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

UNITED STATES OF AMERICA,  
Plaintiff,

v.

ATLANTIC RICHFIELD  
COMPANY and  
NORTHWESTERN  
CORPORATION,  
Defendants.

CIVIL ACTION NO. CV89-039-BU-SEH

**CONSENT DECREE**  
**FOR THE MILLTOWN SITE**

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## I. BACKGROUND

### The United States' Complaint

A. In 1989, the United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter (the “Complaint”) pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, (“CERCLA”), 42 U.S.C. § 9607, against the Atlantic Richfield Company (“AR”).

B. In the Complaint, which was subsequently amended on October 14, 1992, October 31, 1994, and November 5, 2004, the United States sought recovery of past response costs and declaratory judgment of liability for future response costs paid at or in connection with the Original Portion of the Silver Bow Creek / Butte Area National Priorities List (“NPL”) Site, the Milltown Reservoir Sediments NPL Site (now referred to as the “Milltown Reservoir/Clark Fork River NPL Site”), and the Anaconda Smelter NPL Site. The scope of the Silver Bow Creek / Butte Area NPL Site was enlarged to include areas in and around Butte, Montana. On November 5, 2004, the Complaint was amended to include an area known as the Butte Priority Soils Operable Unit.

C. In response to the United States' Complaint, AR asserted several defenses and filed counterclaims against the United States, seeking cost recovery, contribution, contractual indemnity, equitable indemnification, recoupment, and declaratory relief. Among AR's defenses to the United States' claims is AR's assertion that the United States' CERCLA claims are in the nature of contribution under CERCLA § 113 rather than CERCLA § 107, and thus AR's CERCLA liability is several rather than joint and

several. This defense is addressed in a Report and Recommendation issued by the Magistrate in this case.

#### Settlement Framework

D. In November of 1998, the United States and AR reached a settlement regarding the claims of the United States at a portion of the Silver Bow Creek / Butte Area NPL Site -- the Streamside Tailings Operable Unit. The Streamside Tailings consent decree, together with a consent decree entered in the case of *Montana v. Atlantic Richfield* (the "State Action"), both of which were entered on April 19, 1999, also resolved the majority of the natural resource damages claims of the United States and the State of Montana (the "State") and all of the natural resource damages claims of the Confederated Salish and Kootenai Tribes (the "Tribes") against AR subject to the Tribes' reservation in paragraph 86 of the Streamside Tailings Consent Decree. The Streamside Tailings consent decree also established a framework for resolving the United States' remaining claims throughout the Clark Fork River Basin in Montana. Under Section VII of the Streamside Tailings decree, the parties agreed to resolve the remaining areas in six groups or "baskets" of operable units:

1. Rocker Site;
2. Butte Mine Flooding (Berkeley Pit) Site and the Butte Active Mining Area Site;
3. Anaconda Smelter Site;
4. Clark Fork River Operable Unit, Warm Spring Ponds Operable Units, and the Milltown Reservoir Operable Units;
5. Butte Priority Soils (towns of Butte and Walkerville) Site; and

6. The Westside Soils Site, formerly referred to as the Non Priority Soils Operable Unit in paragraph 31(F) of the Streamside Tailings consent decree (rural Butte).

The United States and AR have already successfully concluded their negotiations for the Rocker and Butte Mine Flooding sites. The Rocker Site consent decree was entered in November of 2000, and the Butte Mine Flooding Site consent decree was entered in August of 2002. The United States and AR have also completed negotiation of a consent decree resolving certain past response costs relating to the Anaconda Smelter Site, Butte Priority Soils Site, the Clark Fork River Operable Unit, and the Warm Springs Ponds Operable Units. That consent decree was entered by the Court on January 24, 2005.

E. The Streamside Tailings consent decree describes the baskets of operable units to be negotiated in the order described above, but it also provides the parties with flexibility to change this order. Consistent with this flexible framework, the parties commenced negotiations to next address the Milltown portion of the fourth basket of sites (defined herein as the “Milltown Site”), rather than the Anaconda Smelter Site. Concurrently with these discussions regarding AR’s alleged liability, the United States, the State, and the Tribes also commenced negotiations regarding the Milltown Site with NorthWestern Corporation (“NorthWestern”), which acquired the Milltown Project from Montana Power Company in 2002, and Clark Fork and Blackfoot LLC, a wholly owned subsidiary of NorthWestern, which represents that it is the current owner and operator of the hydroelectric dam at the Milltown Site (collectively defined below as “NorthWestern”) and currently holds the license issued by the Federal Energy Regulatory

Commission (“FERC”) for the Milltown Project. Collectively, the Parties agree to resolve in this Consent Decree:

1. the claims of the United States against AR and NorthWestern concerning liability for future response actions at the Milltown Site, including the design and implementation of the Remedial Action and subsequent Operation and Maintenance at the Milltown Site;
2. the past and future response cost claims of the United States against AR and NorthWestern relating to the Milltown Site, including: (a) past response costs directly associated with the Milltown Site; (b) past response costs paid by EPA that EPA has allocated to the Milltown Site from the Milltown/Clark Fork NPL Site-wide account and a general account covering all of the named sites within the Clark Fork River Basin; (c) future response costs, including allocated costs, to be paid by EPA (which include funds transferred to the State through a Cooperative Agreement) at the Milltown Site; (d) interim response costs incurred by EPA (which, again, include funds transferred to the State through a Cooperative Agreement) at the Milltown Site; and (e) certain past costs incurred by the United States Department of Justice in pursuing the claims filed in the Complaints in this action relating to the Milltown Site;
3. the past, interim and future response cost claims of the State against AR and NorthWestern relating to the Milltown Site;
4. claims of the United States, the State of Montana, and the Confederated Salish and Kootenai Tribes against NorthWestern for Natural Resource

Damages relating to the Milltown Site and Downstream Clark Fork River Riparian Area;

5. defenses and counterclaims that have been asserted or could be asserted by AR or NorthWestern relating to the Milltown Site and for NorthWestern the Downstream Clark Fork River Riparian Area.

The Consent Decree also addresses certain responsibilities of NorthWestern under the Federal Power Act pertaining to the surrender and decommissioning of the Milltown Project (including the removal of the Milltown Dam), as described in the attached SOW, and Paragraph 6 and Section VI (Performance of the Work and Hydroelectric Activities by the Settling Defendants) of this Consent Decree.

F. The United States is filing with this Consent Decree an amended complaint to name NorthWestern as a potentially responsible party for the Milltown Site under Section 107 of CERCLA, 42 U.S.C. § 9607.

The Milltown / Clark Fork River Superfund Site

G. The Milltown Dam was built between 1906 and 1908 at the confluence of the Blackfoot and Clark Fork Rivers, and became a trap for sediments transported downstream to it, including mining waste. In response to a release or a substantial threat of a release of hazardous substances at or from sediments located behind the Milltown Dam near Milltown, Montana, EPA commenced initial sampling at the Milltown Site in 1982. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA listed the Milltown Reservoir Site on the National Priorities List (NPL) by publication in the Federal Register on September 8, 1983, at 48 Fed.Reg. 40658. As originally listed the Milltown Reservoir Site included the contamination found in the reservoir bed behind Milltown Dam, and

resulting contamination of other media, such as groundwater near the reservoir bed and surface water at and below the reservoir.

H. EPA and the Montana Department of Environmental Quality (“DEQ”), through a cooperative agreement, completed an initial Remedial Investigation and Focused Feasibility Study (“RI/FS”) for the ground water portion of the Milltown Site and released the results in 1983 and 1984. Under the National Contingency Plan (“NCP”) regulations in effect at that time, EPA did not issue a Proposed Plan. On April 14, 1984, EPA, with the concurrence of DEQ, issued a Record of Decision (“ROD”) for an interim remedial measure which provided for an alternative water supply for residents within Milltown, Montana whose domestic water supplies were contaminated. On August 7, 1985, EPA, with the concurrence of DEQ, issued a supplement to the 1984 Record of Decision to provide for the replacement of water lines and other water delivery systems for the same residents. This action is known as the Water Supply Operable Unit (also known as “OU#1”) and was implemented by EPA and DEQ.

I. In February of 1990, after conducting other data collection and liability searches, EPA and DEQ initiated a RI/FS for the Milltown Site pursuant to 40 C.F.R. § 300.430. These activities were performed primarily by AR in accordance with an Administrative Order on Consent, Docket No. CERCLA VIII-90-07, and were completed in November of 2002. The RI/FS examines alternatives for a final remedial action at the Milltown Reservoir Sediments Operable Unit (known as “OU #2”). Both the Water Supply Operable Unit and the Milltown Reservoir Sediments Operable Unit are encompassed in the Milltown Site. This Consent Decree addresses, among other things,

past response costs and future work and related covenants and reservations for the Milltown Site.

J. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the Proposed Plan for remedial action for the Milltown Site on April 5, 2003, in a major local newspaper of general circulation. DEQ, the Department of the Interior, and the Tribes concurred in the Proposed Plan. EPA provided an opportunity for written and oral comments from the public on the Proposed Plan for remedial action. In response to public comments, EPA developed a Revised Proposed Plan which changed the scope of the original Proposed Plan by altering the proposed disposal site for excavated sediments and altering the excavation techniques and timing of the removal of the Milltown Dam. EPA published notice of the Revised Proposed Plan for remedial action for the Milltown Site in May of 2004 in a major local newspaper of general circulation. DEQ, the Department of the Interior, and the Tribes concurred in the Revised Proposed Plan. A copy of the transcript of public meetings on the Proposed Plans is available to the public as part of the administrative record upon which the EPA Regional Administrator or his delegate based the selection of the response action. The ROD was issued on December 20, 2004, and EPA published notice of the ROD in a major local newspaper of general circulation on the same date. In the ROD, EPA, in consultation with the State, selected a remedy for the Milltown Site in accordance with CERCLA and in a manner not inconsistent with the NCP.

K. The ROD embodies EPA's decision for the response actions to be implemented at the Milltown Site, and is attached as Appendix A. DEQ had a reasonable

opportunity to review and comment on the ROD and gave its concurrence thereto on behalf of the State of Montana.

L. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected in the ROD, the response actions required to date of the Settling Defendants, and the Work and Hydroelectric Activities to be performed by the Settling Defendants shall constitute response actions taken or ordered by the President.

Notice

M. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified DEQ in January of 2002 of negotiations with AR and NorthWestern regarding the Milltown Site, and EPA provided DEQ, on behalf of the State, with an opportunity to participate in such negotiations and to be a party to this Consent Decree. DEQ has since participated in these negotiations, and the State is a signatory to this Consent Decree.

N. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the Department of the Interior (“DOI”), the State, and the Tribes in February of 2002 of negotiations with potentially responsible parties regarding the release of Hazardous Substances relating to the Milltown Site that may have resulted in injury to natural resources under Federal, State or Tribal trusteeship. DOI, the State, and the Tribes have since participated in these negotiations and are signatories to this Consent Decree.

O. For purposes of Section 122(j)(2) of CERCLA, 42 U.S.C. § 9622(j)(2), the actions to be conducted by the State pursuant to Paragraphs 29 and 32 of this Consent Decree and the payment to be made by NorthWestern pursuant to Section XVIII

(NorthWestern's Compensation for Restoration Activities at the Milltown Site) of this Consent Decree constitute appropriate actions necessary to protect and restore any natural resources injured by the alleged releases and threatened release of Hazardous Substances relating to the Milltown Site and the Downstream Clark Fork River Riparian Area for which NorthWestern is alleged to be liable.

No Admission of Liability

P. By entering into this Consent Decree, AR, NorthWestern, the United States, the State, and the Tribes (collectively, the "Parties") do not admit to any liability arising out of the transactions or occurrences either that were alleged, or could have been alleged, in the complaint, amended complaints or counterclaims filed in this action. In addition, neither AR nor NorthWestern (the "Settling Defendants") admit or acknowledge that any alleged release or threatened release of Hazardous Substances at or from the Milltown Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

The Proposed Settlement

Q. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that implementation of this Consent Decree will expedite the cleanup of the Milltown Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, in the public interest, and consistent with the goals of CERCLA.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Parties. Solely for the purposes of this Consent Decree and the underlying complaints, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States, the State, the Tribes and upon each of the Settling Defendants, as defined below, and their successors and assigns. Any change in ownership or corporate status of either of the Settling Defendants, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter that Settling Defendant's responsibilities under this Consent Decree.

3. Each Settling Defendant shall provide a copy of this Consent Decree to each contractor hired by that Settling Defendant to perform the Work or Hydroelectric Activities, as defined below, or any portion of the Work or Hydroelectric Activities, required by this Consent Decree and to each person representing that Settling Defendant with respect to the Milltown Site or the Work or Hydroelectric Activities. Each Settling Defendant shall also condition all contracts entered into hereunder upon performance of the Work or Hydroelectric Activities in conformity with the terms of this Consent Decree. The Settling Defendants or their respective contractors shall provide

written notice of the Consent Decree to all subcontractors hired by that Settling Defendant or its contractor to perform any portion of the Work or Hydroelectric Activities required by this Consent Decree. The Settling Defendants shall nonetheless be responsible for ensuring that their respective contractors and subcontractors perform the Work or Hydroelectric Activities contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendant with which it has contracted, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“ARAR” shall mean an applicable or relevant and appropriate requirement, criterion, standard, or limitation of federal or state law within the meaning of Section 121(d)(2) of CERCLA, 42 U.S.C. § 9621(d)(2), identified in the ROD.

“AR” shall mean the Defendant, Atlantic Richfield Company, its divisions and subsidiaries, including ARCO Environmental Remediation L.L.C. (AERL), and any predecessors in interest. It shall also mean any successors in interest to the extent that any such successor’s liability at the Milltown Site derives from the

liability of the Atlantic Richfield Company, its divisions and subsidiaries, including AERL, and any predecessors in interest.

“Biological Resources” shall mean those natural resources referred to in section 101(16) of CERCLA as fish and wildlife and other biota. “Fish and wildlife” include marine and freshwater aquatic and terrestrial species; game, nongame, and commercial species; and threatened, endangered, and State sensitive species. “Other biota” encompass shellfish, terrestrial and aquatic plants, and other living organisms not otherwise listed in this definition.

“Category of Injury” shall mean changes in the physical or chemical quality described for geologic resources at 43 C.F.R. § 11.62(e) (2005) and the biological responses described at 43 C.F.R. § 11.62(f) (2005) for Biological Resources.

“CECRA” shall mean the Montana Comprehensive Environmental Cleanup and Responsibility Act, as amended, §§ 75-10-701 et seq., MCA.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

“Certification of Completion of the Remedial Action” shall mean EPA’s certification, in consultation with the State, pursuant to Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), that the Remedial Action and any modifications thereto have been completed at the Milltown Site in accordance with the requirements of CERCLA, the NCP and the Record of Decision and any modifications thereto, including certification that Performance Standards have been attained.

“CFRSSI LAP” shall mean the Clark Fork River Superfund Site Investigations Laboratory Analytical Protocol (AR/PTI, April 1992), as subsequently amended as of the Effective Date.

“CFRSSI QAPP” shall mean the Clark Fork River Superfund Site Investigations Quality Assurance Project Plan (AR/PTI, May 1992), as subsequently amended as of the Effective Date.

“Clark Fork River Basin” shall mean the main stem of the Clark Fork River to the Idaho border and all areas within Montana that naturally drain into the Clark Fork River or its tributaries.

“Consent Decree” shall mean this Consent Decree and all appendices attached hereto (listed in Section XXXII). In the event of conflict between this Consent Decree and any Appendix, this Consent Decree shall control.

“Cost Documentation” shall mean a cost package for EPA’s costs which consists of applicable: (1) payroll information, consisting of the SCORPIO\$ report or an equivalent cost summary, and any time sheets that exist, if requested by AR; (2) indirect cost information, consisting of an overall and an employee-by-employee SCORPIO\$ report or equivalent cost summary; (3) travel information, consisting of a SCORPIO\$ report or an equivalent cost summary, travel authorizations, and travel vouchers or their equivalent that exist; (4) EPA contractor (including Contract Laboratory Program contracts) information, consisting of site and/or Operable Unit (as this term is defined below) specific vouchers, any existing progress reports, Treasury schedules, tasking documents for contractors not required to provide progress reports, Annual Allocation

Reports and the SCORPIO\$ report or an equivalent cost summary; (5) EPA Interagency Agreements (“IAGs”) information, consisting of SCORPIO\$ reports or an equivalent cost summary, IAGs and any amendments thereto, invoices or the equivalent, proof of payment documents, and any existing progress reports or their equivalent; (6) EPA Cooperative Agreements information, consisting of SCORPIO\$ reports or an equivalent cost summary, cooperative agreements and any amendments thereto, drawdown documentation, State quarterly progress reports; (7) prejudgment interest information, consisting of an interest cost report showing methodologies and calculations; and (8) Operable Unit allocated cost information, consisting of a narrative of allocation methodologies and spreadsheets implementing such methodologies. Because the State has incurred costs and may continue to incur costs under cooperative agreements with EPA, which relate to or are allocated to the Milltown Site, Cost Documentation for these expenditures, if requested by AR, shall include (a) State contractor invoices, (b) any existing contractor progress reports, and (c) form 661 SBAS information (if not included in the State quarterly progress reports) or its equivalent; EPA may also provide the information described in the foregoing list of “Cost Documentation” in the form of printouts from electronic databases or systems that have been or may be developed by EPA in the future. “Cost Documentation” for response costs incurred by the Department of Justice shall consist of a cost summary of (a) direct labor costs, (b) other direct costs (invoices, travel, etc.), and (c) indirect costs, and upon request by the Settling Defendants, shall also consist

of the supporting reports for each of these three types of Department of Justice costs.

“Day” shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or State of Montana or Federal holiday, the period shall run until the close of business of the next working day.

“DEQ” shall mean the Montana Department of Environmental Quality and any predecessor or successor departments or agencies of the State.

“DOI” shall mean the United States Department of the Interior and any successor departments or agencies.

“DOJ” shall mean the United States Department of Justice and any successor departments or agencies.

“Downstream Clark Fork River Riparian Area” shall mean the main stem of the Clark Fork River between the Idaho/Montana border and the confluence of the Clark Fork and Blackfoot Rivers, and its riparian zone.

“Effective Date” shall mean 60 days from the date that this District Court enters the Consent Decree, unless an appeal of the entry and judgment is filed during the 60-day period; if an appeal is taken, the Effective Date shall mean the date on which the District Court’s judgment is affirmed.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies.

“EPA Site Record” shall mean the files presently maintained in EPA’s Montana Office records center for a particular Operable Unit of the Milltown

Reservoir/Clark Fork River NPL Site that are neither privileged nor confidential and that are not contained within the administrative record for that Operable Unit.

“Envirocon” shall mean Envirocon, Inc., its officers and employees.

“ESD” shall mean an Explanation of Significant Differences, issued by EPA pursuant to Section 117(c) of CERCLA, 42 U.S.C. § 9617(c) and 40 C.F.R. § 435(c)(2)(i).

“Federal Action” shall mean *United States v. Atlantic Richfield Company*, No. CV-89-039-SEH (D. Mont.).

“FERC” shall mean the Federal Energy Regulatory Commission, and any successor departments or agencies.

“Federal Milltown Future Response Costs” shall mean all response costs that the United States incurs after the Effective Date relating to the Milltown Site, including, but not limited to direct and indirect costs that the United States pays, and the State pays through funding from the United States pursuant to a cooperative agreement, in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs paid pursuant to Sections VIII (Remedy Review), X (Access and Institutional Controls), XVI (Emergency Response), and Paragraph 152 (Work Takeover) of Section XXIII (Covenants and Reservations by the United States) of this Consent Decree; and including allocable Clark Fork General and Milltown/Clark Fork River Site-wide costs. Federal Milltown Future Response Costs shall also include

all Federal Milltown Interim Response Costs and Interest on the Milltown Site Past Response Costs that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from July 31, 2002, to the Effective Date of this Consent Decree. Federal Milltown Future Response Costs also includes all interim and future costs incurred by the Department of Justice pertaining to the Milltown Site.

Section XVII (Reimbursement of Response Costs) of this Consent Decree requires Settling Defendants to reimburse EPA for all of its Federal Future Response Costs relating to the Milltown Site, including Federal Milltown Future Response Costs paid by EPA to the State under cooperative agreement. Federal Milltown Future Response Costs shall not include Oversight Costs, as that term is defined in this Consent Decree, paid by EPA either directly or through a cooperative agreement with the State. Federal Milltown Future Response Costs shall also not include: (a) direct or indirect costs of implementation of Restoration or Hydroelectric Activities; or (b) costs incurred or paid by FERC or the US Fish and Wildlife Service regarding the Milltown Project.

“Federal Milltown Interim Response Costs” shall mean all costs of response, including direct and indirect costs, as well as costs allocated from the Milltown/Clark Fork site-wide account and the Clark Fork General account, that are (a) paid at or in connection with the Milltown Site by the United States after July 31, 2002 through December 31, 2004, or (b) incurred at or in connection with the Milltown Site prior to January 1, 2005, but paid after that date.

“Federal Milltown Past Response Costs” shall mean all response costs, including, but not limited to, direct and indirect costs, that EPA paid at or in

connection with the Milltown Site through July 31, 2002, including, without limitation, oversight costs, allocable Clark Fork General and Milltown/Clark Fork River Site-wide costs; Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date; and costs incurred by the State paid through funding from the United States pursuant to a cooperative agreement.

“Grading Plan” shall mean the plan and specifications for topographical configuration of the Project Area as specified in the SOW for: grading; actions to implement the approved channel cut; backfill and topsoil quality, quantities, and placement; floodplain and upland area surface elevations (including the transition from the floodplain to the upland areas); and wetland location and depth. A preliminary Grading Plan is attached as Figure 28 of the SOW. “Grading Plan,” as defined herein, includes any subsequent modification proposed, in accordance with this Consent Decree and the SOW, and its attachments, for discussion among the State, EPA, DOI, the Tribes, AR and NorthWestern that is finally adopted by the State. If AR disagrees with any final modification to the Grading Plan made by the State, AR may invoke the Dispute Resolution provisions in Paragraphs 129 through 134 of Section XXI (Dispute Resolution) of this Consent Decree.

“Hazardous Substance” shall mean a hazardous substance within the meaning of Section 101(14) of CERCLA or a hazardous or deleterious substance within the meaning of Section 75-10-701(8), MCA.

“Hydroelectric Activities” shall mean those activities undertaken or to be undertaken by NorthWestern pursuant to Paragraphs 17 through 23 and

Paragraphs 25 through 26 of Section VI (Performance of the Work and Hydroelectric Activities by the Settling Defendants) of this Consent Decree.

“Interest” on federal claims shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. That rate of interest is subject to change on October 1 of each year. “Interest” on State claims shall mean interest at the rate specified in Section 75-10-722, MCA, as amended.

“Milltown Dam” shall mean the hydroelectric generating dam located near Milltown, Montana at the confluence of the Clark Fork River and the Blackfoot River.

“Milltown Mitigation” shall mean the costs of and actions for mitigating the effects of implementation of the Work on or related to two State-owned bridges located at the Milltown Site that support Interstate 90, the portions of Interstate 90 located at the Milltown Site, and the State-owned bridge located at the Milltown Site supporting Montana Highway 200.

“Milltown Project” means the Milltown Dam and the associated facilities and appurtenant real and personal property licensed by FERC under license No. 2543, and located near Milltown, Montana at the confluence of the Clark Fork River and the Blackfoot River.

“Milltown Site” or “Site” shall mean: (a) the area of sediments, including mining, milling, and smelting waste, extending from the Milltown Dam upstream

to the high pool reservoir level (elevation 3265.5, NAVD 88) and including the five Sediment Accumulation Areas identified in the ROD, and sediments beneath I-90; (b) the associated contaminated aquifer emanating from the contaminated sediment area upstream and downstream from the Milltown Dam; (c) the locations of the sediment and construction debris disposal repositories at or near the Milltown Dam, past and future, identified in the ROD or the SOW or Remedial Design documents; (d) the Milltown Project; (e) the area of sediments, including mining, milling and smelting waste, extending from the Milltown Dam downstream to the USGS Gaging Station Number 12340500; (f) the portion of Interstate 90 along the Milltown Reservoir, and four bridges crossing the Blackfoot River upstream of Milltown Dam, including the Missoula County owned pedestrian footbridge, two state-owned bridges supporting Interstate 90, and the state-owned bridge supporting Montana Highway 200; and (g) the area encompassed by and infrastructure improvements made in the installation of water lines and other water delivery system for residents within Milltown, Montana, as part of the action known as the Water Supply Operable Unit. A map showing the approximate boundaries of the Milltown Site is attached to this Consent Decree as Appendix B. The Parties recognize that the Milltown Site lies at the downstream extent of the four Clark Fork River Basin NPL Sites. The “Milltown Site” shall not include, however, and this Consent Decree does not address or resolve the Settling Defendants’ liability for, any future release of Waste Materials from upstream locations that recontaminate the Site from any of the following categories: (1) releases of Waste Materials resulting from AR’s

failure to comply fully and timely with lawful cleanup requirements of upstream Operable Units as required by the State or the United States; (2) releases of Waste Materials resulting from the failure of upstream retaining walls, settling ponds, dams, or other upstream control measures; or (3) any upstream releases of Waste Materials which come to be located at the Site other than anticipated continuation of existing migration. Notwithstanding the previous sentence, NorthWestern shall not be liable for re-contamination of the Site that results from upstream releases of Waste Material resulting from categories (1) - (3) above unless NorthWestern is otherwise liable for such releases.

