Claims based on the introduction of any hazardous substance, pollutant, or contaminant by any person at the Site after the effective date of this Agreement;

(j) Any and all criminal liability; and

(k) Any liability arising under Section XIII (Completion of Obligations).

44. Nothing in this Agreement constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States or the State to seek or obtain further relief from

the Settling Respondents, and the Covenant Not to Sue in Section VIII (Covenant Not to Sue) is null and void, if information is discovered which establishes that the certification in Section VII (Certification) was false as of the effective date of the Agreement.

45. Nothing in this Agreement is intended to limit, or constitute a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States or the State may have against any person, firm, corporation or other entity not a party to this Agreement.

46. Nothing in this Agreement is intended to limit the right of EPA or the State to undertake future Response actions at the Facility or the Properties or to seek to compel parties other than the Settling Respondents to perform or pay for Response actions or to pay for natural resource damages at the Facility or the Properties. Nothing in this Agreement shall in any way restrict or limit the nature or scope of Response actions which may be taken or be required by EPA or the State in exercising their authority under federal or State law. ADL acknowledges that it will and the Authority acknowledges that it may take title to properties where Response actions may be required. The Settling Respondents further recognize that the implementation of Response actions may interfere with the Settling Respondents' use of the Properties, and may require closure of their operations or a part thereof.

47. The Parties agree that the Settling Respondents' entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

X. PARTIES BOUND/TRANSFER OF COVENANT

48. This Agreement shall apply to and be binding upon the United States, and the State, and the Settling Respondents, their officers, directors, employees, and agents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

49. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondents under this Agreement may be assigned or transferred to any person with the prior written consent of EPA and the State in their sole discretion and provided such transfer is in accordance with Section V (Access/Notice to Successors in Interest and Assigns) whenever such assignment or transfer concerns an interest in the Properties. Such consent may not be arbitrarily withheld. EPA and the State agree to respond within a reasonable time to requests for consent under this Paragraph. The benefits conferred upon Settling Respondents under this Agreement shall not be transferred or transferrable to ARCO, Cleveland Wrecking Company, to any potentially responsible party or responsible party at the Anaconda Smelter Superfund Site, or to the Successor in Interest or Assigns of any such party.

50. The Settling Respondents agree to pay the reasonable costs incurred by EPA and the State to review any subsequent requests for consent to assign or transfer the Property.

51. In the event of an assignment or transfer of the Properties, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as the United States, the State and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Properties, the assignee or transferee must consent in writing to be bound by the terms of this Agreement in order for the Covenant Not to Sue to be available to that party. The Covenant Not to Sue shall not be effective with respect to any Successors in Interest, Assigns or transferees who fail to provide such written consent to the United States and the State.

XI. DISCLAIMER

52. This Agreement in no way constitutes a finding by EPA or the State as to the risks to human health and the environment which may be posed by contamination at the Properties or the Facility nor constitutes any representation by EPA or the State that the Properties or the Facility are fit for any particular purpose.

XII. DOCUMENT RETENTION

53. The Parties agree that the Settling Respondents' operating records concerning the volume, type, and nature of any

hazardous substances that may be generated or released by the Settling Respondents, their Successors In Interest and Assigns during their respective operations at the Properties may be significant for any determination under Section IX, Paragraph 43(f) (Reservation of Rights). The Settling Respondents agree to retain and make available all business and operating records, contracts, site studies and investigations, and documents relating to operations at the Properties, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the the EPA and the State. At the end of ten years, the Settling Respondents shall notify EPA and the State of the location of such documents and shall provide EPA and the State with an opportunity to copy any documents at the expense of EPA or the State.

XIII. COMPLETION OF OBLIGATIONS

54. If the Settling Respondents fail to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Consideration), they shall be liable for all litigation and other enforcement costs incurred by the United States and the State to enforce this Agreement or otherwise obtain compliance.

XIV. OPPORTUNITY FOR PUBLIC COMMENT

55. Notice of this Agreement shall be published in the Federal Register and in a daily newspaper of general circulation in the area affected. The notice shall provide for a period of not less than thirty (30) days for public comment. The United

States reserves the right to withdraw its consent if the comments regarding this Agreement disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XV. EFFECTIVE DATE

56. The effective date of this Agreement shall be the date, after the close of the public comment period, upon which EPA and the State issue written notice to the Settling Respondent that EPA and the State have fully executed the Agreement, and that no comments have been received or that the comments do not provide a basis for withdrawal of consent.

XVI. ATTORNEY GENERAL APPROVAL

57. The Attorney General of the United States or her designee has issued prior written approval of the settlement embodied in this Agreement. That approval is attached as Exhibit E.

XVII. TERMINATION

58. If any of the Parties judges that any or all of the obligations under Section V (Access/Notice to Successors In Interest and Assigns) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Parties agree to terminate the provision(s) establishing such obligations.

IT IS SO AGREED:

ANACONDA-DEER LODGE COUNTY

BY: Jane Anderson
Jane Anderson, Chairman Date: 4/27/94
Anacanda-Deer Lodge County Commission

OLD WORKS GOLF COURSE AUTHORITY and OLD WORKS GOLF COURSE, INC.

BY: William P. Finnegan
William P. Finnegan, Chairman Date: 4/27/94
Old Works Golf Course Authority
President, Old Works Golf Course, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY: Wm Yellowtail
William P. Yellowtail
Regional Administrator, Region VIII

Date: 4/29/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY: Steve C. Herman
Steve Herman
Assistant Administrator for Enforcement

Date: 9/29/94

THE UNITED STATES DEPARTMENT OF JUSTICE, Enforcement and Natural Resources Division, concurs in the proposed Agreement and Covenant Not to Sue Re: Anaconda Smelter Superfund Site, Old Works/East Anaconda Development Area, entered into among the United States Environmental Protection Agency, the State of Montana, Anaconda-Deer Lodge County, and the Old Works Golf Course Authority.

BY: Lois J. Schiffer
Lois J. Schiffer
Acting Assistant Attorney General
Environment and Natural Resources Division

Date: 9/29/94

STATE OF MONTANA,
by and through the Montana Department of Health and Environmental
Sciences:

for BY: William J. Gatz
Robert J. Robinson Date: 4/27/94
Director, Montana Department of
Health and Environmental Sciences

reviewed for legal content:

BY: James M. Madden
James M. Madden Date: 4/27/94
Special Assistant Attorney General,
Montana Department of Health and Environmental Sciences