“Natural Resource Damages” shall mean damages or other relief for injury to, destruction of, or loss of, natural resources including the cost of assessing such injury, destruction, or loss resulting from a release of Hazardous Substances, and including interest and litigation costs. Notwithstanding the foregoing, Natural Resource Damages does not include lawful response actions, or response costs incurred, under CERCLA or CECRA.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“NPL” shall mean the National Priorities List set forth at 40 C.F.R. Part 300, Appendix B.

“NorthWestern” shall mean the Defendant, NorthWestern Corporation, its divisions and subsidiaries, including its wholly owned subsidiary Clark Fork and

Blackfoot, LLC, and for each, their predecessors in interest at the Milltown Site and Project, including Montana Power, LLC. It shall also mean any successors in interest to any of these entities (including bankruptcy successors) to the extent that any such successor's liability at the Milltown Site derives from the liability of these entities.

“Operable Unit” shall mean an area, geographic or otherwise, for which there is a response action, whether removal or remedial, that is subject to a separate administrative record and response selection decision.

“Operation and Maintenance” or “O & M” shall mean all activities required to maintain the effectiveness of Remedial Action as required under an approved Operation and Maintenance Plan.

“Oversight Costs” shall mean, for purposes of this Consent Decree only, those response costs incurred by EPA or the State (either as the lead agency or support agency) after December 31, 2004 in monitoring and supervising Settling Defendants' performance of the Work and Hydroelectric Activities pursuant to the requirements of this Consent Decree, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Consent Decree, as well as costs incurred in overseeing implementation of the Work and Hydroelectric Activities, and also including allocable Clark Fork General and Milltown/Clark Fork River Site-wide costs. However, Oversight Costs do not include:

- (1) the costs of direct action by EPA and/or the State to respond to a release, threat of release, or danger at the Milltown Site;

- (2) the costs of litigation or other enforcement activities relating to the Milltown Site;
- (3) the cost of enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XXI (Dispute Resolution);
- (4) the costs of determining the need for, or taking direct response actions by, EPA and/or the State pursuant to Sections VIII (Remedy Review), XVI (Emergency Response), and Sections XXIII (Covenants and Reservations by the United States) and XXIV (Covenants and Reservations by the State) of this Consent Decree, except that the following costs shall be included in the definition of Oversight Costs:
  - (a) the costs incurred by EPA and the State in conducting the five-year reviews set forth in Section VIII (Remedy Review);
  - (b) the costs incurred by EPA and the State in overseeing additional response actions that may be required pursuant to the five-year reviews;
  - (c) the costs incurred by EPA and the State in overseeing any additional response actions pursuant to Paragraph 26 of Section VI (Performance of the Work by Settling Defendants) and Paragraph 156(h) of Section XXIII (Covenants and Reservations by the United States) and

Paragraph 165(h) of Section XXIV (Covenants and Reservations by the State); and

- (d) the costs incurred by EPA and the State in overseeing Restoration and integration of Restoration and Hydroelectric Activities with Remedial Action (including Operation and Maintenance).

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States, the State, the Tribes, AR, and NorthWestern.

“Performance Standards” shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action contained in the ROD, including ARARs, except for Restoration Performance Standards. The SOW, which is attached to this Consent Decree as Appendix C, contains an explanation by the Settling Defendants of the manner in which they expect to meet these Performance Standards.

“Project Area” shall mean the area within the Milltown Site that is between the Milltown Dam and Duck Bridge as shown on Figure 1 of the SOW.

“RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

“Record of Decision” or “ROD” shall mean the Milltown Reservoir Sediments Operable Unit Record of Decision signed on December 20, 2004 by the Regional Administrator, EPA Region 8, and concurred in by DEQ on behalf

of the State, and all attachments, modifications, or amendments (including ESDs) thereto. The ROD also describes and confirms the interim remedial measure for the Water Supply Operable Unit (also known as OU#1) selected by EPA with the concurrence of DEQ, and requires its continued implementation until ground water Performance Standards at the Milltown Site are met for at least two years. The ROD is attached to this Consent Decree as Appendix A.

“Remaining Sites” shall mean the following areas left to be settled in the Clark Fork River Basin under the April 19, 1999, Streamside Tailings Consent Decree settlement framework: the Anaconda Smelter Site, the Warm Spring Ponds Operable Units including the Mill Willow Bypass; the Clark Fork River Operable Unit, and the Butte Priority Soils Site. For purposes of this Consent Decree only, the “Remaining Sites” shall not include the Westside Site (rural Butte) (formerly known as the Non-Priority Soils Operable Unit), the Butte Active Mining Area Operable Unit or the Milltown Reservoir Operable Unit. The “Remaining Sites” shall also exclude the following sites within the Clark Fork River Basin, all of which were addressed under prior Consent Decrees filed with this Court: (a) the Montana Pole NPL Site, (b) the Streamside Tailings Operable Unit of the Silver Bow Creek / Butte Area NPL Site, (c) the Rocker Timber Framing and Treating Operable Unit of the Silver Bow Creek / Butte Area NPL Site, and (d) the Mine Flooding Operable Unit of the Silver Bow Creek / Butte Area NPL Site.

“Remedial Action” shall mean those activities, except for Operation and Maintenance, undertaken or to be undertaken by Settling Defendants to

implement the Record of Decision pursuant to the SOW, the final Remedial Design and Remedial Action Work Plans, and other plans approved pursuant to the SOW by EPA in consultation with the State. For purposes of this Consent Decree, Remedial Action shall include the removal of the Milltown Dam powerhouse, right abutment, and dividing block, and shall also include implementation of the Grading Plan; but shall not include: (a) Hydroelectric Activities; (b) Restoration; and (c) additional response actions required because Restoration fails to meet Restoration Performance Standards.

“Remedial Action Work Plan” shall mean the document developed pursuant to the SOW and Paragraph 16 of this Consent Decree and approved by EPA in consultation with the State, and any amendments thereto.

“Remedial Design” shall mean those activities to be undertaken by the Settling Defendants to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan described in the SOW or otherwise required under this Consent Decree.

“Remedial Design Work Plan” shall mean the document developed pursuant to the SOW and Paragraph 15 of this Consent Decree and approved by EPA in consultation with the State, and any amendments thereto.

“Restoration” shall mean those activities, including associated operation and maintenance, undertaken or to be undertaken by the State pursuant to the Restoration Plan. For purposes of this Consent Decree, Restoration shall not include removal of the Milltown Dam powerhouse, right abutment, and dividing block as described in the SOW. The Settling Defendants are responsible for

removal of such structures and implementation of the Grading Plan as part of the Remedial Action. Restoration also does not include the activities set forth in the Restoration Plan for Blackfoot River Reach 2 and Clark Fork River Reach 4.

“Restoration Performance Standards” shall mean the list of Restoration Performance Standards for Restoration that is identified as such in Section 12 of the ROD and Attachment 1 to the SOW.

“Restoration Plan” shall mean the document prepared by the State, in consultation with the other Trustees, and any amendments thereto, entitled the “Draft Conceptual Restoration Plan for the Clark Fork and Blackfoot River near the Milltown Dam.” The Restoration Plan and the first amendment to the Restoration Plan, excluding appendices, are attached to this Consent Decree as Appendix D.

“Section” shall mean a portion of this Consent Decree identified by a roman numeral.

“Settling Defendants” shall mean AR and NorthWestern as defined herein.

“Settling Federal Agencies” shall mean the United States Department of Justice, the United States Department of the Interior, the United States Department of Treasury, the United States Department of Commerce, the United States Department of Agriculture, the United States Department of Agriculture Forest Service, the General Service Administration, the National Aeronautics and Space Administration, the United States Department of Defense, the United States Environmental Protection Agency, the United States Department of Health and Human Services, the United States Public Health Service, the Atomic Energy

Commission, the Defense Minerals Exploration Administration, the Defense Minerals Administration, the Office of Minerals Exploration, and the Defense Minerals Procurement Agencies, any agencies, bureaus, or services of such entities, and any predecessor and successor departments, agencies, bureaus, or services of such entities.

“State” shall mean the State of Montana, including all of its departments, agencies, and instrumentalities.

“State Action” shall mean *State of Montana v. Atlantic Richfield Company*, No. CV-83-317-HLN-SEH (D. Mont.).

“State Milltown Future Response Costs” shall mean all response costs relating to Remedial Design and Remedial Action for the Milltown Site, including, but not limited to, direct and indirect costs, that the State pays after the Effective Date in reviewing or developing plans, reports and other items for Remedial Design and Remedial Action pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing the Remedial Design and Remedial Action required by this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, and the costs incurred pursuant to Sections VIII (Remedy Review), X (Access and Institutional Controls), XVI (Emergency Response), and Paragraph 152 (Work Takeover) of this Consent Decree. Such costs are State Milltown Future Response Costs if they are not reimbursed by EPA via cooperative agreement expenditures. Pursuant to the terms of the EPA-DEQ Milltown Site Superfund Memorandum of Agreement, EPA shall endeavor to provide adequate federal

funding to the State for all these activities. Section XVII (Reimbursement of Response Costs) of this Consent Decree requires Settling Defendants to reimburse the State for State Future Response Costs relating to the Milltown Site. State Milltown Future Response Costs shall not include Oversight Costs, as that term is defined in this Consent Decree, or direct or indirect costs of oversight or implementation of Restoration or Hydroelectric Activities.

“State Site Record” shall mean the files for a site that are presently maintained in the records center of a Montana state agency and that are neither privileged nor confidential.

“Statement of Work” or “SOW” shall mean the final statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance, and all attachments thereto, and any modifications made in accordance with this Consent Decree. The SOW is attached to this Consent Decree as Appendix C.

“Supervising Contractor” shall mean the principal contractors or Settling Defendant employees retained or utilized by Settling Defendants and approved by EPA, in consultation with the State, to supervise and direct the implementation of the Work or Hydroelectric Activities under this Consent Decree.

“Tribes” shall mean the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

“Trustees” shall mean the State, the Tribes, and the United States Department of the Interior.

“United States” shall mean the United States of America, including all of its departments, agencies, and instrumentalities.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous or deleterious substance” under Section 75-10-701(8), MCA.

“Work” shall mean all activities the Settling Defendants are required to perform under this Consent Decree, except for Hydroelectric Activities and those activities required by Section XXIX (Retention of Records). Work includes, without limitation, Remedial Design, Remedial Action and Operation and Maintenance. Work does not include Hydroelectric Activities and Restoration.

## V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are:

- a. to protect public health and welfare and the environment at the Milltown Site through the design and implementation of response actions selected in the ROD at the Milltown Site as provided in this Consent Decree;
- b. to reimburse the United States and the State for a portion of their past costs, and for their future response costs at the Milltown Site;
- c. to resolve the damage claims of the United States, the State, and the Tribes against NorthWestern for alleged natural resource injuries resulting from

releases of Hazardous Substances relating to the Milltown Site and Downstream Clark Fork River Riparian Area;

d. to resolve the claims of the United States, the State, and the Tribes against the Settling Defendants as provided in this Consent Decree;

e. to resolve the claims and defenses of the Settling Defendants which have been or could have been asserted against the United States, the State, and the Tribes, with regard to the Milltown Site as provided in this Consent Decree;

f. to provide for the removal of the Milltown Dam and related structures (the powerhouse, shop, dividing block, spillway, radial gate, forebay and portions of the right abutment concrete gravity wall), as well as the removal by NorthWestern of transmission towers and electrical infrastructure prior to the removal of the Milltown Dam and related structures; and

g. to provide for the implementation of certain restoration actions by the State, in consultation with the federal and tribal Trustees, through which the Trustees seek to restore the river and riparian areas at the Milltown Site to a naturally flowing and self-maintaining system through implementation of the Restoration Plan.

6. Commitments by the Settling Defendants and the Settling Federal Agencies.

a. The Settling Defendants shall finance and perform the Work and NorthWestern shall finance and perform the Hydroelectric Activities at the Milltown Site in accordance with this Consent Decree, the ROD, the SOW, and all other work plans, plans, standards, specifications, and schedules set forth herein or developed

by the Settling Defendants and approved by EPA, in consultation with the State, pursuant to this Consent Decree.

b. The Settling Defendants shall reimburse the United States and the State for Federal Milltown Past Response Costs, Oversight Costs, Federal Milltown Future Response Costs, and State Milltown Future Response Costs, as provided in this Consent Decree.

c. The Settling Federal Agencies shall reimburse the Clark Fork River Basin Special Account within the EPA Hazardous Substance Superfund for Federal Milltown Past Response Costs, Oversight Costs, and Federal Milltown Future Response Costs, as provided in this Consent Decree.

d. NorthWestern shall (i) own, operate and maintain the Milltown Project in accordance with the requirements of this Consent Decree and the Federal Power Act, (ii) finance and perform the Hydroelectric Activities in accordance with this Consent Decree, and (iii) compensate the United States, the State, and the Tribes for Natural Resource Damages allegedly resulting from releases of Hazardous Substances relating to the Milltown Site and Downstream Clark Fork River Riparian Area in accordance with this Consent Decree.

e. The obligations of the Settling Defendants under this Consent Decree are joint and several, except for those Consent Decree obligations that specifically identify NorthWestern as the sole responsible party. Under the terms of this Consent Decree, NorthWestern shall be the “sole responsible party” for obligations, including any related stipulated penalties, for Hydroelectric Activities and for the compensation for Natural Resource Damages required in Section XVIII (NorthWestern’s

Compensation for Restoration Activities at the Milltown Site) of this Consent Decree. Accordingly, any use of the term “Settling Defendants” with respect to obligations for Hydroelectric Activities, and for Natural Resource Damage compensation required by Section XVIII (NorthWestern’s Compensation for Restoration Activities at the Milltown Site) of this Consent Decree, including any stipulated penalties assessed with respect to those obligations, refers solely to NorthWestern. In the event of the insolvency or other failure of one Settling Defendant to implement a joint obligation, the other Settling Defendant shall complete all such requirements jointly applicable to the Settling Defendants. Implementation of Restoration shall not relieve the Settling Defendants of any Work obligation or the HydroElectric Activities obligation(s) or of any liability, except as specifically set forth in this Consent Decree.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. For Work undertaken by Settling Defendants pursuant to this Consent Decree, Settling Defendants must also comply with all applicable or relevant and appropriate requirements (“ARARs”) of all federal and state environmental laws as set forth in the ROD, and as further described in Attachment 1 of the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA, Section 300.400(e) of the NCP, and 75-10-721(6) MCA, no permit shall be required for any portion of the Remedial Action and Operation and Maintenance conducted entirely

on-site (i.e., within the Clark Fork Basin Superfund Sites). Where any portion of the Remedial Action and Operation and Maintenance that is not on-site requires a federal or state permit or approval, the Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendants may seek relief under the provisions of Section XX (Force Majeure) of this Consent Decree for any delay in the performance of the Work or the Hydroelectric Activities resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work or the Hydroelectric Activities.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title. Not more than 180 days after the Effective Date, NorthWestern shall submit to EPA and the State, for review and approval, a notice to be filed with the Recorders Office for Missoula County, State of Montana. Such notice shall indicate: (a) that EPA issued a Record of Decision for the Site on December 20, 2004; (b) that the State, in consultation with other Trustees, issued a Restoration Plan for the Milltown Site; and (c) that NorthWestern and AR have entered into this Consent Decree which requires implementation of Work and Hydroelectric Activities associated with the selected remedy at the Milltown Site. NorthWestern shall file the notice not more than 20 days after approval by EPA and the State, with a copy of the recorded notice provided to EPA and the State not more than 10 days after the recording of such notice.

10. At least twenty-one (21) days prior to NorthWestern's conveyance of its interest in any property located within the Milltown Site, including, but not limited to, fee interests, leasehold interests, mortgage interests, or license interests, NorthWestern shall give the grantee written notice of: (i) this Consent Decree; (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Milltown Site (hereinafter referred to as "access easements") pursuant to Section X (Access and Institutional Controls); and/or (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "deed restrictions") pursuant to Section X (Access and Institutional Controls). At least twenty-one (21) days prior to such conveyance, NorthWestern shall also give written notice of the proposed conveyance to EPA, the State, and the Tribes, including the name and address of the grantee, and the date on which notice of this Consent Decree, access easements, and/or restrictive easements are given to the grantee. NorthWestern shall not make any conveyance that is inconsistent with its obligations under Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site) of this Consent Decree.

11. In the event of any such conveyance, NorthWestern shall continue to meet its obligations under this Consent Decree, including, but not limited to, its actions and obligations to perform the Work and the Hydroelectric Activities, to make payments, and to provide other compensation under this Consent Decree, and the obligation to provide access or enforce institutional controls pursuant to Section X (Access and Institutional Controls) of this Consent Decree. Unless the United States or the State is the party to whom the conveyance is given, NorthWestern shall condition any conveyance on

the transferor's acceptance of the obligations of NorthWestern with respect to the provision of access under Section X (Access and Institutional Controls) and the implementation of institutional controls under this Section, such that these obligations remain binding on any and all persons who subsequently acquire any such interest or portion thereof. In no event shall the conveyance release or otherwise affect the obligation of any Settling Defendant to comply with the provisions of this Consent Decree, absent the prior written consent of EPA, DOI, the State, and the Tribes.

12. Recognition of Settlement Between AR and NorthWestern. On September 10, 2003, AR and NorthWestern entered into a settlement agreement, which was later amended by the parties thereto on December 29, 2003. The settlement agreement and a related stipulation, which amended the settlement agreement in several respects, were approved by the United States Bankruptcy Court for the District of Delaware on July 13, 2004. Nothing in this Consent Decree is intended to alter in any way the obligations of AR or NorthWestern to each other under the settlement agreement, as modified by the stipulation and approved by the Bankruptcy Court.

#### VI. PERFORMANCE OF THE WORK AND HYDROELECTRIC ACTIVITIES BY THE SETTLING DEFENDANTS

13. Selection of Supervising Contractors.

a. All aspects of the Work and Hydroelectric Activities to be performed by the Settling Defendants pursuant to Sections VI (Performance of the Work and Hydroelectric Activities by the Settling Defendants), VIII (Remedy Review), IX (Quality Assurance, Sampling and Data Analysis), and XVI (Emergency Response) of this Consent Decree shall be performed under the direction and supervision of the

Supervising Contractors. EPA, in consultation with the State, DOI, and the Tribes, approves Envirocon as the Supervising Contractor for implementation of the SOW and EPA, in consultation with the State, DOI, and the Tribes, approves ELM Consulting, LLC as the Supervising Contractor for the implementation of the Hydroelectric Activities. With respect to any contractor or Settling Defendant employee proposed to be a replacement Supervising Contractor, the Settling Defendants shall notify EPA, DOI, the State, and the Tribes in writing of the name, title, and qualifications of each contractor or Settling Defendant employee proposed as one of the Supervising Contractors and obtain authorization to proceed from EPA, after reasonable opportunity for review and comment by DOI, the State, and the Tribes before the new Supervising Contractor performs, directs, or supervises any Work or Hydroelectric Activities under this Consent Decree. Settling Defendants shall demonstrate that the proposed contractor or Settling Defendant employee proposed as a replacement Supervising Contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify the Settling Defendants in writing. Within thirty (30) days of receipt of EPA's disapproval of the contractor previously proposed, the Settling Defendants shall

submit to EPA and the State a list of contractors or Settling Defendant employees, including the qualifications of each contractor or Settling Defendant employee, that would be acceptable to them. EPA, after consulting with the State, DOI, and the Tribes, will provide written notice of the names of any contractor(s) and Settling Defendant employee(s) that it disapproves and an authorization to proceed with respect to any of the other contractors or Settling Defendants' employees. Settling Defendants may select any contractor or Settling Defendant employee from that list that is not disapproved and shall notify EPA and the State of the name of the contractor or Settling Defendant employee selected within twenty-one (21) days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree, Settling Defendants may seek relief under the provisions of Section XX (Force Majeure).

d. Envirocon has been retained by AR to perform the Remedial Action as described in this Consent Decree, excluding the activities that are Hydroelectric Activities. Notwithstanding AR's retention of Envirocon, the Settling Defendants are obligated to implement the Work as provided in this Consent Decree and such obligations are joint and several. Those obligations to perform Hydroelectric Activities are NorthWestern's several obligations.

14. Statement of Work. Attached to this Consent Decree as Appendix C is the Statement of Work ("SOW"). The SOW describes the various plans, activities, and requirements that must be accomplished for implementation of the

Remedial Action and Operation and Maintenance requirements of the ROD undertaken or to be undertaken by Settling Defendants unless otherwise provided in this Consent Decree or the SOW. The Grading Plan is part of the SOW and reflects certain provisions of the Restoration Plan.

15. Remedial Design.

a. Settling Defendants will submit to EPA and the State a “Remedial Design Work Plan” for the design of the Remedial Action at the Site. The Remedial Design Work Plan shall provide for the phased design of the elements of the remedy set forth in the ROD, including the Grading Plan, which are to be implemented by the Settling Defendants, and the removal of the Milltown Dam divider block, right abutment, and powerhouse in accordance with the SOW and for achievement of the Performance Standards and other requirements set forth in the ROD, this Consent Decree and the SOW. The Remedial Design Work Plan shall include plans and schedules for all design tasks identified in the SOW, including, but not limited to, plans and schedules for the completion of: (1) design sampling and analysis plan (including, but not limited to, a Remedial Design and Remedial Action Quality Assurance Project Plan (RD/RA QAPP) in accordance with Section IX (Quality Assurance, Sampling and Data Analysis)); and (2) a Construction Quality Assurance Plan; and (3) a Health and Safety Plan (HSP) which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. Upon approval of the Remedial Design Work Plan, including the Health and Safety Plan for all field activities, by EPA in consultation with the State, Settling Defendants shall implement the Remedial Design Work Plan. Settling

Defendants shall submit to EPA and the State all plans, submittals and other deliverables required under the approved Remedial Design Work Plan in accordance with the requirements and schedules of the Remedial Design Work Plan and the SOW, including its schedule, for review and approval pursuant to Section XII (Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendants shall not commence further Remedial Design activities at the Site prior to EPA approval.

c. The preliminary design report for each element of the remedy shall include, at a minimum, the following as described in the SOW: (1) design criteria; (2) results of additional field sampling, if any, and pre-design work; (3) project delivery strategy; (4) preliminary plans, drawings and sketches; (5) required specifications in outline form; and (6) preliminary construction schedule.

d. The Draft Final Design Report/Final Design Report for each element of the remedy shall include, at a minimum, the following as described in the SOW: (1) final plans and specifications; (2) Operation and Maintenance Plan; (3) Construction Quality Assurance Project Plan (CQAPP); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards); and (5) Contingency Plan, if applicable. The CQAPP, which shall detail the approach to quality assurance during construction activities at the Site, shall specify a quality assurance official (“QA Official”), independent of the Supervising Contractor, to conduct a quality assurance program during the construction phase of the project. Groundwater and surface water monitoring plans shall be submitted for approval in the Remedial Action Monitoring Plan, as described in the SOW. Upon approval by EPA, in consultation with the State, DOI, and the Tribes (or, in the case of those components

designated in the Consent Decree or the SOW for joint approval by EPA and the State, upon joint approval by EPA and the State, in consultation with DOI and the Tribes, or for approval by the State, upon approval by the State), the final design reports shall be incorporated into and become enforceable under this Consent Decree.

16. Remedial Action.

a. With the final design report submittals, Settling Defendants shall submit to EPA and the State a work plan (“Remedial Action Work Plan”) for the performance of the Remedial Action at the Site. The Remedial Action Work Plan and associated plans described in the SOW shall provide for: (i) construction and implementation of those components of the ROD, as described in the SOW, undertaken or to be undertaken by the Settling Defendants, including the Grading Plan, the surface water monitoring plan, and the ground water monitoring plan to be implemented by Settling Defendants, and the removal of the powerhouse, right abutment, and divider block; and (ii) achievement of Performance Standards, in accordance with this Consent Decree, the ROD, the SOW, and the design plans and specifications developed in accordance with the Remedial Design Work Plan. The Remedial Action Work Plan shall be approved by EPA in consultation with the State, except: (1) for those components designated in the Consent Decree or the SOW for joint approval by EPA and the State, which shall be approved by both EPA and the State, and (2) for those components designated in the Consent Decree or the SOW for approval by only the State, which shall be approved by the State in consultation with EPA. Upon its approval, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree.

b. The Remedial Action Work Plan shall include, as further described in the SOW, the following: (1) the schedule for completion of the Remedial Action; (2) method for selection of any replacement contractor; (3) schedule for developing and submitting other required Remedial Action plans; (4) methodology for implementation of the Construction Quality Assurance Project Plan; (5) methods for satisfying permitting requirements, if any; (6) schedule for developing and methodology for implementation of the approved Operation and Maintenance plan; (7) methodology for implementation of any contingency plans required by the ROD that are Settling Defendants' responsibility as set forth in the SOW; (8) tentative formulation of the Remedial Action project team; (9) construction quality control plan; and (10) procedures and plans for the decontamination of equipment and the disposal of contaminated materials.

c. Upon approval of the Remedial Action Work Plan as described above, after a reasonable opportunity for review and comment by the State, Settling Defendants shall implement the activities required under the Remedial Action Work Plan. Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule set forth in the Remedial Action Work Plan for review and approval pursuant to Section XII (Approval of Plans and Other Submissions). Unless otherwise approved in the SOW or as directed by EPA after consultation with the State, Settling Defendants shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

d. The Settling Defendants shall continue to implement the Remedial Action and O & M for which the Settling Defendants are responsible until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Consent Decree and/or the SOW.

17. Hydroelectric Activities. NorthWestern shall implement the activities required under Paragraphs 18 through 23 and Paragraphs 25 through 26 of this Consent Decree. NorthWestern shall submit to EPA, DOI, the State, and the Tribes all plans, submittals, or other deliverables required under Paragraphs 18 through 23 and Paragraphs 25 through 26 of this Consent Decree in accordance with the schedules set forth therein, and in accordance with Section XII (Approval of Plans and Other Submissions). A copy of all plans, submittals and other deliverables required under this Consent Decree shall also be provided to the project coordinators for AR and Envirocon.

Endangered Species Act Requirements

18. EPA and FERC have completed consultation, documented by a Biological Opinion, pursuant to Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), regarding the Remedial Action, Operation and Maintenance, and Hydroelectric Activities. The Biological Opinion also addresses the Restoration Plan and the removal of Stimson Dam. The resulting Biological Opinion from the United States Fish and Wildlife Service is attached to this Consent Decree as Appendix E. As described in the SOW, EPA or the designated party as identified in the SOW shall undertake and fully comply with those terms and conditions contained in the Biological Opinion that apply to Remedial Action and Operation and Maintenance, and EPA or its designee shall also undertake and fully comply with those terms and conditions contained

in the Biological Opinion that apply to Hydroelectric Activities. Section 7 consultation may need to be reinitiated if any of the conditions described in 50 C.F.R. § 402.16 are triggered, which include, but are not limited to, modification of the action subject to consultation in a manner that causes an effect to a listed species or critical habitat that was not considered in the Biological Opinion. The State has entered into an agreement with the United States that provides for the State's compliance with the ESA while conducting Restoration at the Milltown Site. Within six months of the Effective Date, the United States Fish and Wildlife Service will amend or supplement its existing Biological Opinion to address the State's compliance with the Endangered Species Act during Restoration activities.

#### Safety Requirements

19. Until the removal of the Milltown Dam and related structures as required by the Consent Decree and the SOW, NorthWestern shall comply with the substantive dam safety requirements found at 18 C.F.R. Part 12 (2004).

#### Operational Requirements

20. Until the Milltown Dam and related structures are removed as required by the Consent Decree and the SOW, NorthWestern shall operate the Milltown Project in accordance with the substantive requirements of the Federal Power Act and its implementing regulations, consistent with the requirements that have been set forth in the FERC license for Project No. 2543.

21. NorthWestern shall cooperate with the United States, the State, the Tribes, and AR in its operation of the Milltown Project, and shall avoid any interference with the implementation of the Work. NorthWestern shall also implement any

operational changes, including drawdowns, deemed necessary by EPA, in consultation with the State, the Tribes, and DOI, for the implementation of the Work in accordance with the schedules established by EPA.

Reporting Requirements

22. Beginning sixty days from the date of entry of this Consent Decree, and continuing on a monthly basis thereafter until the Milltown Dam and all related structures are removed, NorthWestern shall provide AR and Envirocon, EPA, the State, the Tribes, and DOI with monthly progress and status reports regarding the activities required solely of NorthWestern under this Consent Decree, including Hydroelectric Activities, and including the reporting requirements contained in the Biological Opinion.

23. Historical Mitigation and Fisheries Mitigation Requirements.

a. Historical Mitigation. In addition to the activities described in the SOW, NorthWestern and AR shall each pay \$50,000 in satisfaction of any and all obligations either NorthWestern or AR may have under law for historical mitigation requirements at the Milltown Site, including any such requirements described in the ROD. Following the lodging of this Consent Decree, Settling Defendants shall make the required payments to EPA or its designee within 30 days of notice by EPA. The EPA notice shall specify the party to whom the payment shall be made and provide all required information for communication with and transfer of payments to EPA or its designee. The respective payments by Northwestern and AR shall be subject to the notice requirements of Paragraph 191.

b. Bull Trout Mitigation. Until the Settling Defendants remove the Milltown Dam and related structures in accordance with the SOW, Northwestern shall continue to provide \$250,000 per year to the Bull Trout Technical Advisory Committee's Bull Trout Conservation Fund (Fund). Payment of this money by Northwestern to the Fund is to be made each year in the manner directed by the Bull Trout Subcommittee of the Milltown Technical Advisory Committee.

c. Fisheries Protection, Mitigation, and Enhancement. Until the Settling Defendants remove the Milltown Dam and related structures as required by Consent Decree and the SOW, NorthWestern shall continue to make annual payments to the Protection, Mitigation, and Enhancement Fund in the manner directed by the Milltown Technical Advisory Committee. The 2005 payment is to be \$94,356.00, and annual payments subsequent to the 2005 payment of \$94,356.00 are to include a 3% annual increase.

24. Stimson Dam. Within thirty (30) days following lodging of this Consent Decree, Northwestern shall pay \$80,000, and AR shall pay \$230,000, toward the removal of the Stimson Dam, which is a rock and crib dam located in the Blackfoot River. An escrow account, to be managed by Trout Unlimited, has been established for the sole purpose of removing the Stimson Dam.

25. License Surrender. Pursuant to the Orders issued by FERC on January 19, 2005 and May 6, 2005, NorthWestern's FERC license for Project No. 2543 shall be deemed surrendered upon the Effective Date of this Consent Decree. No Party to this Consent Decree shall object to such surrender in any judicial or administrative proceeding. If requested by EPA, the State, DOI, or the Tribes, NorthWestern shall

provide briefings for EPA, the State, DOI, the Tribes, AR and Envirocon to discuss the progress of the Hydroelectric Activities.

26. Additional Response Actions. If EPA, in consultation with the State, determines that additional response actions or modifications to the Work or Hydroelectric Activities specified in the SOW are necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of that portion of the remedy set forth in the ROD to be implemented by Settling Defendants, EPA shall require that Settling Defendants modify the appropriate plan to reflect such additional response actions or modifications. Provided, however, that such additional response actions may only be required pursuant to this Paragraph to the extent that they are consistent with the scope of the remedy selected in the ROD and are not: (i) Restoration, (ii) required because Restoration fails to meet Restoration Performance Standards, or (iii) required to reconstruct or restore the Grading Plan after EPA and State approval of Substantial Completion of the Grading Plan, as provided in Subparagraph 30(b) of this Consent Decree. NorthWestern shall be solely responsible for any additional Hydroelectric Activities that are required by EPA pursuant to this Paragraph.

a. For the purposes of this Consent Decree, the “scope of the remedy selected in the ROD” means the removal of radial gate, spillway and forebay sections of the Milltown Dam; the removal of the dividing block, the shop and powerhouse, and portions of the right abutment concrete gravity wall (even though removal of such portions of the Milltown Project was selected in the Restoration Plan and not the remedial action selected in the ROD); the construction of a bypass channel to control sediments and other best engineering controls and management practices for

sediment release control during excavation; the excavation of sediments within the Project Area, and including any necessary dewatering and drying operations; the rail haul and unloading of excavated sediments transported to the Opportunity Ponds near Warm Springs, Montana; implementation of the Grading Plan in the Milltown Project Area as described in the SOW; all site and downstream monitoring associated with Remedial Action and Operation and Maintenance; all measures necessary to address the impacts of Waste Material from the Milltown Site upon water supplies, irrigation uses, or aquatic life downstream to the confluence of the Clark Fork River with the Bitterroot River; all measures necessary to meet wetland requirements described in the ROD and the SOW; appropriate disposal of the removed Milltown Dam and related structures and other debris or waste generated during the Remedial Action; Operations and Maintenance for the Site, including maintenance of all waste and debris repositories and engineering controls necessary to protect in-place waste located within the Project Area shown on Figure 1-1 of Attachment 1 to the SOW; the maintenance and operation of the Milltown Water Supply operable unit; and NorthWestern's maintenance and operation of the Milltown Project.

b. If any Settling Defendant objects to any additional response actions or modifications determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XXI (Dispute Resolution Between EPA and Settling Defendants) and Paragraph 111 (Record Review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

c. Settling Defendants shall implement any work required by any modifications incorporated into the SOW and/or related work plans in accordance with this Paragraph.

d. Nothing in this Paragraph shall be construed to limit EPA's and the State's authority to require performance of further response actions as otherwise provided in this Consent Decree.

27. Settling Defendants acknowledge and agree that nothing in this Consent Decree, or the ROD or the remedial design or remedial action work plans previously approved, the SOW, or the remedial design, remedial action, or O & M work plans to be developed, constitutes a warranty or representation of any kind by the United States or the State that compliance with the work requirements set forth in the SOW or work plans will achieve the Performance Standards.

28. Settling Defendants shall, prior to any off-site shipment of Waste Material that is generated by the Work or Hydroelectric Activities to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator and the State Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 100 cubic yards or 1,000 gallons. Nothing in this Paragraph is intended to, nor shall, relieve the Settling Defendants of their obligations to comply with waste shipment notification and reporting requirements under state or federal law.

a. Settling Defendants shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Settling Defendants shall notify EPA, the State, and the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by Settling Defendants following the award of the contract for any such necessary action. Settling Defendants shall provide the information required by Paragraph 28(a) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

## VII. PERFORMANCE OF RESTORATION BY THE STATE

29. The State shall perform Restoration in accordance with this Consent Decree. Restoration includes actions which are remedial activities to fulfill certain ROD requirements, as well as other mitigation activities to fulfill certain requirements of the Federal Power Act. These activities are generally described in the Restoration Plan, attached to this Consent Decree as Appendix D, and will be subject to coordination with the Trustees and EPA through memoranda of agreement.

### 30. Completion of the Grading Plan.

a. Settling Defendants shall construct the Grading Plan, including Final Grading of the Bypass Channel, to meet the designs, plans, specifications,

and Performance Standards for implementation of the Grading Plan as part of the Remedial Action.

b. Within thirty (30) days after Settling Defendants conclude that all construction activities required to achieve Substantial Completion of the Grading Plan have been fully performed, Settling Defendants shall provide to EPA and the State for approval written notice and documentation sufficient to demonstrate this completion under Section XXX (Notices and Submissions). “Substantial Completion of the Grading Plan,” for purposes of this Consent Decree, shall mean that all designs, plans, specifications, and Performance Standards for construction of the Grading Plan have been attained except those designs, plans, specifications, and Performance Standards for construction that relate to Final Grading of the Bypass Channel. “Final Grading of the Bypass Channel,” for purposes of this Consent Decree and the SOW, shall mean those features and actions relating to the bypass channel that are described in Attachment 4 to the SOW, including but not limited to backfilling and regrading of the bypass channel. Upon EPA and State approval of the notice and documentation of Substantial Completion of the Grading Plan, the State shall thereafter proceed with Restoration activities within the Project Area and maintain certain areas within the Grading Plan as shown in Figure 1-1 of Attachment 1 to the SOW and as explained in Attachment 4 to the SOW. Unless otherwise agreed to by AR, on-site physical actions to implement Restoration within the Project Area (except SAA III-d-1, III-e, and the “remaining dam removal area,” as described in Attachment 4 to the SOW) shall not occur prior to EPA and State approval of Substantial Completion of the Grading Plan.

c. Except as otherwise provided in this subparagraph (c), Settling Defendants shall complete Final Grading of the Bypass Channel on or before November 30 of the year following EPA and State approval of Settling Defendants' notice and documentation of Substantial Completion of the Grading Plan. In the event Final Grading of the Bypass Channel is scheduled by the State to occur after November 30 of the year following the EPA and State approval of notice and documentation of Substantial Completion of the Grading Plan, the Settling Defendants shall complete the Final Grading of the Bypass Channel in accordance with the State's schedule; provided however, in such event, the State shall reimburse the Settling Defendants or Settling Defendants' contractor for costs of re-mobilizing and de-mobilizing the equipment necessary to complete these activities up to a maximum amount of \$50,000. Under the circumstances specified in the SOW and its Attachment 4, should those circumstances arise, the State will pay Settling Defendants' contractor for certain costs of Grading Plan implementation.

d. Upon EPA and State approval of notice and documentation of Substantial Completion of the Grading Plan, Settling Defendants shall maintain certain areas within the Grading Plan, as shown in Figure 1-1 of Attachment 1 to the SOW and as explained in Attachment 4 to the SOW. The Settling Defendants shall cooperate with the State by providing as-built drawings and Remedial Action data requested by the State for development and implementation of the Restoration Plan.

31. Compliance With Applicable Law. All Restoration activities will be performed in accordance with the requirements of all applicable federal and state laws and regulations. The State must also comply with all applicable or relevant and

appropriate requirements (“ARARs”) of all federal and state environmental laws as set forth in the ROD as further described in Attachment 1 to the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

32. Emergency Response. In the event of any action or occurrence during the performance of the Restoration which causes or threatens a release of Waste Material at or from the Milltown Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, or which causes a pollution source or combination of pollution sources to present an imminent and substantial endangerment to the health or welfare of persons, the State shall (a) immediately take all appropriate action to prevent, abate, or minimize such pollution and/or the release or threat of release of Waste Materials, (b) immediately take such action as may be necessary to stop the discharge of pollutants causing or contributing to such pollution, and (c) shall immediately notify EPA’s Project Coordinator, or, if the Project Coordinator is unavailable, EPA’s Alternate Project Coordinator. If neither of these persons is available, the State shall notify the EPA Emergency Response Unit, Region 8. The State shall take such actions in consultation with EPA’s Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the health and safety plans, the emergency consultation procedures of the Endangered Species Act, 50 C.F.R. § 402.05, and any other applicable plans or documents under this Consent Decree.

33. Coordination with Settling Defendants. Restoration activities shall be coordinated with, and shall not interfere with, the schedules and other EPA-approved

requirements set forth in the SOW and the Hydroelectric Activities described in, or otherwise required by, this Consent Decree.

34. Settling Defendants Right to Comment. Settling Defendants will be entitled to comment upon any Restoration document for which public comment is sought or required. Settling Defendants will be entitled to comment directly on design and implementation of the Restoration. The State shall provide the Settling Defendants with a copy of each major design document as soon as it becomes publicly available. The State shall provide any proposed modifications of the Grading Plan to the Settling Defendants, EPA, DOI and the Tribes within the timeframes described in the SOW, and documentation in the form of plans, drawings and specifications comprising the final Grading Plan, as determined by the State, shall be available to the Settling Defendants no later than the date on which the State submits its comments to the Stage 3 Reservoir Drawdown Preliminary Design Report.

35. Nothing in this Section shall be construed to create any rights for, or grant any cause of action to, Settling Defendants against the State. Restoration will be subject to coordination with the Trustees and EPA through memoranda of agreement.

36. Bull Trout Habitat Restoration by the State. Performance of Restoration by the State, with DOI Fish and Wildlife Service Region 6 concurrence as to its completion, shall be deemed full compliance with the requirements set forth in Paragraph 24 of the Streamside Tailings consent decree.

## VIII. REMEDY REVIEW

37. Periodic Review. Settling Defendants shall conduct any studies and investigations as requested by EPA, in order to permit EPA, in consultation with the

State, to conduct reviews of whether the Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations. EPA shall conduct its reviews consistent with Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and all applicable regulations and guidance.

38. EPA Selection of Further Response Actions. If EPA, in consultation with the State, determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select further response actions for the Milltown Site in accordance with the requirements of CERCLA and the NCP.

39. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, shall be provided with an opportunity to comment on any further response actions proposed by EPA, in consultation with the State, as a result of the review conducted pursuant to Section 121(c) of CERCLA, and to submit written comments for the record during the comment period.

40. Settling Defendants' Obligation To Perform Further Response Actions. In addition to requirements for further response actions contained in this Consent Decree, if EPA, in consultation with the State, selects further response actions for the Milltown Site, Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraphs 149, 150, 160, and 161 (United States' and the State's Pre-certification and Post-certification Reservations) are satisfied. Settling Defendants may invoke the procedures set forth in Section XXI (Dispute Resolution Between EPA and Settling Defendants) to dispute (1) EPA's determination that the reopener conditions of Paragraphs 149 and 150 of Section XXIII (Covenants and

Reservations by the United States) or Paragraphs 160 and 161 of Section XXIV (Covenants and Reservations by the State) are satisfied, (2) EPA's determination that the Remedial Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 111 (Record Review).

41. Submissions of Plans. If Settling Defendants are required to perform further response actions pursuant to Paragraph 40, they shall submit to EPA for approval, in consultation with the State, a schedule and plan for such work. After approval of the schedule and plan by EPA, following a reasonable opportunity for comment by the State, Settling Defendants shall implement the plan in accordance with the provisions of this Consent Decree.

#### IX. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

42. Settling Defendants shall use applicable portions of the approved quality assurance, quality control, and chain of custody procedures for all samples in accordance with the CFRSSI QAPP and any amendments made thereto during the course of the implementation of this Consent Decree. If such data are relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA in consultation with the State shall be admissible as evidence, without objection, in any proceeding under this Consent Decree. Settling Defendants shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by Settling Defendants in implementing this Consent Decree. In addition, Settling

Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA and the State pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Consent Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the CFRSSI LAP, and any amendments made thereto during the course of the implementation of this Consent Decree. Settling Defendants shall ensure that all laboratories they utilize for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Consent Decree will be conducted in accordance with the procedures set forth in the QAPP.

43. Upon request, Settling Defendants shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Settling Defendants shall notify EPA and the State not less than ten (10) days in advance of any sample collection activity unless shorter notice is agreed to by EPA and the State. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary. Upon request, EPA shall allow Settling Defendants to take split or duplicate samples of any samples taken as part of EPA's oversight of Settling Defendants' implementation of the Work and NorthWestern's implementation of Hydroelectric Activities.

44. Settling Defendants shall submit to both EPA and the State one paper copy and an electronic copy of the results of all sampling and/or tests or other data

obtained or generated by or on behalf of Settling Defendants with respect to the Milltown Site and/or the implementation of this Consent Decree in the next monthly report, unless EPA after consultation with the State agrees otherwise or unless otherwise provided for in the SOW or resulting Remedial Design Work Plan or Remedial Action Work Plan.

45. Notwithstanding any provision of this Consent Decree, the United States and the State hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, CECRA, and any other applicable federal and state statutes or regulations.

#### X. ACCESS AND INSTITUTIONAL CONTROLS

46. If any Settling Defendant owns, or has the legal ability to control access on any part of the Milltown Site, or any other property where access and/or water use restrictions are needed to implement this Consent Decree, that Settling Defendant shall, with respect to those properties:

a. commencing on the date of lodging of this Consent Decree, provide access to the United States, the State, the Tribes, the other Settling Defendant, and their representatives and contractors, at all reasonable times to the Milltown Site property, the rail haul lines and facilities used for the cleanup of the Milltown Site, and the Opportunity Ponds near Warm Springs, Montana and any other property to which access is required for the implementation of this Consent Decree, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

i. Monitoring the Work, Hydroelectric Activities and the Restoration;

ii. Implementing the Work and Hydroelectric Activities to be performed respectively by the Settling Defendants and by NorthWestern, and their representatives and contractors;

iii. Implementing the Work by EPA and its representatives and contractors and representatives and contractors of the State pursuant to the conditions set forth in Paragraph 152 (Work Takeover) of this Consent Decree;

iv. Implementing the Restoration by the Trustees and their representatives and contractors;

v. Verifying any data or information submitted to the United States or the State;

vi. Conducting investigations relating to contamination at or near the Milltown Site;

vii. Obtaining samples;

viii. Assessing the need for, planning, or implementing additional response actions at or near the Milltown Site;

ix. Assessing the need for, planning, or implementing restoration activities at or near the Milltown Site;

x. Monitoring the environmental, safety, and operational requirements of the Milltown Project;

xi. Assessing Settling Defendants' compliance with this Consent Decree; and

xii. Determining whether the Milltown Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree.

Prior to obtaining access to the Milltown Site, the United States, the State, and Settling Defendants shall consider any health and safety limitations previously identified by: NorthWestern for the Milltown Site, Montana Rail Link, Inc. for the rail haul lines, and AR for the Opportunity Ponds.

b. commencing on the date of lodging of this Consent Decree, refrain from using the Milltown Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the Work, the Hydroelectric Activities, and the Restoration to be performed pursuant to this Consent Decree. Such limitations on use include, but are not limited to, the requirement that drawdowns of the water level behind the dam shall be carried out in a manner that is consistent with the Remedial Action and the Hydroelectric Activities.

47. If any part of the Milltown Site, or any other property where access and/or land/water use restrictions are needed to implement the Work or Hydroelectric Activities is owned or controlled by persons other than Settling Defendants, Settling Defendants shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendants, as well as for the United States on behalf of EPA, and the State, as well as their representatives and contractors, for the purpose of conducting the Work,

Hydroelectric Activities, and Restoration, including, but not limited to, those activities listed in Paragraph 46(a) of this Consent Decree; and

b. an agreement, enforceable by Settling Defendants, the State, and the United States, to abide by the obligations and restrictions established by Paragraph 46(b) of this Consent Decree, or that are otherwise necessary to implement, ensure non-interference with, or ensure the protectiveness of the Work, Hydroelectric Activities, and Restoration.

c. Prior to the lodging of this Consent Decree, AR provided information that satisfied EPA that at present the alternative water supply is adequately funded and fully functional through a prior agreement. AR shall continue to fund operation and maintenance of the alternative water supply for the contaminated ground water in and near Milltown, Montana until such time as the Performance Standards for ground water are met consistently for two years. Settling Defendants shall fund and cooperate with Missoula County or any other eligible organization or group of individuals of Settling Defendants' choosing in any proceeding to adopt a controlled ground water area before the State Department of Natural Resources and Conservation or similar measures, in accordance with the ROD. In addition, Settling Defendants shall fund any monitoring and enforcement of the water well use restrictions that are established by the State Department of Natural Resources and Conservation to support Remedial Action for the Milltown Site.

48. For purposes of Paragraph 47 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access agreements, land/water use restrictions, and/or deed restrictions for Work and

Hydroelectric Activities. For the Milltown Site, “reasonable sums” shall be determined by considering, among other factors, the potentially responsible party status of the current owners and the degree of general cooperation shown by these parties. The United States or the State may, as it deems appropriate, assist Settling Defendants in obtaining access or water use restrictions, either in the form of access agreements, contractual agreements or in the form of deed restrictions running with the land. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVII (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining such access and/or water use restrictions for the Work and the Hydroelectric Activities.

49. If EPA, in consultation with the State, determines that additional land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls (“Institutional Controls”) are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, then the Settling Defendants shall cooperate with EPA’s and the State’s efforts to secure such Institutional Controls. If the State, in consultation with EPA and the other Trustees, determines that additional Institutional Controls are needed to implement the Restoration Plan, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, then Settling Defendants shall cooperate with the Trustees’ efforts to secure such Institutional Controls. However, Settling Defendants’ obligation to cooperate with the Trustees’ efforts to secure such Institutional Controls shall not obligate either Settling Defendant to make any payments or to incur any legal or contractor costs.

50. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their respective access authorities and rights, as well as all of their respective rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, any other applicable federal and state statute or regulation. The Tribes retain all of their respective access authorities and right, if any, under any applicable treaty.

51. Except as expressly provided in this Section, the Settling Defendants shall have no obligation under this Consent Decree to obtain access or implement institutional controls for Restoration activities on property owned or controlled by persons other than Settling Defendants.

#### XI. REPORTING REQUIREMENTS

52. In addition to any other requirement of this Consent Decree, Settling Defendants shall submit to both EPA and the State paper and electronic copies of written monthly progress reports with respect to activities other than those described in Paragraph 22 of this Consent Decree, that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation, of any work plans that may be required under this Consent Decree, which are scheduled for the next six weeks and provide other information relating to the progress of the Work; (e) include information

regarding unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the RA or Remedial Design Work Plans or other work plans or schedules that Settling Defendants have proposed to EPA or that have been approved by EPA; (g) include any information required by the Biological Opinions described in Paragraph 18; and (h) describe all activities undertaken in support of the community relations plan during the previous month and those to be undertaken in the next month. Unless EPA agrees to an alternative schedule, Settling Defendants shall submit these progress reports to EPA and the State by the tenth day of every month following the lodging of this Consent Decree until EPA notifies Settling Defendants that it has issued a Certification of Completion of the Remedial Action. Thereafter, Settling Defendants shall submit quarterly reports for Operation and Maintenance Activities, as described in Paragraph 58. If requested by EPA or the State, Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work.

53. Settling Defendants shall notify EPA and the State of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of the Remedial Design Work Plan, Remedial Action Work Plan, and Operation and Maintenance Plan or other work plans, no later than seven (7) days prior to the performance of the activity, unless such advance notice is impracticable, in which case notice shall be given as soon as possible, but in all instances prior to the performance of the activity.

54. Upon the occurrence of any event during performance of the Work and the Hydroelectric Activities that Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), Settling Defendants shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 8, United States Environmental Protection Agency. Settling Defendants shall also orally notify the State Project Coordinator within 24 hours of the onset of such an event. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

55. Within twenty (20) days of the onset of such an event, Settling Defendants shall furnish to EPA and the State a written report, signed by Settling Defendants Project Coordinators, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within thirty (30) days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

56. Unless otherwise specifically stated, Settling Defendants shall submit to both EPA and the State one paper copy and one electronic copy of any plan, report, and data required by this Consent Decree.

57. All reports and other documents submitted by Settling Defendants to EPA and the State (other than the monthly progress reports and quarterly O&M reports

referred to in Section XI (Reporting Requirements) and the reports referred to in Paragraph 22 of this Consent Decree) which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of Settling Defendants. For purposes of this Section XI (Reporting Requirements), a Settling Defendant's approved Supervising Contractor is an authorized representative of that Settling Defendant.

58. In addition to any other requirement of this Consent Decree, upon request by EPA, Settling Defendants shall submit to both EPA and the State one paper copy and one electronic copy of written quarterly Operations & Maintenance reports following construction completion. Unless EPA agrees to an alternative schedule, Settling Defendants shall submit those reports to EPA and the State by the tenth day of each quarter, until EPA notifies Settling Defendants pursuant to Paragraph 73(b) of Section XV (Certification of Completion) and, as to NorthWestern only, pursuant to Paragraph 74 of Section XV (Certification of Completion).

## XII. APPROVAL OF PLANS AND OTHER SUBMISSIONS

### EPA Approval of Plans and Other Submissions

59. After review of any plan, report or other item for implementation of the Work or Hydroelectric Activities which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Settling Defendants (if a joint obligation) or the responsible Settling Defendant modify the

submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within twenty-one (21) days, except where to do so would cause serious disruption to the Work or the Hydroelectric Activities, or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

60. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 59(a), (b), or (c), Settling Defendants (if a joint obligation) or the responsible Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to Settling Defendants' right to invoke the Dispute Resolution procedures set forth in Section XXI (Dispute Resolution Between EPA and Settling Defendants) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 59(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Paragraph 63 and Section XXII (Stipulated Penalties).

61. a. Upon receipt of a notice of disapproval pursuant to Paragraph 59(d), Settling Defendants (if a joint obligation) or the responsible Settling Defendant shall, within twenty-one (21) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXII, shall accrue during the 21-day period (or other EPA-specified period) but

shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 59 and 60.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 59(d), Settling Defendants (if a joint obligation) or the responsible Settling Defendant shall proceed, at the direction of EPA, in consultation with the State, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants (if a joint obligation) or the responsible Settling Defendant of any liability for stipulated penalties under Section XXII (Stipulated Penalties).

62. In the event that EPA disapproves a resubmitted plan, report or other item, or portion thereof, EPA may again require Settling Defendants (if a joint obligation) or the responsible Settling Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item, after consultation with the State. Settling Defendants (if a joint obligation) or the responsible Settling Defendant shall implement any such plan, report, or other item as modified or developed by EPA, subject only to Settling Defendants' right to invoke the procedures set forth in Section XXI (Dispute Resolution Between EPA and Settling Defendants).

63. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants (if a joint obligation) or the responsible Settling Defendant shall be deemed to have failed to submit such plan, report, or item timely and adequately unless Settling Defendants invoke the dispute resolution procedures set forth in Section XXI (Dispute Resolution Between EPA and

Settling Defendants) and EPA's action is overturned pursuant to that Section. The provisions of Section XXI (Dispute Resolution Between EPA and Settling Defendants) and Section XXII (Stipulated Penalties) shall govern the implementation of the Work or the Hydroelectric Activities and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXII. All plans, reports, and other items required for implementation of the Work or the Hydroelectric Activities to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

### XIII. PROJECT COORDINATORS

64. Settling Defendants, Envirocon, EPA, and the State have already designated their respective Project Coordinators and Alternate Project Coordinators for the Milltown Site, the names and addresses of which are noted in Section XXX (Notices and Submissions). If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor shall be given to the other Parties at least five (5) working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. Any successor to one of the Settling Defendants' Project Coordinators and Alternate Project Coordinators shall be subject to disapproval by EPA, in consultation with the State, and shall have the technical expertise sufficient to adequately oversee all aspects of the Work and, for NorthWestern, to

adequately oversee all aspects of the Hydroelectric Activities that NorthWestern is required to perform. Neither the Settling Defendants' Project Coordinators nor Alternate Project Coordinators shall be attorneys. They may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

65. EPA and the State may designate representatives, including, but not limited to, EPA and State employees, and federal and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Milltown Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

#### XIV. ASSURANCE OF ABILITY TO COMPLETE REMEDIAL ACTION AND OPERATION AND MAINTENANCE

66. Settling Defendants have established and shall maintain financial assurance as described herein in the amount of \$70 million for the purpose of assuring financial ability to implement the Remedial Action and Operation and Maintenance. This amount reflects the value of the insurance policy that Settling Defendants obtained to

perform Remedial Action at the Site and the estimated cost of certain additional operation and maintenance activities. Prior to the date of lodging of this Consent Decree, the Settling Defendants provided the United States and the State, as financial assurance for the amount stated above, a policy of insurance issued by American International Specialty Lines Insurance Company, a subsidiary of American International Group, Inc. (Policy No. EPP 7619780). The United States and the State have agreed to accept this policy as financial assurance for the Remedial Action that it insures. In addition to this policy, Settling Defendants will establish and maintain, within 90 days after the Effective Date, financial assurance for the Settling Defendants' obligations for the Operation and Maintenance requirements specified in the ROD and which are not covered under the AIG insurance policy in the form of one of the following mechanisms:

a. A surety bond guaranteeing performance of the Operation and Maintenance or for payment of the total estimate of the cost of operation and maintenance or for the reduced amount as approved under this Paragraph;

b. One or more irrevocable letters of credit equaling the total estimated cost of the Operation and Maintenance, or equaling the reduced amount as approved under this Paragraph; or

c. A trust fund equaling the total estimated cost of all Operation and Maintenance, or equaling the reduced amount as approved under this Paragraph; or

d. A written guarantee to perform all of the Operation and Maintenance by a parent or affiliate corporation that meets the requirements of 40 C.F.R.

§264.143(f) and Paragraph 68 with respect to the cost of the Operation and Maintenance;  
or

e. A policy of insurance issued by an insurance carrier, and governed by terms and conditions, acceptable in all respects to the United States and the State.

67. Settling Defendants shall submit statements signed by a responsible corporate official conveying the information required for the selected or current method of financial assurance on an annual basis, with the first submission due on May 1, 2006, and subsequent submissions due on May 1 of each succeeding year. No more than twice every calendar year, the Settling Defendants may submit a request to reduce the amount of financial assurance set forth in Paragraph 66, above, due to completed Remedial Action and Operation and Maintenance activities. Upon receiving written approval of the reduced amount by EPA and the State, the Settling Defendants may reduce the amount of the financial assurance. Settling Defendants may also request, at any time but not more frequently than twice a calendar year, a change in the form of financial assurance, provided that the new proposed amount, form, and terms of financial assurance meet the requirements of this Paragraph. Upon receiving written approval of the new form and terms by EPA and the State, Settling Defendants may change the form of financial assurance. The Settling Defendants' resubmitted financial assurance shall be in one of the following mechanisms:

a. A surety bond guaranteeing performance of the Remedial Action and Operation and Maintenance or payment of the total estimated costs of

Remedial Action and Operation and Maintenance, or for the reduced amount as approved under Paragraph 67;

b. One or more irrevocable letters of credit equaling the total estimated cost of the Remedial Action and Operation and Maintenance, or equaling the reduced amount as approved under Paragraph 67; or

c. A trust fund equaling the total estimated cost of all Remedial Action and Operation and Maintenance, or equaling the reduced amount as approved under Paragraph 67; or

d. A written guarantee to perform all of the Remedial Action and Operation and Maintenance by a parent or affiliate corporation that meets the requirements of 40 C.F.R. § 264.143(f) and Paragraph 68 with respect to the cost of the Remedial Action and Operation and Maintenance, or

e. A policy of insurance issued by an insurance carrier, and governed by terms and conditions, acceptable in all respects to the United States and the State.

68. Any corporate guarantee provided pursuant to Section XIV (Assurance of Ability to Complete Remedial Action and Operation and Maintenance) shall be in substantial compliance with 40 C.F.R. § 264.151(h) and shall contain the following language:

a. Nothing contained in this guarantee shall prevent any consolidation or merger of the guarantor with or into any other corporation (whether or not affiliated with the guarantor), or successive consolidations or mergers in which the guarantor, or its successor or successors shall be a party or parties, or shall prevent any sale or conveyance of all or substantially all of the property of the guarantor to any other corporation (whether or not affiliated with the

guarantor); provided, however, that the guarantor hereby covenants and agrees that upon any such consolidation, merger, sale, or conveyance, or upon any other consolidation, merger, sale or conveyance that leaves the guarantor unable to meet the requirements of 40 C.F.R. § 264.143(f), the business entity resulting from such consolidation or merger, or the business entity which shall have acquired such property or assets (or in the event of sales or conveyances of assets to more than one business entity, the business entity acquiring the largest share of such property or assets) shall expressly assume all obligations and covenants to be performed by the guarantor under this guarantee, including the obligation to continue to meet the requirements of 40 C.F.R. § 264.143(f).

b. In the case of any such consolidation or merger, and upon the assumption by the successor business entity of all obligations and covenants to be performed by the guarantor hereunder as required by the immediately preceding paragraph, such successor business entity shall succeed to and be substituted for the guarantor with the same effect as if it had been named herein as the guarantor. In the event of such sale or conveyance, upon the assumption by the business entity acquiring such assets of all obligations and covenants to be performed by the guarantor, hereunder as required by the immediately preceding paragraph, then the guarantor, or any successor business entity which shall theretofore have become the guarantor in the manner described in this Section, shall be discharged from all obligations and covenants under this guarantee and may be dissolved and liquidated, provided that the successor business entity meets the standards in 40 C.F.R. § 264.143(f) with respect to the cost of the Remedial Action and Operation and Maintenance.

c. The guarantor, or any successor to the guarantor, shall provide written notice to the United States and the State of any transaction in which another party is to become a successor to the guarantor, at least 30 days prior to the closing of any such transaction. Concurrent with such notice, the guarantor or successor shall provide to the United States and the State the successor's name, state of organization, and registered address, the name of a responsible corporate official within the successor, and a copy of any documents or agreements necessary to evidence the assumption of the guarantee. Within 90 days

after the closing of any such transaction, the successor entity shall provide to the United States and the State the information demonstrating that the successor meets the requirements of 40 C.F.R. § 264.143(f) with respect to the cost of the Remedial Action and Operation and Maintenance.

69. In the event that EPA, after a reasonable opportunity for review and comment by the State, determines at any time that the financial assurances provided pursuant to this Section no longer satisfy the requirements of this Consent Decree, Settling Defendants shall, within thirty (30) days of receipt of notice of EPA's determination, obtain and present to EPA and the State alternate financial assurance in compliance with this Consent Decree.

70. Any dispute concerning the Settling Defendants' demonstration of financial ability to complete the Work shall be subject to dispute resolution and judicial review pursuant to Paragraph 113 of this Consent Decree.

71. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

#### XV. CERTIFICATION OF COMPLETION

72. Completion of the Remedial Action.

a. Within thirty (30) days after Settling Defendants conclude that the Remedial Action has been fully performed and the Performance Standards have been attained for a period of at least two years, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA, and the State. Provided, however, Settling Defendants may schedule such inspection and seek certification of Completion of the Remedial Action pursuant to this Paragraph 72 prior to

the Final Grading of the Bypass Channel if the State schedules Final Grading of the Bypass Channel to occur after November 30 of the year following the EPA and State approval of notice and documentation of Substantial Completion of the Grading Plan pursuant to Paragraph 30(c) (Completion of the Grading Plan).

b. If, after the pre-certification inspection, Settling Defendants still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, they shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XII (Approval of Plans and Other Submissions) within thirty (30) days of the inspection. In the report, a registered professional engineer and Settling Defendants' Project Coordinators shall state that the Remedial Action has been completed in accordance with the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer, and a description of how the Performance Standards were met. The report shall contain the following statement, signed by a responsible corporate official of each Settling Defendant or Settling Defendants' Project Coordinators:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity for review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be

undertaken by Settling Defendants pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards. Provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the “scope of the remedy selected in the ROD,” as that term is defined in Paragraph 26(a). EPA will set forth in the notice a schedule for performance of such activities consistent with this Consent Decree or require Settling Defendants to submit a schedule to EPA for approval pursuant to Section XII (Approval of Plans and Other Submissions) with a copy to the State. Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XXI (Dispute Resolution Between EPA and Settling Defendants).

c. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion of the Remedial Action and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved for a period of at least two years (excluding those construction Performance Standards for the Final Grading of the Bypass Channel, if that action has been scheduled by the State as provided under Paragraph 30(c) of this Consent Decree), EPA will so certify in writing to Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXIII (Covenants and Reservations by the United States) and Section XXIV (Covenants and Reservations by

the State). Certification of Completion of the Remedial Action shall not affect Settling Defendants' remaining obligations under this Consent Decree.

73. Completion of the Work.

a. Within ninety (90) days after Settling Defendants conclude that all phases of the Work (including O & M), have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA and the State. If, after the pre-certification inspection, Settling Defendants still believe that the Work has been fully performed, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of each Settling Defendant or Settling Defendants' Project Coordinators:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by one or both of the Settling Defendants pursuant to this Consent Decree to complete the Work. Provided, however, that EPA may only require one or both Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 26(a). EPA will set forth in

the notice a schedule for performance of such activities consistent with this Consent Decree or require Settling Defendant or Settling Defendants responsible for such activities pursuant to the terms of this Consent Decree to submit a schedule to EPA for approval pursuant to Section XII (Approval of Plans and Other Submissions). The Settling Defendant or Settling Defendants responsible for the performance of such activities pursuant to this Consent Decree shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XXI (Dispute Resolution Between EPA and Settling Defendants).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion of the Work by Settling Defendants and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify Settling Defendants in writing.

74. Completion of the Hydroelectric Activities. Within ninety (90) days after NorthWestern concludes that the Hydroelectric Activities have been fully performed, NorthWestern shall schedule and conduct a pre-certification inspection to be attended by representatives of Settling Defendants, EPA, the State, DOI, and the Tribes unless EPA, the State, the Tribes, or DOI decline to participate. If, after the pre-certification inspection, NorthWestern still believes that the Hydroelectric Activities have been fully performed, then it shall, within thirty (30) days of the inspection, submit a written report requesting certification to EPA, DOI, the Tribes, and the State for approval, pursuant to Section XII (Approval of Plans and Other Submissions). In the

report, a registered professional engineer and NorthWestern's Project Coordinator shall state that the Hydroelectric Activities have been completed in accordance with the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible official of NorthWestern or NorthWestern's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, DOI, the State, and the Tribes determine that the Hydroelectric Activities or any portion thereof have not been completed in accordance with this Consent Decree, EPA will notify NorthWestern in writing of the activities that must be undertaken by NorthWestern pursuant to this Consent Decree to complete the Hydroelectric Activities. EPA will set forth in the notice a schedule for performance of such activities consistent with this Consent Decree or require NorthWestern to submit a schedule to EPA for approval pursuant to Section XII (Approval of Plans and Other Submissions). NorthWestern shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XXI (Dispute Resolution Between EPA and Settling Defendants).

a. If EPA, DOI, the State, and the Tribes conclude, based on the initial or any subsequent report requesting Certification of Completion of Hydroelectric Activities, that the Hydroelectric Activities have been performed in accordance with this Consent Decree, then EPA, DOI, the State, and the Tribes will so

certify in writing to NorthWestern, which shall constitute the Certification of Completion of the Hydroelectric Activities for purposes of this Consent Decree, including, but not limited to, Section XXIII (Covenants and Reservations by the United States), Section XXIV (Covenants and Reservations by the State), and Section XXV (Covenants and Reservations by the Tribes). The Certification of Completion of the Hydroelectric Activities shall not affect the Settling Defendants' remaining obligations under this Consent Decree.

#### XVI. EMERGENCY RESPONSE

75. In the event of any action or occurrence during the performance of the Work or Hydroelectric Activities which causes or threatens a release of Waste Material at or from the Milltown Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, or which causes a pollution source or combination of pollution sources to present an imminent and substantial endangerment to the health or welfare of persons, the Settling Defendants and their Supervising Contractors shall, subject to Paragraph 76, (a) immediately take all appropriate action to prevent, abate, or minimize such pollution and/or the release or threat of release of Waste Materials, (b) immediately take such action as may be necessary to stop the discharge of pollutants causing or contributing to such pollution, and (c) shall immediately notify EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, Settling Defendants and their Supervising Contractors shall notify the EPA Emergency Response Unit, Region 8. Settling Defendants and their Supervising Contractors shall take such actions in consultation with EPA's Project Coordinator or

other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, the emergency consultation procedures of the Endangered Species Act, 50 C.F.R. § 402.05, and any other applicable plans or documents required under this Consent Decree. Settling Defendants and their Supervising Contractors shall, in addition, immediately notify the State Project Coordinator. In the event that Settling Defendants and their Supervising Contractors fail to take appropriate action as required by this Section, and EPA or, as appropriate, the State, takes such action instead, Settling Defendants shall reimburse EPA and the State all response costs of the action not inconsistent with the NCP pursuant to Section XVII (Reimbursement of Response Costs), and all costs of taking any other action to abate the discharge of pollutants causing or contributing to the pollution.

76. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States or the State (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Milltown Site, or (b) subject to Section XXIII (Covenants and Reservations by the United States) or Section XXIV (Covenants and Reservations by the State) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Milltown Site.

#### XVII. REIMBURSEMENT OF RESPONSE COSTS

77. The Clark Fork River Basin Remaining Sites Special Account.

EPA has established a special account within the EPA Hazardous Substance Superfund

called the Clark Fork River Basin Remaining Sites Special Account (also known as the Clark Fork River Basin Special Account). The amounts paid by Settling Defendants to the United States under Paragraphs 79 (Settling Defendants' Payment of Federal Milltown Site Past Response Costs) and 80 (Milltown Site Future Response Costs), and the amounts paid by the Settling Federal Agencies to EPA under Paragraph 85 (Settling Federal Agencies' Payment of Response Costs for the Milltown Site), shall be deposited in the Clark Fork River Basin Remaining Sites Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with any of the sites within the Clark Fork River Basin or to be transferred by EPA to the EPA Hazardous Substance Superfund.

78. The Milltown Reservoir Special Account. No later than thirty (30) days after the Effective Date, EPA shall establish a special account within the EPA Hazardous Substance Superfund called the Milltown Reservoir Special Account. The amounts paid by the Settling Defendants to the United States under Paragraph 81 (Settling Defendants' Payment of Milltown Site Oversight Costs) and Paragraph 82 (Settling Defendants Payment for Milltown Bridge and Highway Mitigation Costs) shall be deposited in the Milltown Reservoir Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Milltown Site or to be transferred by EPA to the EPA Hazardous Substance Superfund.

79. Settling Defendants' Payment of Federal Milltown Site Past Response Costs. Not more than thirty (30) days after the Effective Date of this Consent Decree, the Settling Defendants shall pay \$6,000,000 to the Clark Fork River Basin

Special Account of the EPA Hazardous Substance Superfund for Federal Milltown Past Response Costs paid by EPA, by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to a DOJ account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 89V0279, the EPA Region and Site/Spill ID # 08-23, and DOJ case number 90-11-2-430. Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney’s Office for the District of Montana following lodging of this Consent Decree. Any payments received by DOJ after 4:00 P.M. (Eastern Time) will be credited on the next business day. The Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXX (Notices and Submissions) and to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region 8, 999 18<sup>th</sup> Street, Denver, Colorado 80202.

80. Milltown Site Future Response Costs.

a. The Settling Defendants shall reimburse the EPA Hazardous Substance Superfund for all Federal Milltown Future Response Costs that are not inconsistent with the National Contingency Plan. In the year following the Effective Date and in other years where Federal Milltown Future Response Costs are paid, the United States will exercise best efforts to send the Settling Defendants an annual bill, including Cost Documentation, requiring payment of Federal Milltown Future Response Costs. Any failure by the United States to provide such annual billing and/or complete Cost Documentation, however, shall not relieve the Settling Defendants of any obligation under this Consent Decree. The Settling Defendants shall make all payments within sixty

(60) days of its receipt of each bill requiring payment, except as otherwise provided in Paragraph 83. The Settling Defendants shall make all payments required by this Paragraph in the form of a certified or cashier's check or checks, or by wire transfer as described above, made payable to "EPA Clark Fork River Basin Special Account Hazardous Substance Superfund" and referencing the EPA Region and Site/Spill ID # 08-23, the DOJ case number 90-11-2-430, and the name and address of the party making payment. The Settling Defendants shall send the check to the address given in the periodic billing, and shall send copies of the check to the United States as specified in Section XXX (Notices and Submissions), to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624, and to Director of Financial Management Programs, US EPA Region VIII, 999 18<sup>th</sup> Street, Denver, Colorado 80202.

b. The Settling Defendants shall reimburse the State for all independently incurred State Milltown Future Response Costs that are not inconsistent with the National Contingency Plan. In the year following the Effective Date and in other years where State Milltown Future Response Costs are paid, the State will exercise best efforts to send the Settling Defendants an annual bill, including Cost Documentation, requiring payment of the State's Milltown Future Response Costs. Any failure by the State to provide such annual billing and/or complete Cost Documentation, however, shall not relieve the Settling Defendants of any obligation under this Consent Decree. The Settling Defendants shall make all payments within sixty (60) days of its receipt of each bill requiring payment, except as otherwise provided in Paragraph 83. All payments to the State of Montana under this Section shall be paid by electronic funds transfer in

accordance with the instructions provided by the State with the bill. The Settling Defendants shall contact the Administrator of the Remediation Division of DEQ at least 48 hours prior to initiating the transfer to provide notice of the date and time of the expected transfer and to confirm the wiring instructions and account and bank routing numbers. Written confirmation of the payment shall be sent to the State as provided in Section XXX (Notices and Submissions).

81. Settling Defendants' Payment of Milltown Site Oversight Costs.

Within thirty (30) days of the Effective Date, the Settling Defendants shall pay to the Milltown Reservoir Special Account \$2,100,000 in full satisfaction and settlement of the obligation to pay Oversight Costs for the Milltown Site. Such payment shall be made by FedWire Electronic Funds Transfer ("EFT") to a DOJ account in accordance with the procedures in Paragraph 79. The Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXX (Notices and Submissions) and Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region 8, 999 18th Street, Denver, Colorado 80202; to the State and to NorthWestern. The amount paid by the Settling Defendants under this Paragraph shall be deposited into the Milltown Reservoir Special Account. This amount, and all interest earnings on this amount, shall be retained and used to conduct or finance response actions at or in connection with the Milltown Site or transferred by EPA to the EPA Hazardous Substance Superfund. Oversight Costs the United States or the State may incur for the Milltown Site in excess of the amount paid by the Settling Defendants pursuant to this Paragraph shall not be recoverable from Settling Defendants except as the United States

and the State may incur additional Oversight Costs based on its reserved rights to take additional actions pursuant to Section XXIII (Covenants and Reservations by the United States) and Section XXIV (Covenants and Reservations by the State).

82. Settling Defendants' Payment for State-Owned Bridge and Highway Mitigation Costs. Within thirty (30) days of the Effective Date, the Settling Defendants shall pay to the Milltown Reservoir Special Account \$4,000,000 in full satisfaction and settlement of the obligation to pay for Milltown Mitigation. Such payment shall be made by EFT to a DOJ account in accordance with procedures in Paragraph 79. The Settling Defendants shall send notice that such payment has been made to the United States as specified in Section XXX (Notices and Submissions) and Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region 8, 999 18th Street, Denver, Colorado 80202; to the State and to NorthWestern. Subject to the SMOA, the amount paid by the Settling Defendants under this Paragraph shall be deposited into the Milltown Reservoir Special Account. This amount, and all interest earnings on this amount, shall be retained and used to conduct or finance Milltown Mitigation or response actions at or in connection with the Milltown Site or transferred by EPA to the EPA Hazardous Substance Superfund. Milltown Mitigation costs that the United States or the State may incur for the Milltown Site in excess of the amount paid by the Settling Defendants pursuant to this Paragraph shall not be recoverable from Settling Defendants except as the United States and the State may incur additional Milltown Mitigation costs based on its reserved rights to take additional

actions pursuant to Section XXIII (Covenants and Reservations by the United States) and Section XXIV (Covenants and Reservations by the State).

83. The Settling Defendants may contest payment of any Federal or State Milltown Future Response Costs under Paragraph 80 solely on the basis that:

(a) the United States or the State has made an accounting error; (b) the United States or the State is seeking reimbursement of Oversight Costs, Restoration costs, or, for AR only, Hydroelectric Activities costs, inconsistent with this Consent Decree; (c) a cost item demanded for reimbursement represents costs that are inconsistent with the NCP; or (d) EPA or the State has failed to provide complete Cost Documentation as required by Paragraph 80. The failure of the United States or the State to provide complete Cost Documentation shall not relieve the Settling Defendants of any obligation under this Consent Decree, but it may provide the basis for Settling Defendants to seek, through the dispute resolution provisions of Section XXI (Dispute Resolution), a reduction in the Settling Defendants' obligation to reimburse EPA or the State for those costs which the Settling Defendants claims are not fully supported by Cost Documentation, as defined herein. Any objection made under this Paragraph shall be made in writing within sixty (60) days of receipt of the bill and must be sent to the United States or the State. Any such objection shall specifically identify the contested Federal and State Milltown Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within the 60-day period pay all uncontested Federal and State Milltown Future Response Costs to the United States or the State in the manner described in Paragraph 80 and shall initiate the dispute resolution procedures in Section XXI (Dispute Resolution). Any such payment made by the Settling Defendants shall be credited by the

United States or the State only to the payment of the uncontested costs. If the United States or the State prevails in the dispute, within thirty (30) days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued Interest) to the United States or the State, in the manner described in Paragraph 80. If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated accrued Interest) for which they did not prevail to the United States or the State, in the manner described in Paragraph 80. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XXI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the United States and the State for their respective Milltown Future Response Costs.

84. Interest. In the event that the payments required by (a) Paragraph 79 (Settling Defendants' Payment of Federal Milltown Site Past Response Costs), (b) Paragraph 80 (Milltown Site Future Response Costs), (c) Paragraph 81 (Settling Defendants' Payment of Milltown Site Oversight Costs); (d) Paragraph 82 (Settling Defendants' Payment for State-Owned Bridge and Highway Mitigation Costs); and (e) Section XXII (Stipulated Penalties) are not made within the time period specified in these Paragraphs, the Settling Defendants shall pay Interest on the unpaid balance.

a. The Interest to be paid on the amounts due under Paragraphs 79 (Settling Defendants' Payment of Milltown Site Past Response Costs), 81 (Settling Defendants' Payment of Milltown Site Oversight Costs), and 82 (Settling

Defendants' Payment for State-Owned Bridge and Highway Mitigation Costs) shall begin to accrue thirty (30) days after the Effective Date.

b. The Interest to be paid on the amounts due under Paragraph 80 (Milltown Site Future Response Costs) shall begin to accrue sixty (60) days after the date of receipt by the Settling Defendants of the bill submitted by EPA for such costs or as provided by State statute for State costs. The Interest to be paid on the amounts due under Section XXII (Stipulated Penalties) shall begin to accrue on the date of receipt of the stipulated penalty demand.

c. Interest shall continue to accrue through the date of the Settling Defendants' payment.

d. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States or the State by virtue of the Settling Defendants' failure to make timely payments under this Section.

e. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 79.

85. Settling Federal Agencies' Payment of Response Costs for the Milltown Site. As soon as reasonably practicable after the Effective Date of this Consent Decree, the United States, on behalf of the Settling Federal Agencies, shall pay to EPA \$ 2,500,000 for reimbursement of Federal Milltown Past Response Costs, Oversight Costs, and Federal Milltown Future Response Costs to be incurred by EPA at the Milltown Site.

a. The total amount to be paid by the Settling Federal Agencies pursuant to this Paragraph shall be deposited in the Clark Fork River Basin Special Account within the EPA Hazardous Substance Superfund to be retained and used

to conduct or finance response actions at or in connection with any of the sites within the Clark Fork River Basin, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

b. If the payment to the EPA Hazardous Substances Superfund required by this Paragraph is not made as soon as reasonably practicable, the Director, Legal Enforcement Program, EPA Region 8, may raise any issues relating to payment to the appropriate Department of Justice Assistant Section Chief for the Environmental Defense Section.

c. In the event that payment required by this Paragraph are not made within sixty (60) days of the Effective Date of this Consent Decree, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the Effective Date of this Consent Decree and accruing through the date of the payment.

d. The Parties acknowledge that the payment obligations of the Settling Federal Agencies under this Consent Decree can only be paid from the appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti Deficiency Act, 31 U.S.C. Section 1341, or any other applicable provision of law.

#### XVIII. NORTHWESTERN'S COMPENSATION FOR RESTORATION ACTIVITIES AT THE MILLTOWN SITE

86. Funding of the \$2.5 Million Obligation. NorthWestern has paid a total of \$2.5 million into an interest bearing escrow account at the LaSalle Bank National

Association for the State's benefit ("State Escrow"). The State Escrow has been established with instructions to the escrow agent to pay to the State from the State Escrow the full balance of the \$2.5 million, which is due to the State under this Consent Decree no later than 30 days after the Effective Date. This money, and all interest and earnings thereon earned subsequent to payment by the escrow agent to the State, shall be used by the State only to implement the Restoration Plan.

87. Funding of the \$1.4 Million Obligation. NorthWestern shall pay to the State an additional \$1.4 million as provided in this section no later than 915 days after the Effective Date. NorthWestern hereby guarantees payment of this additional \$1.4 million obligation, as set forth in this Section. This money, and all interest and earnings thereon earned subsequent to payment to the State, also shall be used by the State only to implement the Restoration Plan.

88. NorthWestern Insurance Policy. NorthWestern currently maintains certain insurance coverage relating to the Milltown Dam, AIG Pollution Legal Liability Select Policy No. 1952382 ("the NorthWestern Policy"). NorthWestern shall provide written documentation evidencing all terms and the continuation of such insurance to EPA and each Trustee within 30 days of lodging of the Consent Decree. As of the Effective Date, NorthWestern hereby assigns to the State its right to any premium refund as provided for under the NorthWestern Policy. In addition, within ten (10) days after the Effective Date, NorthWestern shall notify AIG of this assignment and provide written instructions to AIG or its successor to pay the full balance of any premium refund to the State upon NorthWestern's request for cancellation of the NorthWestern Policy as set forth in Paragraph 89 of this Consent Decree.

89. Within 60 days of entry of this Consent Decree, NorthWestern shall cause the State and the United States to be included as additional named insureds under the NorthWestern Policy. The NorthWestern Policy may not be modified without express permission of the State. NorthWestern shall comply with all terms, conditions or contractual obligations under the NorthWestern Policy, including the payment of any premium or deductible when due. NorthWestern shall maintain the NorthWestern Policy in full force and effect until the Milltown Dam has ceased operation and been dismantled and NorthWestern has executed a written request for cancellation as provided in this Paragraph, unless the State agrees otherwise. NorthWestern shall deliver a written request for cancellation of the NorthWestern Policy to AIG, as provided for in Endorsement No. 12 of said policy, within five (5) working days of the date upon which Milltown Dam has ceased operations and is dismantled.

90. Proceeds from the NorthWestern Policy Refund. NorthWestern shall fund the \$1.4 million obligation set forth in Paragraph 87 (Funding of the \$1.4 Million Obligation) first with the proceeds assigned to the State from the NorthWestern Policy premium refund.

91. Proceeds from Sale of Specified Lands. NorthWestern shall fund the \$1.4 million obligation set forth in Paragraph 87 (Funding the \$1.4 Million Obligation) second with any proceeds from the sale of lands owned by NorthWestern and located in and around the Milltown Site. A description of these lands is contained in Appendix F to this Consent Decree. No portion of these lands shall be sold or transferred prior to the date on which the Milltown Dam ceases operations and is dismantled. After the lodging of the Consent Decree, in consultation with the United States, State and

Tribes, NorthWestern shall identify and provide the appraised value of the lands located in and around the Milltown Site that it proposes to sell. NorthWestern shall use all commercially reasonable efforts to sell, on the open market and at fair market value, only those lands needed to satisfy the balance of the \$1.4 million obligation set forth in Paragraph 87 (Funding the \$1.4 Million Obligation). In the event any land identified for sale is made the subject of a bona fide buy-sell agreement with a third party, NorthWestern shall not consummate such sale unless and until the State, in its sole discretion, approves of such sale; however, if the State does not approve such sale, NorthWestern shall have a credit in the amount of the fair market value of the land, against the unsatisfied portion of the \$1.4 million obligation, provided NorthWestern may not receive a credit for any particular land more than one time. Upon the closing of any approved land sale, NorthWestern shall immediately pay the proceeds from the sale to the State. To the extent that the proceeds from the sale of the specific lands exceed the amount necessary to reach \$1.4 million (after deduction from the \$1.4 million of the NorthWestern Policy premium refund amount), any such excess shall remain with NorthWestern.

92. Sale of Specified Water Rights. After the State and NorthWestern agree that NorthWestern has exhausted all commercially reasonable efforts to sell the identified lands, NorthWestern shall fund any remaining unpaid portion of the \$1.4 million obligation set forth in Paragraph 87 (Funding the \$1.4 Million Obligation) with any proceeds from the sale of water rights owned by NorthWestern relating to the Milltown Site. A description of these water rights is contained in Appendix G of this Consent Decree. In consultation with the United States, the State and the Tribes,

NorthWestern shall identify and provide the appraised value of the specific water rights to be sold by NorthWestern. NorthWestern shall use all commercially reasonable efforts to sell, on the open market and at fair market value, only those water rights needed to satisfy the unpaid balance of the \$1.4 million obligation set forth in Paragraph 87 (Funding the \$1.4 Million Obligation). In the event any water right identified under this Paragraph for sale is made the subject of a bona fide buy-sell agreement with a third party, NorthWestern shall not consummate said sale unless and until the State, in its sole discretion, approves of such sale; however, if the State does not approve such sale, NorthWestern shall have a credit in the amount of the fair market value of the water right against the unsatisfied portion of the \$1.4 million obligation, provided that NorthWestern shall not receive a credit for any particular water right more than one time. Upon the closing of any approved water right sale, NorthWestern shall immediately pay the proceeds from the sale to the State. To the extent that the proceeds from the sale of the specific water rights exceed the amount necessary to reach \$1.4 million (after deduction from the \$1.4 million of the NorthWestern Policy premium refund and the land sales proceeds), any such excess shall remain with NorthWestern.

93. In the event that NorthWestern has not paid the \$1.4 million obligation set forth in Paragraph 87 (Funding the \$1.4 Million Obligation) in full after first complying with Paragraph 90 (Proceeds from the NorthWestern Policy Refund), after second complying with Paragraph 91 (Proceeds from Sales of Specified Lands), and after third complying with Paragraph 92 (Sale of Specified Water Rights), then NorthWestern shall pay to the State in cash any remaining unpaid balance of its \$1.4

million obligation. NorthWestern shall make such payment no later than 915 days after the Effective Date.

94. After the Milltown Dam ceases operations and is dismantled, the State or its designee shall have the option to accept from NorthWestern a conveyance of all or any portion of NorthWestern's real property interests in lands and/or water rights owned by NorthWestern in and around the Milltown Site, provided that the State or its designee does so prior to the purchase by and the conveyance of such lands and water rights to a third party pursuant to Paragraphs 91 and 92, above. In the event of such a conveyance of land and/or water rights to the State or its designee, and after the State first receives the proceeds assigned to it pursuant to Paragraph 90 (Proceeds from the NorthWestern Policy Refund), then NorthWestern shall receive full credit in the amount of any then remaining unpaid balance of the \$1.4 million obligation to the State and said obligation shall be considered to be fully satisfied.

95. NorthWestern's Contribution of Remaining Lands and Water Rights. In addition to the payments set forth in Paragraph 86 (Funding of the \$2.5 Million Obligation) and Paragraph 87 (Funding of the \$1.4 Million Obligation), and as a further contribution to restoration of the Milltown Site, NorthWestern shall offer to the State or the State's designee, no later than 925 days after the Effective Date, all remaining land holdings and water rights of NorthWestern in and around the Milltown Site which are not sold or conveyed in accordance with the provisions of this Section XVIII (Compensation for Restoration Activities at the Milltown Site). NorthWestern shall make this offer in the form of an option to the State or its designee to accept all or any portion of these lands and water rights. The State or its designee shall

have 365 days following Completion of Remedial Action or 1290 days after the Effective Date, whichever is later, to accept the lands and water rights offered, or any portion thereof. Should the State or its designee reject, or not accept within the time limit provided any or all of the remaining land holdings and water rights, NorthWestern shall subsequently offer to the United States and the Tribes any land or water rights that the State or its designee does not accept. The United States and the Tribes have one year from the date of such offer to accept the lands and water rights so offered, or any portion thereof. Upon acceptance of any of the water rights, the State, United States or Tribes shall provide assurances that any water rights that it or its designees accept will not be changed to a consumptive use. NorthWestern releases the United States from any obligation it may have to appraise property as part of the property transfers under Paragraphs 95 and 96.

96. Alberton Gorge Transfer. As agreed in a stipulation among the Parties, during bankruptcy proceedings, NorthWestern assumed, with the bankruptcy court's approval, its obligations under its executory contract with the Five Valleys Land Trust involving the sale of certain property located along the Alberton Gorge, and its ultimate transfer to the State. That transaction closed on November 30, 2004, and the Alberton Gorge property was conveyed to the State on that date.

97. All payments made to the State by NorthWestern pursuant to this Section shall be made by electronic funds transfer to US Bank, Helena Branch, Bank Routing No. 092900383, Account No. 156041200221, specifying in the addendum, third party record, or similar information field "DOJ/NRDP NorthWestern Payment." NorthWestern, or for the State Escrow, the escrow agent, shall contact the Fiscal Bureau

Chief of the Central Services Division of the Montana Department of Justice at least 48 hours prior to initiating a transfer to provide notice of the date, time, and amount of the expected transfer and to confirm the wiring instructions, bank routing, and account numbers. All payments received by the State under this Section and Section XXII (Stipulated Penalties), and subsequent interest and earnings, shall be deposited to the State special revenue fund, as provided for in Mont. Code Ann. § 17-2-102(1)(b)(i), known as the “Milltown Restoration Fund.” This special revenue fund shall be held and maintained by the State in accordance with the requirements of this Consent Decree and such payments and subsequent interest and earnings on such payments shall be separately accounted for in this fund, and may be invested as deemed prudent by the State consistent with the requirements of this Consent Decree. No portion of these payments deposited in the Milltown Restoration Fund, or any interest or earnings thereon, is to be treated as State General Fund money, nor is any portion to be converted or transferred to the State General Fund.

#### XIX. INDEMNIFICATION AND INSURANCE

98. a. The United States, the State, and the Tribes do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA’s or DEQ’s authorized representatives under Section 104(e) of CERCLA or state law. Both Settling Defendants shall indemnify, save and hold harmless the United States and the State and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, and their respective officers, directors, employees, agents, contractors,

subcontractors, and any persons acting on its behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's or DEQ's authorized representatives under Section 104(e) of CERCLA or state law. Further, Settling Defendants agree to pay the United States and the State all costs they incur, including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States and the State based on negligent or other wrongful acts or omissions of Settling Defendants, and their respective officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities relating to the Milltown Site pursuant to this Consent Decree. Neither the United States, the State, nor the Tribes shall be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither Settling Defendants nor any such contractor shall be considered an agent of the United States, the State, or the Tribes.

b. NorthWestern shall indemnify, save and hold harmless the Tribes and their officials, agents, employees, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of NorthWestern, and its respective officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Further, NorthWestern agrees to pay the Tribes all costs the Tribes incur, including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made

against the Tribes based on negligent or other wrongful acts or omissions of NorthWestern, and its respective officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree.

c. The United States and the State shall give Settling Defendants notice of any claim for which the United States and the State plan(s) to seek indemnification pursuant to Paragraph 98(a), and shall consult with Settling Defendants prior to settling such claim. The Tribes shall give NorthWestern notice of any claim for which the Tribes plan to seek indemnification pursuant to Paragraph 98(b), and shall consult with NorthWestern prior to settling such claim.

99. Settling Defendants waive all claims against the United States, the State, and the Tribes for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State arising from or on account of any contract, agreement, or arrangement between Settling Defendants, individually or collectively, and any person for past performance or response activities at the Milltown Site or performance of activities by Settling Defendants that are required under this Consent Decree, including, but not limited to, claims on account of construction delays; provided, however, such waiver does not include claims by the Settling Defendants for damages or costs arising from the State's failure to implement Restoration activities in a timely manner, but only if such delay is caused by the State or its agents or contractors and not by any other Party or third party or by any other intervening factor beyond the State's control and only to the extent Settling Defendants incur damages or additional costs caused by such delay. In addition:

a. Settling Defendants shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Settling Defendants and any person for performance of any activities relating to the Milltown Site under this Consent Decree, including, but not limited to, claims on account of construction delays; provided, however, such indemnification and hold harmless does not include claims by the Settling Defendants for damages or costs arising from the State's failure to implement Restoration activities in a timely manner, but only if such delay is caused by the State or its agents or contractors and not by any other Party or third party or by any other intervening factor beyond the State's control and only to the extent Settling Defendants incur damages or additional costs caused by such delay.

b. NorthWestern shall indemnify and hold harmless the Tribes with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between NorthWestern and any person for performance of any activities relating to the Milltown Site under this Consent Decree.

100. a. Prior to the lodging of this Consent Decree, each Settling Defendant provided the United States and the State with information that satisfied the United States and the State as to each Settling Defendants' financial resources and ability to provide the equivalent of comprehensive general liability insurance with limits of five million dollars, combined single limit, and automobile insurance with limits of two million dollars, combined single limit.

b. If, prior to the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 72(c) of Section XV (Certification of Completion), any material change occurs in the financial resources of any Settling Defendant such that the Settling Defendant may no longer be able to assure its ability to provide the equivalent of comprehensive general liability insurance with limits of five million dollars, combined single limit, and automobile insurance with limits of two million dollars, combined single limit, that Settling Defendant shall promptly notify the United States and the State in accordance with Section XXX (Notices and Submissions). Upon receipt of such notice, EPA may, in its sole and unreviewable discretion, after reasonable opportunity for review by the State, require that Settling Defendant obtain that insurance.

c. If, prior to the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Paragraph 72(c) of Section XV (Certification of Completion), the United States or the State obtain(s) information regarding any material change in the financial resources of a Settling Defendant that leads the United States, in consultation with the State, to believe that Settling Defendant may no longer have the financial ability to provide the equivalent of comprehensive general liability insurance with limits of five million dollars, combined single limit, and automobile insurance with limits of two million dollars, combined single limit, the United States shall so notify that Settling Defendant in accordance with Section XXX (Notices and Submissions). The Settling Defendant shall have sixty (60) days after receiving any such written notice to respond and provide corrected or supplemental information or otherwise assure the United States and the State that it has the ability to provide the

equivalent of comprehensive general liability insurance and automobile insurance with limits of five million dollars, combined single limit and two million dollars, combined single limit respectively.

d. If the Settling Defendant does not satisfactorily resolve the United States' concerns that a material change has occurred in its financial resources such that the Settling Defendant may no longer have the financial ability to provide the equivalent of comprehensive general liability with limits of five million dollars, combined single limit, and automobile insurance with limits of two million dollars, combined single limit, EPA, in consultation with the State and the Tribes, and in its sole and unreviewable discretion, may require the Settling Defendant to obtain such insurance which names the United States and the State as additional beneficiaries and/or additional insureds.

e. If the Settling Defendant demonstrates by evidence satisfactory to EPA and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, the Settling Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

f. In addition, for the duration of the Consent Decree, Settling Defendants shall also satisfy, or shall ensure that their respective contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of workers' compensation insurance for all persons performing activities required of Settling Defendants by this Consent Decree. Until EPA issues its notice of completion of

remedial action pursuant to Paragraph 72(c), Settling Defendants shall provide to EPA and the State certificates of such insurance and, if requested, a copy of each insurance policy. Settling Defendants shall resubmit such certificates and copies of policies each year on or before January 30<sup>th</sup>.

## XX. FORCE MAJEURE

101. “Force Majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of a Settling Defendant, of any entity controlled by that Settling Defendant, or of that Settling Defendant’s contractors, that delays or prevents the performance of any obligation under this Consent Decree despite the best efforts to fulfill the obligation of the Settling Defendant or Settling Defendants required to implement the obligation. The requirement that the Settling Defendant or Settling Defendants responsible for performing an obligation exercise “best efforts to fulfill the obligation” under this Paragraph includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. “Force Majeure” does not include financial inability to complete the Work, the Hydroelectric Activities or a failure to attain the Performance Standards. A “Force Majeure” event may, however, include a labor strike or work stoppage directly related to remedial construction activities at the Milltown Site.

102. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendant or Settling Defendants responsible for the obligation shall

notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Hazardous Waste Management Division, EPA Region 8, and shall also notify orally the State Project Coordinator, within seven (7) days of when a responsible Settling Defendant first knew that the event might cause a delay. Within twelve (12) days thereafter, the responsible Settling Defendant or Settling Defendants shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the rationale for attributing such delay to a force majeure event if the Settling Defendant intends to assert such a claim; and a statement as to whether such event may cause or contribute to an endangerment to public health, welfare or the environment. The responsible Settling Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure event. Failure to comply with the above requirements shall preclude any Settling Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. For obligations where responsibility is joint, Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by any Settling Defendant, or Settling Defendants' contractors knew or should have known. For those obligations that are the several obligation of a Settling Defendant, that Settling Defendant shall be deemed to know of any circumstance which any entity

controlled by that Settling Defendant including its contractors knew or should have known.

103. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendants in writing of its decision.

104. If the Settling Defendant responsible for performing the obligation elects to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Settling Defendant(s) shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts to fulfill the obligation

were exercised to avoid and mitigate the effects of the delay, and that the Settling Defendant complied with the requirements of Paragraphs 102 and 103 above. If the Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by the Settling Defendant of the affected obligation of this Consent Decree.

## XXI. DISPUTE RESOLUTION

### Dispute Resolution Between EPA and Settling Defendants

105. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes between EPA and the Settling Defendants arising under or with respect to this Consent Decree. The procedures set forth in this Section shall not apply to actions by the United States or the State to enforce obligations of Settling Defendants that have not been disputed in accordance with this Section. EPA's decisions under these procedures, except for EPA's final administrative decision under Paragraph 111(b), will be made in consultation with the State.

106. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of Settling Defendants under this Consent Decree that is not directly in dispute, unless EPA agrees or the Court orders otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 138. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that Settling Defendant(s) do not prevail on the disputed issue, stipulated penalties shall be assessed and paid by the Settling Defendant or Settling

Defendants responsible for the obligation which was disputed as provided in Section XXII (Stipulated Penalties). Stipulated penalties shall not be assessed by the United States nor paid by Settling Defendant(s) to the extent that Settling Defendant(s) prevail on the disputed issue.

107. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations among the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party to the dispute sends the other party to the dispute a written Notice of Dispute.

108. In the event that the parties to the dispute cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, not more than thirty (30) days after the conclusion of the informal negotiation period, one or more of Settling Defendants invokes the formal dispute resolution procedures of this Section by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendant(s). The Statement of Position shall specify the position of the Settling Defendant(s) as to whether formal dispute resolution should proceed under Paragraph 111 or Paragraph 112.

109. Within thirty (30) days after receipt of such Statement of Position, EPA will serve on the Settling Defendant or Settling Defendants to the dispute EPA's Statement of Position, including, but not limited to, any factual data, analysis, or opinion

supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 111 or Paragraph 112. Not more than thirty (30) days after receipt of EPA's Statement of Position, the Settling Defendants to the dispute may submit a further statement of position in reply.

110. If there is disagreement between EPA and Settling Defendant(s) as to whether dispute resolution should proceed under Paragraph 111 or Paragraph 112, the Parties to the dispute shall follow the procedures set forth in the Paragraph determined by EPA to be applicable. If Settling Defendant(s) ultimately appeal to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in Paragraph 111 or Paragraph 112.

111. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action to be implemented by the Settling Defendants and any other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (a) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA for implementation by Settling Defendants under this Consent Decree; and (b) the adequacy of the performance of response actions taken by Settling Defendants pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the ROD's provisions.

a. EPA shall maintain an administrative record of the dispute, which shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Assistant Regional Administrator for Enforcement Compliance and Environmental Justice, EPA Region 8, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 111(a). This decision shall be binding upon Settling Defendants, subject only to the right to seek judicial review pursuant to Subparagraphs 111(c) and 111(d).

c. Any administrative decision made by EPA pursuant to Paragraph 111(b) shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendant(s) to the dispute with the Court and served on the Parties not more than thirty (30) days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States and the State may file a response to such motion not more than 30 days after receipt of that motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Assistant Regional Administrator for Enforcement Compliance and Environmental Justice, EPA Region 8, is arbitrary and capricious or otherwise not in accordance with

law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 111(a).

112. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by Paragraph 113.

113. Following receipt of the Statement of Position submitted pursuant to Paragraph 109, the Assistant Regional Administrator for Enforcement Compliance and Environmental Justice, EPA Region 8, will issue a final decision resolving the dispute. The Assistant Regional Administrator's decision shall be binding on Settling Defendant(s) to the dispute, unless, within twenty (20) days of receipt of the decision one or more Settling Defendant(s) to the dispute files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to such motion within 30 days of receipt of the motion.

114. Judicial review of any dispute governed by Paragraphs 112 through 113 shall be governed by applicable principles of law.

Dispute Resolution Between DOI, the Tribes, and NorthWestern

115. The dispute resolution procedures of Paragraphs 115 through 122 shall be the exclusive mechanism to resolve disputes between DOI, the Tribes, and NorthWestern arising under or with respect to this Consent Decree. The procedures set

forth in these Paragraphs shall not apply to actions by DOI or the Tribes to enforce obligations of NorthWestern that have not been disputed in accordance with this Section.

116. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of NorthWestern under this Consent Decree that is not directly in dispute, unless the Parties agree or the Court orders otherwise. Stipulated penalties with respect to a disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 138. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that NorthWestern does not prevail on the disputed issue, stipulated penalties shall be assessed and paid by NorthWestern as provided in Section XXII (Stipulated Penalties). Stipulated penalties shall not be assessed by the United States nor paid by NorthWestern to the extent that NorthWestern prevails on the disputed issue.

117. Any dispute between NorthWestern, the Tribes, and DOI which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party to the dispute sends the other party to the dispute a written Notice of Dispute.

118. The parties may also attempt to resolve the dispute through the use of a neutral third-party mediator if all of the parties to the dispute agree to such mediation

and the mediator within twenty (20) days after the conclusion of the informal negotiating period. The period of meditation shall not exceed 30 days from the conclusion of the informal negotiating period.

119. In the event that the parties to the dispute cannot resolve a dispute through informal negotiations or mediation, then the position advanced by DOI, in consultation with the Tribes shall be considered binding unless, not more than thirty (30) days after the conclusion of the informal negotiation period, or if the parties agree to the use of a mediator not more than thirty (30) days after the conclusion of mediation, NorthWestern invokes the formal dispute resolution procedures of this Section by serving on DOI and the Tribes a written Statement of Position on the matter in dispute, including any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by NorthWestern.

120. Within thirty (30) days after receipt of such Statement of Position, DOI, in consultation with the Tribes, will serve on NorthWestern its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by DOI and the Tribes.

121. Following receipt of the Statement of Position submitted pursuant to Paragraph 120, DOI, in consultation with the Tribes, will issue a final decision resolving the dispute. The decision shall be binding on NorthWestern unless, within twenty (20) days of receipt of the decision NorthWestern files with the Court and serves on DOI and the Tribes a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly

implementation of this Consent Decree. DOI and/or the Tribes may file a response to such motion within 30 days of receipt of the motion.

122. Judicial review of any dispute governed by Paragraphs 115 through 121, above, shall be governed by applicable principles of law.

Dispute Resolution Between NorthWestern and the State

123. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes solely between the State and NorthWestern arising under or with respect to compliance with Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site). The procedures set forth in this Section shall not apply to actions by the State to enforce obligations of NorthWestern that have not been disputed in accordance with this Section. The State's decisions under these procedures, except for the State's final administrative decision under Paragraph 128, will be made in consultation with DOI and the Tribes.

124. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of NorthWestern under this Consent Decree that is not directly in dispute, unless the State agrees or the Court orders otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 138. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site). In the event that NorthWestern does not prevail on the disputed issue, stipulated

penalties shall be assessed and paid as provided in Section XXII (Stipulated Penalties). Stipulated penalties shall not be assessed by the State nor paid by NorthWestern to the extent that NorthWestern prevails on the disputed issue.

125. Any dispute between NorthWestern and the State arising under or with respect to Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site) of this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless the period is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party to the dispute sends the other party to the dispute a written Notice of Dispute.

126. In the event that the parties to a dispute arising under Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site) cannot resolve the dispute by informal negotiations under the preceding Paragraph, then the position advanced by the State shall be considered binding unless, not more than thirty (30) days after the conclusion of the informal negotiation period, NorthWestern invokes the formal dispute resolution procedures of this Section by serving on the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by NorthWestern.

127. Within thirty (30) days after receipt of NorthWestern's Statement of Position, the State will serve on NorthWestern the State's Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that

position and all supporting documentation relied upon by the State. Not more than thirty (30) days after receipt of the State's Statement of Position, NorthWestern may submit a further Statement of position in reply. Copies of all papers submitted by either NorthWestern or the State in connection with a dispute shall also be served on the other Parties to this Consent Decree.

128. Following receipt of NorthWestern's Statement of Position and any further reply submitted by NorthWestern pursuant to Paragraph 127, the Attorney General of the State will issue a final decision resolving the dispute. The Attorney General's decision shall be binding on NorthWestern unless, within twenty (20) days of receipt of the decision, NorthWestern files with the Court and serves on the Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The State may file a response to NorthWestern's motion within 30 days of receipt of the motion.

#### Dispute Resolution Between the State and AR

129. Notwithstanding any other provision of this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising with respect to the State's modifications to the Grading Plan. No Party except AR may formally dispute any modification to the Grading Plan made by the State. If AR disagrees with any final modification to the Grading Plan made by the State, AR may invoke the dispute resolution procedures of this Section. Except for the State's final

administrative decision under Paragraph 134 of this Section, the State shall make its decisions under these procedures in consultation with EPA, DOI and the Tribes.

130. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of AR under this Consent Decree that is not directly in dispute, unless the State agrees or the Court orders otherwise.

131. Any dispute between AR and the State arising under or with respect to any final modification to the Grading Plan by the State shall in the first instance be the subject of informal negotiations among the State, EPA, DOI, the Tribes, AR and NOR. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless the period is modified by written agreement of AR and the State. The dispute shall be considered to have arisen when AR sends the State a written Notice of Dispute.

132. In the event that AR and the State cannot resolve the dispute by informal negotiations under the preceding Paragraph, then the position advanced by the State shall be considered binding unless, not more than twenty (20) days after the conclusion of the informal negotiation period, AR invokes the formal dispute resolution procedures of this Section by serving on the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by AR.

133. Within twenty (20) days after receipt of AR's Statement of Position, the State will serve on AR the State's Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all

supporting documentation relied upon by the State. Not more than ten (10) days after receipt of the State's Statement of Position, AR may submit a further Statement of position in reply. Copies of all papers submitted by either AR or the State in connection with a dispute shall also be served on the other Parties to this Consent Decree.

134. Following receipt of AR's Statement of Position and any further reply submitted by AR pursuant to Paragraph 133, the Attorney General of the State will issue a final decision within twenty (20) days resolving the dispute. The Attorney General's decision shall be binding on AR unless, within twenty (20) days of receipt of the decision, AR files with the Court and serves on the Parties a motion for judicial review of the Attorney General's decision. AR's motion, supporting briefs and evidence shall set forth the matter in dispute, arguments supporting its position, the efforts made by the parties to resolve the dispute, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The State may file a response to AR's motion within 20 days of receipt of the motion. Judicial review of any dispute arising under Paragraphs 129 through 134 shall be governed by applicable principles of law and the provisions of this Consent Decree and the SOW, including its attachments, which relate to the Grading Plan.

## XXII. STIPULATED PENALTIES

135. Unless excused under Section XX (Force Majeure), the Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 136 and 137 to the United States for failure to comply with the requirements of this Consent Decree specified below for which that Settling Defendant is either jointly or severally responsible, except that NorthWestern shall be liable only to the State for

stipulated penalties in the amounts set forth in Paragraph 136(a) for NorthWestern’s failure to comply with the requirements in Section XVIII (NorthWestern’s Compensation for Restoration Activities at the Milltown Site) of this Consent Decree. “Compliance” by each of the Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below for which that Settling Defendant is jointly or severally responsible in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

136. a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$4,000	1st through 14th day
\$5,500	15th through 30th day
\$7,500	31st day and beyond

b. Failure to comply with any of the requirements in Section VI (Performance of the Work and Hydroelectric Activities by Settling Defendants), except for temporary exceedances of total suspended solids that are specifically anticipated in the SOW and the scouring model referenced therein, Section VIII (Remedy Review), Section X (Access and Institutional Controls), Section XIV (Assurance of Ability to Complete the Remedial Action and Operation and Maintenance), Section XVI (Emergency Response), Section XVII (Reimbursement of

Response Costs) and Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site).

c. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph d:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$2,000	1st through 14th day
\$3,500	15th through 30th day
\$5,000	31st day and beyond

d. Failure to comply with any other requirement in Section IX (Quality Assurance, Sampling, and Data Analysis), Section XI (Reporting Requirements), Section XII (Approval of Plans and Other Submissions), Section XIII (Project Coordinators), Section XV (Certification of Completion), Section XIX (Indemnification and Insurance), Section XXVIII (Access to Information), Section XXIX (Retention of records), Section XXX (Notices and Submissions) and Section XXXIV (Community Relations).

137. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 152 of Section XXIII (Covenants and Reservations by the United States), Settling Defendants shall be liable for a stipulated penalty in the amount of \$900,000; provided, however, that this stipulated penalty shall not exceed 30% of the present value of the Work to be taken over, based on EPA's cost estimates and a discount rate of 5%.

138. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the

final day of the correction of the noncompliance or completion of the activity; provided, however, that stipulated penalties shall not accrue:

a. with respect to a deficient submission under Section XII (Approval of Plans and Other Submissions), during the period, if any, beginning on the twenty-first (21<sup>st</sup>) day after EPA's receipt of such submission until five days after the date that EPA notifies Settling Defendants of any deficiency;

b. with respect to a decision by the Assistant Regional Administrator for Enforcement Compliance and Environmental Justice, EPA Region 8, under Paragraphs 111(b) and 113 of Section XXI (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's Statement of Position is received until five days after the date that the Assistant Regional Administrator issues a final decision regarding such dispute;

c. with respect to judicial review by this Court or the Court of Appeals of any dispute under Section XXI (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until five days after the date that the Court issues a final decision regarding such dispute.

Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree. Any violation of the compliance milestones set forth in Paragraph 15 (Remedial Design), however, shall not also constitute a separate violation of the compliance milestones set forth in Paragraph 16 (Remedial Action).

139. Following EPA's determination, in consultation with DOI, the State, and the Tribes, that one or more of the Settling Defendants have failed to comply

with a requirement of this Consent Decree, EPA may give the Settling Defendants written notification of the same and describe the noncompliance. EPA may send to NorthWestern, for any violation of a requirement of this Consent Decree that is limited to NorthWestern, and to the Settling Defendants, for all other requirements of this Consent Decree, a written demand for the payment of the penalties. Stipulated penalties shall accrue as provided in Paragraph 138 regardless of whether EPA has notified the Settling Defendants of a violation.

140. Following the State's determination, in consultation with EPA, DOI, and the Tribes, that NorthWestern has failed to comply with a requirement of this Consent Decree, the State may give NorthWestern written notification of the same and describe the noncompliance. The State may send NorthWestern a written demand for the payment of the penalties. Stipulated penalties shall accrue as provided in Paragraph 138 regardless of whether the State has notified NorthWestern of a violation.

141. All penalties accruing under this Section shall be due and payable to the United States, or to the State pursuant to Paragraph 140, within thirty (30) days of one or both Settling Defendants' receipt from EPA, or from the State pursuant to Paragraph 140, of a demand for payment of the stipulated penalties, unless one or both Settling Defendants invoke the Dispute Resolution procedures under Section XXI (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," and shall be mailed to the following addresses:

Regular Mail: Mellon Bank, Attn: Superfund Accounting, Lockbox 360859,  
Pittsburgh, PA 15251-6859;

or

Federal Express, Airborne, Etc.: Mellon Bank, 3 Mellon Bank Center, Room #153-2713, Pittsburgh, PA 15259 REF: Lockbox 360859.

Each such payment shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID # 08-22, the DOJ Case Number 90-11-2-430, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Paragraph, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXX (Notices and Submissions), and to Cost Recovery Coordinator, US EPA Montana Office, 10 West 15<sup>th</sup> Street, Suite 3200, Helena, Montana 59624 and to Director of Financial Management Programs, US EPA Region VIII, 999 18<sup>th</sup> Street, Denver, Colorado 80202. EPA shall forward to DOI, however, any stipulated penalties assessed for a Settling Defendant's violations of the Endangered Species Act.

142. All payments made to the State pursuant to this Section shall be made by electronic funds transfer to US Bank, Helena Branch, Bank Routing No. 092900383, Account No. 156041200221, specifying in the addendum, third party record, or similar information field "DOJ/NRDP NorthWestern Milltown Stip. Pymt." NorthWestern shall contact the Administrator of the Central Services Division of the Montana Department of Justice at least 48 hours prior to initiating a transfer to provide notice of the date, time, and amount of the expected transfer and to confirm the wiring instructions, bank routing, and account numbers.

143. The payment of stipulated penalties shall not alter in any way Settling Defendants' obligation to complete the performance of the Work or Hydroelectric Activities required under this Consent Decree.

144. Effect of Dispute Resolution. Penalties shall continue to accrue as provided in Paragraph 138 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA or the State that is not appealed to this Court, Settling Defendants to the dispute shall pay accrued stipulated penalties determined to be owing to the United States, or to the State as provided in Paragraph 140 of this Consent Decree, within fifteen (15) days of the agreement or the receipt of EPA's or the State's decision or order;

b. If the dispute is appealed to this Court and the United States or the State prevails in whole or in part, Settling Defendants to the dispute shall pay all accrued stipulated penalties determined by the Court to be owed to the United States or the State within sixty (60) days of receipt of the Court's decision or order, except as provided in Subparagraph c, below; and

c. If the District Court's decision is appealed by any Party, Interest shall accrue on the stipulated penalties determined by the District Court to be owing to the United States or the State. Within fifteen (15) days of receipt of the final appellate court decision, Settling Defendants to the dispute shall pay all accrued stipulated penalties and Interest determined to be owed by said Settling Defendants to the United States or the State.

145. Failure to Pay Stipulated Penalties. If one or both Settling Defendants fail to pay stipulated penalties when due, the United States or the State may institute proceedings to collect the penalties, as well as Interest and the cost of enforcing the requirements of this Consent Decree, including attorney's fees. The affected Settling Defendants shall pay Interest on the unpaid balance of any stipulated penalty, which shall begin to accrue on the date of demand made pursuant to Paragraph 139.

146. No Waiver of Other Remedies. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to the Endangered Species Act or Section 122(1) of CERCLA; provided, however, that the United States shall not seek civil penalties pursuant to Section 122(1) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Consent Decree.

147. Discretion to Waive Stipulated Penalties. Notwithstanding any other provision of this Section, the United States or the State may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

### XXIII. COVENANTS AND RESERVATIONS BY THE UNITED STATES

148. United States' Covenants for the Milltown Site. In consideration of the actions that will be performed and the payments that will be made by Settling Defendants under the terms of this Consent Decree, and except as specifically provided in

Paragraphs 149 (United States' Pre-Certification Reservations for the Milltown Site), 150 (United States' Post-Certification Reservations for the Milltown Site), and 156 (United States' General Reservation of Rights) of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants and their respective officers, directors and employees, to the extent that the liability of such officers, directors, and employees arises solely from their status as officers, directors, and employees, pursuant to Sections 106, 107(a), and 113(f) (to the extent that that the United States has any claims against Settling Defendants under Section 113(f) of CERCLA, 42 U.S.C. §§ 9606, 9607(a), 9613(f), Sections 3004(u) and (v), 3008 and 7003 of RCRA, 42 U.S.C. §§ 6924(u) and (v), 6928 and 6973, and Sections 309(b), 311, and 504 of the Clean Water Act, 33 U.S.C. §§ 1319(b), 1321, and 1364, relating to the Milltown Site. Except with respect to future liability, these covenants shall take effect upon the receipt by EPA of the payments required by Paragraph 79 of Section XVI (Settling Defendants' Payment of Federal Milltown Past Response Costs). With respect to future liability, these covenants shall take effect upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 72(c) of Section XIV (Certification of Completion of the Remedial Action). These covenants are conditioned upon the satisfactory performance by Settling Defendants of their joint and several obligations under this Consent Decree and, for each Settling Defendant, its respective sole obligations under this Consent Decree. These covenants extend only to Settling Defendants and their respective officers, directors, and employees, and do not extend to any other person. Settling Defendants shall have also resolved their liability for implementation of the

Grading Plan upon satisfaction of the requirements of Paragraph 30 of this Consent Decree.

149. United States' Pre-certification Reservations for the Milltown Site.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants, and EPA reserves the right to issue an administrative order seeking to compel Settling Federal Agencies:

i. to perform further response actions relating to the Milltown Site; or

ii. to reimburse the United States for additional costs of response relating to the Milltown Site

if, prior to Certification of Completion of the Remedial Action:

A. conditions at the Milltown Site, previously unknown to EPA, are discovered, or

B. information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

150. United States' Post-certification Reservations for the Milltown

Site. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute

proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants, and EPA reserves the right to issue an administrative order seeking to compel the Settling Federal Agencies:

i. to perform further response actions relating to the Milltown Site; or

ii. to reimburse the United States for additional costs of response relating to the Milltown Site

if, subsequent to Certification of Completion of the Remedial Action:

A. conditions at the Milltown Site, previously unknown to EPA, are discovered, or

B. information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

151. Information and Conditions Known to the United States for the Milltown Site. For purposes of Paragraph 149 (United States' Pre-Certification Reservations for the Milltown Site), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of lodging of this Consent Decree that are described or contained in: (a) the ROD; (b) the administrative record supporting the ROD; (c) the EPA Site Record for the Milltown Reservoir Sediments OU and the Milltown Water Supply OU; (d) the Record of Decision for the Clark Fork River Operable Unit and the administrative record supporting that

Record of Decision; (e) the EPA Clark Fork River Operable Unit Site Record; and (f) any other non-privileged or non-confidential records relating to the Milltown Site or the Clark Fork River Operable Unit maintained by EPA and its employees. For purposes of Paragraph 150 (United States' Post-Certification Reservations for the Milltown Site), the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of EPA's Certification of Completion of the Remedial Action and described or contained in: (a) the ROD; (b) the administrative record supporting the ROD; (c) the EPA Site Record for the Milltown Reservoir Sediments OU and the Milltown Water Supply OU; (d) the Record of Decision for the Clark Fork River Operable Unit and the administrative order supporting that Record of Decision; (e) the EPA Clark Fork River Operable Unit Site Record; and (f) any other non-privileged or non-confidential records relating to the Milltown Site or the Clark Fork River Operable Unit maintained by EPA and its employees. For purposes of Paragraphs 149 and 150, as those Paragraphs pertain to Milltown Mitigation, information known to EPA shall also include: (a) all geotechnical, structural and hydrological data, surveys, inspection reports and other geotechnical, structural and hydrological information in records maintained by the Montana Department of Transportation as of the date of lodging pertaining to the two State-owned bridges located at the Milltown Site that support Interstate 90, portions of Interstate 90 located at the Milltown Site, and the State-owned bridge located at the Milltown Site supporting Montana Highway 200; (b) all geotechnical information gathered during the Phase 1 and Phase 2 geotechnical sampling of the two State-owned bridges located at the Milltown Site that support Interstate 90 and the State-owned bridge located at the Milltown Site supporting Montana Highway 200; and (c) the mitigation

report that EPA will produce after the collection of the Phase 1 and Phase 2 geotechnical sampling of the two State-owned bridges located at the Milltown Site that support Interstate 90 and the State-owned bridge located at the Milltown Site supporting Montana Highway 200. For purposes of Paragraphs 149 (United States' Pre-Certification Reservations for the Milltown Site) and 150 (United States' Post-Certification Reservations for the Milltown Site), the fact that the Remedial Action has failed shall not constitute, in and of itself, an unknown condition or new information, unless the failure of the Remedial Action results from an unknown condition or new information.

152. Work Takeover.

a. In the event EPA, in consultation with the State, determines that the Settling Defendants (i) have ceased implementation of any portion of the Work or the Hydroelectric Activities, (ii) are seriously or repeatedly deficient or late in their performance of the Work or the Hydroelectric Activities, or (iii) are implementing the Work or the Hydroelectric Activities in a manner which may cause an endangerment to human health or the environment, then EPA may issue a written notice ("Work Takeover Notice") to the Settling Defendants indicating EPA's intention to take over some or all of the Work or Hydroelectric Activities. In the Work Takeover Notice, EPA shall also indicate the circumstances giving rise to EPA's intention to take over some or all of the Work or Hydroelectric Activities.

b. The Settling Defendants shall have a period of 30 days in which to remedy the circumstances identified in EPA's Work Takeover Notice. If, after the expiration of the 30-day period, the Settling Defendants have not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of Work Takeover Notice,

then EPA may at any time thereafter assume the performance of all or any portions of the Work or the Hydroelectric Activities that constitute Remedial Action or Operation and Maintenance (“Work Takeover”) as EPA determines necessary. EPA shall provide written notice to the Settling Defendants of its decision to commence the Work Takeover, and the date of such written notice, or such other date that follows as may be specified by EPA in the written notice, shall be the “Work Takeover Commencement Date.”

c. The Settling Defendants may invoke the procedures set forth in Section XXI (Dispute Resolution), Paragraph 111 to dispute EPA’s implementation of a Work Takeover under this Paragraph. Notwithstanding the Settling Defendants’ invocation of such dispute resolution procedures, however, and during any such dispute, EPA may commence and continue a Work Takeover under this Paragraph until the earlier of (i) the date that the circumstances giving rise to the Work Takeover have been resolved, to EPA’s satisfaction, or (ii) the date that a final decision is rendered in accordance with Section XIX (Dispute Resolution), requiring EPA to terminate such Work Takeover.

d. After the Work Takeover Commencement Date, and for the duration of any Work Takeover, EPA at its election shall have access to the policy of insurance described in Paragraph 66 (Assurance of Ability to Complete Remedial Action and Operation and Maintenance) to ensure continuous funding of the Work. Settling Defendants agree that, following the Work Takeover Commencement Date, EPA may elect to be designated as the first named insured under the relevant coverages of the policy for such purposes.

e. The Settling Defendants shall also reimburse EPA for any costs paid or incurred by EPA performing the Work or the Hydroelectric Activities during the course of the Work Takeover to the extent that the United States does not pursue recovery of such costs through the policy of insurance described in Paragraph 66 or to the extent such costs are not promptly and fully paid to EPA by the insurer. Notwithstanding any other provision of this Consent Decree, costs paid or incurred by the United States in performing the Work or the Hydroelectric Activities pursuant to this Paragraph shall be considered Federal Milltown Future Response Costs that the Settling Defendant or Settling Defendants responsible for performing the Work or Hydroelectric Activities in question shall pay pursuant to Section XVII (Reimbursement of Response Costs).

153. Milltown Site Covenant for the Settling Federal Agencies. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of this Consent Decree, and except as specifically provided in Paragraphs 149 (United States' Pre Certification Reservations for the Milltown Site, 150 (United States' Post Certification Reservations for the Milltown Site, and 156 (United States' General Reservation of Rights) of this Section, EPA covenants not to take administrative action against the Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and Sections 3004(u) and (v), and 7003 of RCRA, 42 U.S.C. §§ 6924(u) and (v) and 6973, relating to the Milltown Site. Except with respect to future liability, this covenant shall take effect upon the receipt by EPA of the payments required by Paragraph 85 (Settling Federal Agencies' Payment of Response Costs for the Milltown Site). With respect to future liability, this covenant shall take

effect upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 72(c) of Section XIV (Certification of Completion of Remedial Action). This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. This covenant extends only to the Settling Federal Agencies and does not extend to any other person.

154. United States' Covenant for Natural Resource Damages to NorthWestern. Except as specifically provided in Paragraphs 155 (United States' Natural Resources Damages Reservation as to NorthWestern) and 156 (General Reservations of Rights of the United States) of this Section, the United States covenants not to sue or to take administrative action against NorthWestern, and against its officers, directors and employees to the extent such officers', directors', and employees' liability arises solely from their status as officers, directors, or employees, for recovery of Natural Resource Damages under Section 107 of CERCLA, 42 U.S.C. § 9607 and Section 311 of the Clean Water Act, 33 U.S.C. 1321, relating to the Milltown Site and the Downstream Clark Fork River Riparian Area. This covenant not to sue shall take effect upon the Certification of Completion of the Remedial Action by EPA in accordance with Section XV of this Consent Decree, the Certification of Completion of Hydroelectric Activities in accordance with Section XV of this Consent Decree, and receipt by the State (or other eligible governmental parties) of all compensation and conveyances required under Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site) of this Consent Decree. This covenant not to sue extends only to NorthWestern, and to its officers, directors and employees, and does not extend to any other person.

155. United States' Natural Resource Damages Reservation as to NorthWestern.

a. Notwithstanding any other provision of the Consent Decree, the United States reserves the right to institute proceedings against NorthWestern seeking recovery of Natural Resource Damages arising from:

i. injury to, destruction of, or loss of natural resources, and the cost of assessing such injury, destruction, or loss, that results from a release of any kind of hazardous substance not identified in any site record or administrative record maintained by the United States Fish and Wildlife Service for the Milltown Site, or the EPA Site Record or EPA administrative record for the Milltown Site, as of the date of lodging of the Consent Decree; or

ii. injury to, destruction of, or loss of natural resources, and the cost of assessing such injury, destruction, or loss, that results from unanticipated, extraordinary events, such as the failure of the Milltown Dam, which result in the release of substantial additional quantities of Hazardous Substances; or

iii. injury to, destruction of, or loss of natural resources, and the cost of assessing such injury, destruction, or loss, within the Milltown Site and the Downstream Clark Fork River Riparian Area to Biological Resources within a taxonomic family not addressed in the Site files of the Fish and Wildlife Service of DOI for the Site, the Tribes' natural resource damage assessment, the State's natural resource damage

assessment or the expert reports submitted in the Federal or State Action and that is of a Category of Injury not identified in the DOI Site files for the Milltown Site, the Tribes' natural resource damage assessment, the State's natural resource damage assessment or the expert reports submitted in the Federal or State Action.

b. The United States has asserted as part of its claims in the Federal Action that there are continuing releases and re-releases of hazardous substances within the Clark Fork River not resulting from unanticipated, extraordinary events, and the United States agrees that such continuing releases, including releases anticipated from Remedial Action and Restoration under this Consent Decree, and their alleged effects, are not, separately or combined, unanticipated or extraordinary events or conditions.

c. Nothing in this Section XXIII (Covenants and Reservations by the United States) affects the United States' Reservations for natural resource damage claims against AR regarding the Milltown Site contained in the Consent Decree lodged in this action for the Streamside Tailings Operable Unit.

156. United States' General Reservations of Rights. The covenants set forth in Paragraphs 148 (United States' Covenants for the Milltown Site), 153 (Milltown Site Covenant for Settling Federal Agencies), and 154 (United States' Covenant for Natural Resource Damages to NorthWestern) do not pertain to any matters other than those expressly specified in those Paragraphs. With respect to all other matters, the United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants, and EPA reserves the right to issue an administrative order seeking

to compel the Settling Federal Agencies to take action in certain circumstances, including, but not limited to, the following:

a. Non-compliance with Consent Decree: claims to enforce this Consent Decree based on a failure by one or both Settling Defendants to meet a requirement of this Consent Decree for which one or both parties are obligated pursuant to this Consent Decree;

b. Failure to Comply with Upstream Cleanup Requirements: claims against AR based on releases of Waste Materials resulting from AR's failure to fully and timely comply with the cleanup requirements of upstream operable units as required by the State or the United States;

c. Release or Disposal Outside of the Milltown Site: claims against Settling Defendants or the Settling Federal Agencies for response costs and injunctive relief under CERCLA Sections 106 and 107, RCRA Sections 3004(u), 3004(v), 3008, and 7003, or Sections 309(b), 311, and 504 of the Clean Water Act, arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Milltown Site (other than as provided in the ROD and the SOW), including claims for (i) any releases of Waste Material that come to be located at the Milltown Site from a failure of upstream retaining walls, settling ponds, dams, or other upstream control measures; or (ii) any upstream releases of Waste Material which come to be located at the Milltown Site, other than anticipated continuation of existing migration or releases caused by a failure of Restoration to meet Restoration Performance Standards. NorthWestern shall not be liable by virtue of this subparagraph for an upstream release for which it is not otherwise liable;

d. Conduct Causing Future Release or Disposal: claims for response costs and injunctive relief under CERCLA Sections 106 and 107 or RCRA Sections 3004(u), 3004(v), 3008, and 7003, or Sections 309(b), 311, and 504 of the Clean Water Act, against each Settling Defendant, arising from future conduct by that Settling Defendant after the Effective Date that causes a release or disposal of Waste Materials at or from the Milltown Site, other than as provided in the ROD and the SOW;

e. Release from Catastrophic Events: claims for response costs and injunctive relief under CERCLA Sections 106 and 107; RCRA Sections 3004(u), 3004(v), 3008 and 7003; and Sections 309(b), 311, and 504 of the Clean Water Act, arising from the release of Waste Material from catastrophic events, including a failure or collapse of the Milltown Dam;

f. Criminal liability: claims for criminal liability;

g. Violations of State and Federal Law: liability for violations of federal or state law by Settling Defendants which occur during or after implementation of the Remedial Action;

h. Claims for Additional Costs and Response Actions: liability, prior to Certification of Completion of the Remedial Action, for additional response actions other than Milltown Mitigation and claims for additional response actions that are necessitated by a failure of Restoration to meet Restoration Performance Standards, that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 26 (Additional Response Actions) because they are outside the scope of the remedy selected in the ROD. The rights reserved under this Subparagraph 156(h) shall be exercised only in a separate administrative or judicial

proceeding, and the costs incurred by EPA for these response actions shall not be considered Federal Milltown Future Response Costs recoverable under this Consent Decree;

i. Claims for Mitigation Work at the Railroad Bridge:

liability for costs and actions to evaluate and mitigate the effects, if any, of implementation of the Work on the railroad bridge crossing the Blackfoot River upstream of the Milltown Dam. The rights reserved under this Subparagraph 156(i) shall be exercised only in a separate administrative proceeding or in an amended complaint in this proceeding, and the costs incurred by EPA for these response actions shall not be considered Federal Milltown Future Response Costs recoverable under this Consent Decree;

j. Claims for Additional Milltown Mitigation Costs: liability,

prior to Certification of Completion of the Remedial Action, for additional costs of Milltown Mitigation if such mitigation activities implemented by EPA at these areas fail to address the effects of the Work on or related to these structures because of implementation of response actions that are outside the scope of the remedy selected in the ROD; provided, however, EPA can only recover costs of additional Milltown Mitigation if EPA and/or the State has spent all of the funds available from any Congressional appropriation designated for Milltown Mitigation and funds paid by AR pursuant to Paragraph 82 for Milltown Mitigation; and

k. Claims Reserved Under the Streamside Tailings Consent

Decree: liability for all claims reserved by the United States against AR in the consent decree entered in this action for the Streamside Tailings Operable Unit, including natural

resource damages claims reserved by the United States against AR in Paragraph 77 of the Streamside Tailings consent decree, but excluding any claims resolved through subsequent consent decrees entered by this Court for the Rocker Operable Unit, the Mine Flooding Operable Unit, and the past response costs incurred at the Anaconda Smelter Site, the Warm Spring Ponds Operable Units including the Mill Willow Bypass, the Clark Fork River Operable Unit, and the Butte Priority Soils Site.

157. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

#### XXIV. COVENANTS AND RESERVATIONS BY THE STATE

158. State's Covenants for the Milltown Site. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of this Consent Decree, and except as specifically provided in Paragraphs 160 (State's Pre-Certification Reservations for the Milltown Site), 161 (State's Post-Certification Reservations for the Milltown Site), and 165 (State's General Reservation of Rights), the State covenants not to sue or to take administrative action against Settling Defendants and their respective officers, directors and employees, to the extent that the liability of such officers, directors, and employees arises solely from their status as officers, directors, and employees, pursuant to Sections 106, 107(a)(4)(A), (B), and (D), and 113(f) of CERCLA, Sections 3004(u) and (v), 3008 and 7002 of RCRA, Sections 309(a), 311, 504, and 505 of the Clean Water Act, Sections 601, 602, 611, 613, 614 (except with respect to enforcement of an emergency order under 75-5-621), 615, 617, 631, and 635 of the Montana Water Quality Act, and Sections 711, 715(2)(A), and

722 of CECRA, relating to the Milltown Site. The claims reserved by the State in Subparagraphs 22(e) and (f) of the State/AR Consent Decree entered in the State Action are hereby released as to the Milltown Site.

159. Except with respect to future liability, the covenants set forth in the preceding Paragraph shall take effect for AR upon the receipt by EPA of the payments required by Paragraph 79 of Section XVI (Settling Defendants' Payment of Federal Milltown Past Response Costs). With respect to future liability, these covenants shall take effect for AR upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 72(c) of Section XIV (Certification of Completion of the Remedial Action). These covenants shall take effect for NorthWestern upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 72(c) of Section XIV (Certification of Completion of the Remedial Action), the Certification of Completion of the Hydroelectric Activities in Paragraph 74, and receipt by the State (or other eligible governmental parties) of all compensation and conveyances required under Section XVIII (NorthWestern's Compensation for Restoration Activities). These covenants are conditioned upon the satisfactory performance by Settling Defendants of their joint and several obligations under this Consent Decree and, for each Settling Defendant, its respective sole obligations under this Consent Decree. These covenants, as set forth in the preceding Paragraph, extend only to Settling Defendants and their respective officers, directors, and employees, and do not extend to any other person. Settling Defendants shall have also resolved their liability for implementation of the Grading Plan upon satisfaction of the requirements of Paragraph 30 of this Consent Decree.

160. State's Pre-Certification Reservations for the Milltown Site.

Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling

Defendants:

i. to perform further response actions relating to the Milltown Site; or

ii. to reimburse the State for additional costs of response relating to the Milltown Site

if, prior to Certification of Completion of the Remedial Action:

A. conditions at the Milltown Site, previously unknown to the State, are discovered, or

B. information, previously unknown to the State, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

161. State's Post-Certification Reservations for the Milltown Site.

Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling

Defendants:

i. to perform further response actions relating to the Milltown Site; or

ii. to reimburse the State for additional costs of response relating to the Milltown Site

if, subsequent to Certification of Completion of the Remedial Action:

A. conditions at the Milltown Site, previously unknown to the State, are discovered, or

B. information, previously unknown to the State, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

162. Information and Conditions Known to the State for the Milltown Site. For purposes of Paragraph 160 (State's Pre-Certification Reservations), the information and the conditions known to the State shall include only that information and those conditions known to the State as of the date of lodging of this Consent Decree that are described or contained in: (a) the ROD; (b) the administrative record supporting the ROD; (c) the DEQ State Site Record for the Milltown Reservoir Sediments Operable Unit and the Milltown Water Supply Operable Unit; (d) the Record of Decision for the Clark Fork River Operable Unit and the administrative record for that Record of Decision; (e) the DEQ State Site Record for the Clark Fork River Operable Unit; (f) the DEQ State Site Record for the Thompson Falls Reservoir Site; (g) any other non-privileged or non-confidential records relating to the Milltown Site or the Clark Fork

River Operable Unit maintained by DEQ or its employees; (h) the DFWP State Site Record relating to the Milltown Site; (i) the DNRC State Site Record relating to the Milltown Dam and hydroelectric project license; (j) the NRDP State Site Record relating to the Milltown Site. For purposes of Paragraph 161 (State's Post-Certification Reservations), the information and the conditions known to the State shall include only that information and those conditions known to the State as of EPA's Certification of Completion of the Remedial Action and described or contained in: (a) the ROD for the Milltown Site; (b) the administrative record supporting the ROD; (c) the DEQ Site Record for the Milltown Reservoir Sediments Operable Unit and the Milltown Water Supply Operable Unit; (d) the Record of Decision for the Clark Fork River Operable Unit and the administrative record for that Record of Decision; (e) the DEQ State Site Record for the Clark Fork River Operable Unit; (f) the DEQ State Site Record for the Thompson Falls Reservoir Site; (g) any other non-privileged or non-confidential records relating to the Milltown Site or the Clark Fork River Operable Unit maintained by DEQ or its employees; (h) any other information received or discovered by the State pursuant to the requirements of this Consent Decree; (i) the DFWP State Site record relating to the Milltown Site; and (j) the DNRC State Site record relating to the Milltown Dam and hydroelectric project license; and (k) the NRDP State Site record relating to the Milltown Site. For purposes of Paragraphs 160 and 161, as those Paragraphs pertain to Milltown Mitigation, information known to the State shall also include: (a) all geotechnical, structural and hydrological data, surveys, inspection reports and other geotechnical, structural and hydrological information in records maintained by the Montana Department of Transportation as of the date of lodging pertaining to the two State-owned

bridges located at the Milltown Site that support Interstate 90, portions of Interstate 90 located at the Milltown Site, and the State-owned bridge located at the Milltown Site supporting Montana Highway 200; (b) all geotechnical information gathered during the Phase 1 and Phase 2 geotechnical sampling of the two State-owned bridges located at the Milltown Site that support Interstate 90 and the State-owned bridge located at the Milltown Site supporting Montana Highway 200; and (c) the mitigation report that EPA will produce after the collection of the Phase 1 and Phase 2 geotechnical sampling of the two State-owned bridges located at the Milltown Site that support Interstate 90 and the State-owned bridge located at the Milltown Site supporting Montana Highway 200. For purposes of Paragraphs 160 (State's Pre-Certification Reservations) and 161 (State's Post-Certification Reservations), the fact that the Remedial Action has failed shall not constitute, in and of itself, an unknown condition or new information, unless the failure of the Remedial Action results from an unknown condition or new information.

163. Covenants by the State Relating to Natural Resource Damages.

Except as specifically provided in Paragraphs 164 (State Natural Resource Damages Reservation) and 165 (State's General Reservations of Rights) of this Section, the State covenants not to sue or to take administrative action against NorthWestern, and against its officers, directors and employees to the extent such officers', directors', and employees' liability arises solely from their status as officers, directors, or employees, for recovery of Natural Resource Damages under Section 107 of CERCLA, 42 U.S.C. § 9607, and Section 715 of CECRA, § 75-10-715, MCA, relating to the Milltown Site and the Downstream Clark Fork River Riparian Area. This covenant not to sue shall take effect upon the Certification of Completion of the Remedial Action in accordance with

Section XV (Certification of Completion) of this Consent Decree, the Certification of Completion of Hydroelectric Activities in accordance with Section XV (Certification of Completion) of this Consent Decree, and receipt by the State (or other eligible government parties) of all compensation and conveyances required under Section XVIII (NorthWestern's Compensation for Restoration Activities at the Milltown Site) of this Consent Decree. This covenant not to sue extends only to NorthWestern, and to its officers, directors and employees, and does not extend to any other person. This covenant is conditioned upon the satisfactory performance by NorthWestern of its obligations under this Consent Decree.

164. State's Natural Resource Damage Reservation.

a. Notwithstanding any other provision of the Consent Decree, the State reserves the right to institute proceedings against AR seeking recovery of natural resource damages arising from injury to, destruction of, or loss of, natural resources and for the costs of assessing and litigating any claims for such natural resource damages against AR to the extent that such claims were reserved in the Montana v. ARCO consent decree, which was entered by this Court in State of *Montana v. Atlantic Richfield Company*, Case No. 83-317-HLN-PGH, on April 19, 1999 or in the Streamside Tailings Consent Decree;

b. Notwithstanding any other provision of the Consent Decree, the State reserves the right to institute proceedings against NorthWestern seeking recovery of Natural Resource Damages arising from:

i. injury to, destruction of, or loss of, natural resources not relating to the Milltown Site and Downstream Clark Fork River Riparian Area; and

ii. injury to, destruction of, or loss of, natural resources arising from injuries to natural resources caused by unanticipated, extraordinary events that occur after the lodging of this Consent Decree, such as the catastrophic failure of the Milltown Dam, and that result in the release of substantial additional quantities of Hazardous Substances. The State has asserted as part of its claims in this action that there are continuing releases and re-releases of Hazardous Substances in the Clark Fork River not resulting from unanticipated, extraordinary events, and the State agrees that such continuing releases, including the anticipated releases from Remedial Action and Restoration and their alleged effects, are not separately or combined, unanticipated or extraordinary events.

165. State's General Reservations of Rights as to Settling Defendants.

The covenants set forth in Paragraphs 158 (State's Covenant for the Milltown Site) and Paragraph 163 (Covenants by the State Relating to Natural Resource Damages) do not pertain to any matters other than those expressly specified in those Paragraphs. The State reserves, and this Consent Decree is without prejudice to, all rights against the Settling Defendants with respect to all other matters, including but not limited to, the following:

a. Non-compliance with Consent Decree: claims to enforce this Consent Decree based on a Settling Defendant's failure to meet a requirement of this Consent Decree;

b. Failure to Comply with Upstream Cleanup Requirements:

claims against AR based on releases of Waste Material resulting from AR's failure to fully and timely comply with the cleanup requirements of upstream operable units as required by the State or the United States;

c. Release or Disposal Outside of the Milltown Site: claims

against Settling Defendants for response costs and injunctive relief under CERCLA Sections 106 and 107, RCRA Sections 3004(u), 3004(v), 3008, and 7002, or Sections 309(a), 311, 504, and 505 of the Clean Water Act, or corresponding provisions of state law, arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Milltown Site (other than as provided in the ROD or the SOW), including claims for (i) any releases of Waste Material that come to be located at the Milltown Site from a failure of upstream retaining walls, settling ponds, dams, or other upstream control measures; or (ii) any upstream releases of Waste Material which come to be located at the Milltown Site, other than anticipated continuation of existing migration, or releases caused by a failure of Restoration to meet Restoration Performance Standards. NorthWestern shall not be liable by virtue of this subparagraph for an upstream release for which it is not otherwise liable;

d. Conduct Causing Future Release or Disposal: liability for

response costs and injunctive relief under CERCLA Sections 106 and 107, or RCRA Sections 3004(u), 3004(v), 3008, and 7002, Sections 309(a), 311, 504, and 505 of the Clean Water Act, or corresponding provisions of state law, arising from future conduct by a Settling Defendant after the Effective Date that causes a release or disposal of Waste Material at or from the Milltown Site other than as provided in the ROD or the SOW;

e. Release from Catastrophic Events: claims for response costs and injunctive relief under CERCLA Sections 106 and 107; RCRA Sections 3004(u), 3004(v), 3008, and 7002, Sections 309(a), 311, 504, and 505 of the Clean Water Act, or corresponding provisions of state law from catastrophic events, including a failure or collapse of the Milltown Dam, that result in the release of substantial additional quantities of Waste Material;

f. Criminal liability: claims for criminal liability;

g. Violations of Federal or State Law: liability for violations of federal or state law by Settling Defendants which occur during or after implementation of the Remedial Action;

h. Claims for Additional Costs and Response Actions: liability, prior to Certification of Completion of the Remedial Action, for additional response actions other than Milltown Mitigation and claims for additional response actions that are necessitated by a failure of Restoration to meet Restoration Performance Standards, that the State determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 26 (Additional Response Actions) because they are outside the scope of the remedy selected in the ROD. The rights reserved under this Subparagraph 165(h) shall be exercised only in a separate administrative or judicial proceeding, and the costs incurred by the State for these response actions shall not be considered State Milltown Future Response Costs recoverable under this Consent Decree;

i. Claims for Mitigation Work at the Railroad Bridge: liability for costs and actions to evaluate and mitigate the effects, if any, of implementation of the Work on the railroad bridge crossing the Blackfoot River upstream

of the Milltown Dam. The rights reserved under this Subparagraph 165(i) shall be exercised only in a separate administrative proceeding or in an amended complaint in this proceeding, and the costs incurred by the State for these response actions shall not be considered State Milltown Future Response Costs recoverable under this Consent Decree;

j. Claims for Additional Milltown Mitigation Costs: liability, prior to Certification of Completion of the Remedial Action, for additional costs of Milltown Mitigation if such mitigation activities implemented by EPA at these areas fail to address the effects of the Work on or related to these structures because of implementation of response actions that are outside the scope of the remedy selected in the ROD; provided, however, the State can only recover costs of additional Milltown Mitigation if EPA and/or the State has spent all of the funds available from any Congressional appropriation designated for Milltown Mitigation and funds paid by AR pursuant to Paragraph 82 for Milltown Mitigation;

k. Claims, counterclaims and defenses against Settling Defendants under CERCLA, CECRA, and any other federal or state law, including common law, in the event that any claim is asserted against the State by any person for response costs, response actions, damages, costs or injunctive relief that results from erosion of sediments or releases of hazardous substances from the Milltown Site;

l. Delays: claims against Settling Defendants arising from failure of the Settling Defendants to implement the Work or Hydroelectric Activities in a timely manner, but only if such delay is caused by the Settling Defendants or its agents or contractors and not by any other Party or third party or by any other intervening factor

beyond the Settling Defendants' control and only to the extent that the State incurs damages or additional costs caused by such delay; and

m. Defenses and Counterclaims: the State's counterclaims and defenses to any claim asserted by the Settling Defendants against the State under Paragraph 175 (Settling Defendants' Reservations of Rights Regarding the Milltown Site), but only for counterclaims and defenses arising from the same matters, transactions, and occurrences that are raised in or directly related to the Settling Defendants' claims against the State.

166. Notwithstanding any other provision of this Consent Decree, the State retains all authority and reserves all rights to take any and all response actions authorized by law.

## XXV. COVENANTS AND RESERVATIONS BY THE TRIBES

167. Tribes' Covenant Not to Sue NorthWestern. Except as specifically provided in Paragraphs 168 (Tribes' Natural Resource Damages Reservation) and 170 (Tribes' General Reservation of Rights) of this Section, the Tribes covenant not to sue NorthWestern, and its officers, directors and employees to the extent such officers', directors' and employees' liability arises solely from their status as officers, directors, or employees, under Sections 107(a) and 113(f) of CERCLA, Section 7002 of RCRA, Sections 504 and 505 of the Clean Water Act, and Sections 724 and 726 of CECRA, relating to the Milltown Site and the Downstream Clark Fork River Riparian Area. This covenant shall take effect upon Certification of Completion of the Remedial Action by EPA in accordance with Section XV of this Consent Decree, the Certification of Completion of the Hydroelectric Activities in accordance with Section XV of this

Consent Decree, and upon receipt by the State (or other eligible governmental party) of all compensation and conveyances required under Section XVIII (Northwestern's Compensation for Restoration Activities at the Milltown Site) of this Consent Decree. This covenant is conditioned upon the satisfactory performance by NorthWestern of its obligations under this Consent Decree. This covenant extends only to NorthWestern and its officers, directors, and employees, and does not extend to any other person.

168. Tribes' Natural Resource Damages Reservation. Notwithstanding any other provision of this Consent Decree, the Tribes reserve the right to institute proceedings against AR seeking recovery of Natural Resource Damages arising from claims for damages for injury to, destruction of, or loss of, natural resources to the extent that such claims were reserved in Paragraph 86 of the Streamside Tailings Consent Decree.

169. Notwithstanding any other provision of this Consent Decree, the Tribes reserve the right to institute proceedings against NorthWestern seeking recovery of Natural Resource Damages arising from:

a. injury to, destruction of, or loss of natural resources resulting from releases not relating to the Milltown Site and the Downstream Clark Fork River Riparian Area, and

b. injury to, destruction of, or loss of, natural resources caused by unanticipated, extraordinary events that occur after the lodging of this Consent Decree, such as the catastrophic failure of the Milltown Dam, that result in the release of substantial additional quantities of Hazardous Substances. The Tribes have asserted as part of their claims in this action that there are continuing releases and re-releases of

Hazardous Substances in the Clark Fork River not resulting from unanticipated, extraordinary events, and the Tribes agree that such continuing releases, including the anticipated releases from Remedial Action and Restoration and their alleged effects, are not, separately or combined, unanticipated or extraordinary events.

170. Tribes' General Reservation of Rights. The covenant set forth in Paragraph 167 (Tribes' Covenant Not to Sue NorthWestern) does not pertain to any matters other than those expressly specified in Paragraph 167 (Tribes' Covenant Not to Sue NorthWestern). The Tribes reserve, and this Consent Decree is without prejudice to, all rights with respect to all other matters against NorthWestern, including but not limited to the following:

a. Non-Compliance with Consent Decree: claims to enforce this Consent Decree based on failure by NorthWestern to meet a requirement of this Consent Decree for which it is obligated pursuant to this Consent Decree;

b. Releases or Disposal Outside of the Milltown Site: claims for response costs and injunctive relief under Section 107 of CERCLA, Section 7002 of RCRA, Section 505 of the Clean Water Act, and Section 724 and 726 of CECRA, arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Milltown Site (other than as provided in the ROD or the SOW), including claims for (i) any releases of Waste Material that come to be located at the Milltown Site from a failure of upstream retaining walls, settling ponds, dams or other upstream control measures; or (ii) any upstream releases of Waste Material which come to be located at the Milltown Site, other than anticipated continuation of existing migration or releases caused by a failure of to meet Restoration Performance Standards. Northwestern shall

not be liable by virtue of this subparagraph for an upstream release for which it is not otherwise liable;

c. Conduct Causing Future Release or Disposal: liability for response costs and injunctive relief under Section 107 of CERCLA, Section 7002 of RCRA, Section 505 of the Clean Water Act, and Sections 724 and 726 of CECRA, arising from future conduct of NorthWestern after the Effective Date of this Consent Decree that causes a release or disposal of Waste Material at or from the Milltown Site other than as provided in the ROD or the SOW;

d. Releases from Catastrophic Events: claims for response costs and injunctive relief under CERCLA Section 107, Section 7002 of RCRA, Section 505 of the Clean Water Act, and Sections 724 and 726 of CECRA arising from the release of Hazardous Materials from catastrophic events, including a failure or collapse of Milltown Dam; and

e. Violation of Federal Law: liability for violations of federal law, including the Treaty of Hellgate, 12 Stat. 975, July 16, 1855, by NorthWestern which occur during or after implementation of the Remedial Action.

171. Mutual Covenants Between United States, the State, the Tribes. In consideration of the payments that will be made by the Settling Federal Agencies under the terms of this Consent Decree, and except as specifically provided in Paragraphs 149, 150, 156, 160, 164, 165, 168, 169, and 170 of this Section, and to the extent that such authority exists, the United States, the State, and the Tribes covenant not to sue or to take administrative action against each other pursuant to Sections 106, 107(a) and 113(f) of CERCLA and Sections 3004(u) and (v), 3008, 7002, and 7003 of RCRA, Sections 309,

311, 504, and 505 of the Clean Water Act, and Sections 711, 715, 722, 724, and 726 of CECRA, relating to the Milltown Site and the Remaining Sites. Except with respect to future liability, these covenants shall take effect upon the receipt by EPA of the payments required by Paragraph 85 of Section XVI (Settling Federal Agencies' Payment of Response Costs for the Milltown Site). With respect to future liability, these covenants shall take effect upon Certification of Completion of the Remedial Action by EPA pursuant to Paragraph 72 (c) of Section XIV (Certification of Completion of the Remedial Action). These covenants extend only to the United States, the State and the Tribes and do not extend to any other person.

**XXVI. COVENANTS AND RESERVATIONS BY SETTLING  
DEFENDANTS AND SETTLING FEDERAL AGENCIES**

172. Settling Defendants' Covenant Not to Sue the United States Regarding the Milltown Site. Subject to the reservations in Paragraph 175 (Settling Defendants' Reservation of Rights), Settling Defendants hereby covenant not to sue and agree not to assert any past, present, or future claims or causes of action against the United States, its agencies, instrumentalities, officials, employees, agents, and contractors relating to the Milltown Site, as defined herein, including:

- a. any direct or indirect claim related to the Milltown Site for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
- b. any claims under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 and 9613, under RCRA Sections 3004(u) and (v), 3008 and 7002, Sections 311,

504, and 505 of the Clean Water Act, or under CECRA, including Sections 711, 715, 719, 722, 724, and 726, MCA 75-10-711, 75-10-715, 75-10-719, 75-10-722, 75-10-724, 75-10-726, and any other theory of recovery or provision of law related to the Milltown Site; or

c. any claims arising out of response or Restoration actions at the Milltown Site, including claims based on the selection or implementation of response or Restoration actions, oversight of response or Restoration actions, or approval of plans for such activities.

d. NorthWestern's Covenant Not to Sue the United States Regarding the Downstream Clark Fork River Riparian Area. NorthWestern hereby covenants not to sue and agrees not to assert any past, present, or future claims or causes of action against the United States, its agents, instrumentalities, officials, employees, against, and contractors for recovery of Natural Resource Damages relating to the Downstream Clark Fork River Riparian Area.

173. Settling Defendants' Covenant Not to Sue the State Regarding Milltown. Subject to the reservations in Paragraph 175 (Settling Defendants' Reservation of Rights), Settling Defendants hereby covenant not to sue and agree not to assert any past, present, or future claims or causes of action against the State, its agencies, instrumentalities, officials, employees, agents, and contractors relating to the Milltown Site, as defined herein, including:

a. any direct or indirect claim related to the Milltown Site for reimbursement from the Environmental Quality Protection Fund (established pursuant to

MCA 75-10-704), the Orphan Share Account (established pursuant to MCA 75-10-743), or any other provision of law;

b. any claims under CERCLA Sections 107 or 113, 42 U.S.C. Sections 9607 and 9613, under RCRA Sections 3004(u) and (v), 3008 and 7002, under Sections 311, 504, and 505 of the Clean Water Act, and under CECRA Sections 711, 715, 719, 722, 724, and 726, MCA 75-10-711, 75-10-715, 75-10-719, 75-10-722, 75-10-724, 75-10-726, and any other theory of recovery or provision of law related to the Milltown Site; or

c. any claims arising out of response or Restoration actions at the Milltown Site, including claims based on selection or implementation of response or Restoration actions, oversight of response or Restoration actions, or approval of plans for such actions.

d. NorthWestern's Covenant Not to Sue the State Regarding the Downstream Clark Fork River Riparian Area. NorthWestern hereby covenants not to sue and agrees not to assert any past, present, or future claims or causes of action against the State, its agencies, instrumentalities, officials, employees, agents, and contractors for recovery of Natural Resource Damages relating to the Downstream Clark Fork River Riparian Area.

174. NorthWestern's Covenant Not to Sue the Tribes Regarding Milltown and the Downstream Clark Fork River Riparian Area. NorthWestern hereby covenants not to sue and agrees not to assert any past, present, or future claims or causes of action against the Tribes, its agencies, instrumentalities, officials, employees, agents,

and contractors relating to the Milltown Site and the Downstream Clark Fork River Riparian Area.

175. Settling Defendants' Reservation of Rights. Settling Defendants reserve, and this Consent Decree is without prejudice to:

a. claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and claims against the State under Chapter 9 of Title 2 of Montana Code Annotated for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States or the State while acting within the scope of his office or employment under circumstances where the United States or the State, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671, or an employee, as that term is defined in 2-9-101, MCA; nor shall any such claim include a claim based on EPA's selection or implementation of response actions, the State's selection or implementation of response or Restoration actions, except as provided in Paragraph 175.c., or the oversight or approval of Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any Federal or State statute other than CERCLA or CECRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or CECRA;

b. Contribution and other claims and counterclaims against the Settling Federal Agencies in the event that any claim is asserted by the United States

or the State against Settling Defendants under Paragraphs 149 and 160 (United States' and State's Pre-Certification Reservations for the Milltown Site), 150 and 161 (United States' and State's Post-Certification Reservations for the Milltown Site), 155 and 164 (United States' and State's Natural Resource Damages Reservation to NorthWestern), 155(c), (d), (e), and (h) (United States' General Reservation of Rights), and 165(c), (d), (e), (h), and (i) (State's General Reservation of Rights), or Paragraphs 157 and 166 (United States' and State's Reservation of Response Authority), but only for contribution and other claims and counterclaims arising from the same matters, transactions, or occurrences that are raised in or directly related to the United States' or the State's claims against Settling Defendants, and only to the extent that the United States has not resolved such claims in the consent decree entered in this action for the Streamside Tailings operable unit;

c. claims against the State under CERCLA, CECRA and any other federal or state law, including the common law, in the event that any administrative or judicial claim is asserted against Settling Defendants by any person, including the State or the United States, for response costs, response actions, damages, costs or injunctive relief that arises from or out of any significant increase in erosion of floodplain soils, river banks, river beds or sediments, or in releases of Hazardous Substances, and any redistribution of those materials or surface water that results from Restoration. It is recognized that prior to implementation of Restoration, there is continuing erosion of floodplain soils, river banks, river beds and sediments (including Hazardous Substances) in and along the Clark Fork River upstream of the Project Area; erosion of the same magnitude following implementation of Restoration shall not be considered a significant

increase in erosion of floodplain soils, river banks, river beds or sediments or in releases of Hazardous Substances that results from Restoration or any other State activity;

d. claims against the State arising from the State's failure to implement Restoration activities in a timely manner, but only if such delay is caused by the State, or its agents or contractors, and not by any other Party or third party or by any other intervening factor beyond the State's control and only to the extent Settling Defendants incur damages or additional costs caused by such delay;

e. the Settling Defendants' defenses to any claim asserted by the United States or the State against Settling Defendants under Paragraphs 149 (United States' Pre-Certification Reservations for Milltown Site), 150 (United States' Post-Certification Reservations for the Milltown Site), 155 (United States' Natural Resource Damages Reservation to NorthWestern), and 156 (United States' General Reservation of Rights), 160 (State's Pre-Certification Reservations for the Milltown Site), 161 (State's Post-Certification Reservations), 164 (State's Natural Resource Damages Reservation), and 165 (State's General Reservation of Rights) or Paragraphs 157 and 166 (United States' and State's Reservation of Response Authority), but only for defenses arising from the same matters, transactions, and occurrences that are raised in or directly related to the United States' or the State's claims against the Settling Defendants; and

f. for NorthWestern, except as otherwise expressly provided in this Consent Decree, all of its defenses to the natural resource damages claims reserved by the United States, the State and the Tribes in this Consent Decree.

176. Settling Federal Agencies' Covenant Not to Sue for Reimbursement. Settling Federal Agencies hereby agree not to assert any direct or

indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Service Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113, or any other provision of law with respect to the Milltown Site, or to assert any direct or indirect claim with respect to the Milltown Site for reimbursement from the State Environmental Quality Protection Fund and the State Orphan Share Account. This covenant does not preclude demand for reimbursement from the Hazardous Substance Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as a lead or support agency under the NCP.

177. No Preauthorization of Claims. Nothing in this Consent Decree 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. § 300.700(d).

178. Waiver of Claims Against Small Contributors. Settling Defendants agree not to assert any claims and to waive all CERCLA, CECRA, and RCRA claims or causes of action that they may have for all matters relating to the Milltown Site, including contribution against any person, other than any contractors implementing the Work on behalf of the Settling Defendants, where the person's liability to Settling Defendants with respect to the Milltown Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of Hazardous Substances at the Milltown Site, or having accepted for transport for disposal or treatment of Hazardous Substances at the Milltown Site, if the materials contributed by such person to the Milltown Site containing Hazardous Substances did not exceed the greater of (A) 0.002% of the total volume of waste at the Milltown Site or (B) 110

gallons of liquid materials or 200 pounds of solid materials. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Milltown Site by such person contributed or could contribute significantly to the costs of response at the Site, or if EPA has named such parties as potentially responsible parties for the Milltown Site pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, except for parties within the scope of Section 107(o) of CERCLA, 42 U.S.C. § 9607(o). This waiver shall be void to the extent that the United States or the State institutes a new action, or issues a new administrative order to Settling Defendants, pursuant to Paragraphs 156 (United States' General Reservation of Rights) and 165 (State's General Reservation of Rights) of this Consent Decree. This waiver also shall not apply with respect to any defense, claim, or cause of action that Settling Defendants or the Settling Federal Agencies may have against any person if such person asserts a claim or cause of action relating to the Milltown Site against Settling Defendants or the Settling Federal Agencies.

## XXVII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

179. Effect on Nonparties. Except as provided in Paragraph 178 (Waiver of Claims Against Small Contributors), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Except as provided in Paragraph 178 (Waiver of Claims Against Small Contributors) of this Decree, each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and

causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the matters addressed in this Consent Decree against any person not a Party hereto.

180. Contribution Protection.

a. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Federal Agencies, the State, the Tribes, and the Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims by third parties as provided by CERCLA Section 113(f)(2), 42 U.S.C.

§ 9613(f)(2), for matters addressed in this Consent Decree. The Parties also agree, and by entering this Consent Decree this Court finds, that the Settling Federal Agencies, the State, the Tribes, and the Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims by third parties as provided by CECRA Section 719(1), 75-10-719(1), MCA, for matters addressed in this Consent Decree. For purposes of this Paragraph, the “matters addressed” in this Consent Decree include:

(i) all Federal Milltown Past Response Costs, Federal Milltown Future Response Costs, State Milltown Future Response Costs, Oversight Costs, Hydroelectric Activities, Work, Milltown Mitigation and removal of the Stimson Dam pursuant to Paragraph 24, as well as all response and Restoration actions at the Milltown Site taken and to be taken by any party, including, without limitation, remedial investigation, feasibility study, remedial design and remedial action work undertaken by Settling Defendants prior to the entry of the Decree; and, (ii) for NorthWestern only, claims for Natural Resource Damages relating to the Milltown Site and the Downstream Clark Fork River Riparian Area. The contribution protection set forth in this Paragraph is intended to provide the broadest

protection afforded by CERCLA and CECRA for matters addressed in this Consent Decree.

b. A consent decree entered by this Court on January 24, 2005, (the “Past Cost Consent Decree”) resolved, subject to the terms and conditions set forth in that consent decree, AR’s liability for specified past response costs at several sites in the Clark Fork Basin. The costs involved in that decree included funding that EPA had provided to the State through cooperative agreements providing for the State participation in the CERCLA process at those sites. The State and AR agree that these settlements resolve any liability between them for the past costs addressed in the Past Cost Consent Decree and agree that “matters addressed” in this Consent Decree include the “Remaining Sites Past Response Costs,” as that term is defined in the Past Cost Consent Decree. AR is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 719(1) of CECRA, § 75-10-719(1), MCA, for “Remaining Sites Past Response Costs,” as that term is defined in the Past Cost Consent Decree.

181. Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree, they will notify the United States, the State, and the Tribes in writing no later than sixty (60) days prior to the initiation of such suit or claim. Settling Defendants agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree, they will notify in writing the United States, the State, and the Tribes within ten (10) days of service of the complaint on them. In addition, Settling Defendants shall notify the United States, the State, and the Tribes within ten (10) days of service or receipt of any

Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial.

182. Waiver of Claim-Splitting Defenses.

a. In any subsequent administrative or judicial proceeding initiated by (i) the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Milltown Site or any of the Remaining Sites, or (ii) the United States, the State, or the Tribes for other claims reserved in Paragraphs 149 and 160 (United States' and State's Pre-Certification Reservations for the Milltown Site), 150 and 161 (United States' and State's Post-Certification Reservations for the Milltown Site), 155, 164, 168, and 169 (United States', State's, and the Tribes' Natural Resource Damages Reservation to NorthWestern), and 156, 165, and 170 (United States', State's, and the Tribes' General Reservation of Rights), Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding by the United States, the State, or, in the case of Northwestern only, the Tribes, were or should have been brought in the Federal Action or in the State Action; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXIII (Covenants by the United States), Section XXIV (Covenants by the State), and Section XXV (Covenants by the Tribes).

b. In any subsequent administrative or judicial proceeding initiated by the United States, the State, or the Tribes for injunctive relief, recovery of response costs, or other appropriate relief relating to the Milltown Site, neither the United

States, the State, or the Tribes shall use any provision of this Consent Decree to assert and maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by Settling Defendants in the subsequent proceeding were or should have been brought in the Federal Action or in the State Action; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXVI (Covenants by Settling Defendants and Settling Federal Agencies).

#### XXVIII. ACCESS TO INFORMATION

183. Subject to the assertion of privilege claims in accordance with Paragraph 184, each Settling Defendant shall provide to EPA and the State, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to the Milltown Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, and correspondence; provided, however, that Settling Defendants shall not be required to re-produce any documents already provided to the United States. In response to reasonable requests by EPA, in consultation with the State, Settling Defendants shall cooperate in making available to EPA and the State, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work, subject to their right to counsel or any other right under State and Federal law.

184. a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to the United States, EPA, or the State under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to the United States, EPA, or the State, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

b. Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by state or federal law. If Settling Defendants assert such a privilege in lieu of providing documents over which it asserts a privilege, and if Settling Defendants have not previously provided a privilege log to the United States for the documents subject to the request, Settling Defendants shall provide the United States and/or EPA, and the State, with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no

documents, reports or other information Settling Defendants are required to create or generate by this Consent Decree shall be withheld on the grounds that they are privileged.

185. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other non-privileged documents or information evidencing conditions relating to the Milltown Site.

186. Nothing in this Section shall require Settling Defendants to produce any documents, records, or other information that Settling Defendants have previously produced to the United States, although Settling Defendants shall cooperate with the United States to identify the approximate date(s) of such previous production or other information to assist the United States in locating previously produced documents.

#### XXIX. RETENTION OF RECORDS

187. Records Retention Period. Until 5 years after Settling Defendants' receipt of EPA's Notification pursuant to Paragraph 72(c) (Certification of Completion of the Remedial Action), each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate to the Milltown Site Work or liability of any person for response actions conducted and to be conducted at the Milltown Site, regardless of any corporate retention policy to the contrary. Settling Defendants shall also instruct their contractors and agents to preserve all documents and records relating to the performance of the Work at the Milltown Site.

188. Notice of Destruction of Retained Documents. At the conclusion of this document retention period, Settling Defendants shall notify the United States and

the State of their intent to destroy any such record or document, providing at that time a period of at least ninety (90) days for the United States and the State to review and obtain such records or documents prior to the destruction of any such records or documents.

Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by state or federal law. If a Settling Defendant asserts such a privilege, it shall provide the United States and the State with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by the Settling Defendant. However, no final documents, reports or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged.

189. Settling Defendants Records Certification. Settling Defendants each hereby certify that, to the best of their knowledge and belief, after thorough inquiry, they have not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to their potential liability or the potential liability of any other Settling Defendant regarding the Milltown Site since the notification of potential liability by the United State or the State, and that they have fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

190. Records Retention by Settling Federal Agencies. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has fully complied with any and all EPA and State requests for information pursuant to Sections 104(e) and 122(e) of CERCLA 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XXX. NOTICES AND SUBMISSIONS

191. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to or upon another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing, and copies of such notice, submission or report shall be provided at the same time and in the same manner to all other Parties. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Except as otherwise specifically provided, written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to the United States, EPA, the State, the Settling Federal Agencies, and Settling Defendants, respectively.

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ #90-11-2-430

and

Director, Montana Office  
U.S. Environmental Protection Agency  
Region 8 Montana Office  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, Montana 59624

As to the Settling Federal Agencies:

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As to the State and DEQ:

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As to Envirocon:

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101 International Way  
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201 West Main Street, Suite 201  
Missoula, Montana 59802

As to ELM Consulting, LLC:

Todd Snarr  
ELM Consulting LLC  
60 State Street  
Peoria, IL 61602

#### XXXI. RETENTION OF JURISDICTION

192. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XXI (Dispute Resolution) hereof.

#### XXXII. APPENDICES

193. The following appendices are attached to and incorporated into this Consent Decree:

Appendix A – the ROD

Appendix B – Site Map

Appendix C – the Statement of Work

Appendix D – Restoration Plan

Appendix E – Biological Opinion regarding the Milltown cleanup project

Appendix F – Description of Milltown Lands

Appendix G – Description of Milltown Water Rights

XXXIII. COMMUNITY RELATIONS

194. Settling Defendants shall propose to EPA, in consultation with the State, Settling Defendants' participation in any amendment to the community relations plan developed by EPA for the Milltown Site. EPA, in consultation with the State, will determine the appropriate role for Settling Defendants under the Plan. Settling Defendants and their primary contractors performing the Work under this Consent Decree shall also cooperate with EPA and the State in providing information regarding the Work to the public. As requested by EPA and the State, Settling Defendants and their contractors shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA or the State to explain activities at or relating to the Milltown Site.

XXXIV. MODIFICATION

195. Modification of Schedules. Schedules specified in this Consent Decree may be modified by agreement of EPA, in consultation with the State, and Settling Defendants. All such modifications shall be made in writing.

196. Except as provided in Paragraph 26 (Additional Response Actions), no material modifications shall be made to the plans and documents required under this Consent Decree without written notification to and written approval of the United States, the State, Settling Defendants, and the Court. Modifications to a plan or document that do not materially alter that document may be made by written agreement

between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and Settling Defendants.

197. Retention of Court's Authority Over Modifications. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

#### XXXV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

198. Lodging and Entry of the Decree. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. In addition and concurrently, the State shall submit for public comment an amendment to its Upper Clark Fork River Basin (UCFRB) Restoration Plan Procedures and Criteria ("RPPC") that would waive certain procedural requirements in the RPPC and allow the State to commit money from the UCFRB Restoration Fund for Restoration as provided for in this Consent Decree. The United States and the State reserve their rights to withdraw from or withhold their consent to this Consent Decree if the comments regarding this Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice. In addition, the State reserves its right to withdraw from or withhold its consent to this Consent Decree if the comments regarding said RPPC amendment disclose facts or considerations which indicate that the amendment is inappropriate, improper, or inadequate. Each Party hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States or the

State has notified Settling Defendants in writing that it no longer supports entry of this Consent Decree.

199. Effect of Court's Decision to Not Approve Decree. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of this Consent Decree may not be used as evidence in any litigation between the Parties

#### XXXVI. SIGNATORIES/SERVICE

200. The undersigned representatives of Settling Defendants, the Environment and Natural Resources Division of the United States Department of Justice, the United States Environmental Protection Agency, the United States Department of the Interior, the Montana Department of Environmental Quality, and the Tribes, each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

201. Settling Defendants shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

#### XXXVII. ENTRY OF FINAL JUDGMENT

202. Upon the Court's approval of this Consent Decree, the Decree shall be entered as a final judgment under Fed. R. Civ. P. 54(b), and shall serve to satisfy

the settlement negotiation requirements contained in paragraph 31(b) of the Streamside Tailings Consent Decree with respect to the Milltown Site. The Court expressly determines that there is no just reason for delay in entering this judgment.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2005.

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UNITED STATES DISTRICT COURT JUDGE

**FOR THE UNITED STATES OF AMERICA:**

Date: \_\_\_\_\_

\_\_\_\_\_  
JOHN C. CRUDEN  
Deputy Assistant Attorney General  
Environment & Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: \_\_\_\_\_

\_\_\_\_\_  
MATTHEW W. MORRISON  
Senior Counsel  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
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Date: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. ZEVENBERGEN  
Senior Counsel  
Environmental Defense Section  
c/o NOAA Damage Assessment  
7600 Sand Point Way, NE  
Seattle, Washington 98115

Date: \_\_\_\_\_

\_\_\_\_\_  
KRIS MCLEAN  
Assistant United States Attorney  
District of Montana  
105 East Pine, 2<sup>nd</sup> Floor  
Missoula, Montana 59802

Date: \_\_\_\_\_

\_\_\_\_\_  
JOHN F. WARDELL  
Region 8 Montana Office Director  
U.S. Environmental Protection Agency  
10 West 15<sup>th</sup> Street, Suite 3200  
Helena, MT 59626-0096

Date: \_\_\_\_\_

\_\_\_\_\_  
CAROL RUSHIN  
Assistant Regional Administrator  
Office of Enforcement, Compliance, and  
Environmental Justice  
U.S. Environmental Protection Agency,  
Region 8  
999 18<sup>th</sup> Street  
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Date: \_\_\_\_\_

\_\_\_\_\_  
D. HENRY ELSEN, Attorney  
Legal Enforcement Program  
U.S. Environmental Protection Agency  
Region 8 Montana Office  
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Helena, MT 59624

**FOR THE STATE OF MONTANA:**

Date: \_\_\_\_\_

\_\_\_\_\_  
The Honorable BRIAN SCHWEITZER  
Governor of Montana  
State Capitol  
Helena, Montana 59620-0801

Date: \_\_\_\_\_

\_\_\_\_\_  
MIKE McGRATH  
Attorney General

Date: \_\_\_\_\_

\_\_\_\_\_  
ROBERT G. COLLINS  
Supervising Assistant Attorney General  
MARY CAPDEVILLE  
Assistant Attorney General  
Montana Department of Justice  
Natural Resource Damage Program  
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P.O. Box 201425  
Helena, Montana 59620-1425

Date: \_\_\_\_\_

\_\_\_\_\_  
RICHARD H. OPPER  
Director  
Montana Dept. of Environmental Quality

Date: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM B. KIRLEY  
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Montana Dept. of Environmental Quality  
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**FOR THE CONFEDERATED SALISH AND KOOTENAI TRIBES:**

Date: \_\_\_\_\_

\_\_\_\_\_  
D. FRED MATT  
Chairman, Tribal Council  
Confederated Salish and Kootenai Tribes  
51383 Highway 93  
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Date: \_\_\_\_\_

\_\_\_\_\_  
JOE HOVENKOTTER  
Staff Attorney  
Confederated Salish and Kootenai Tribes  
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**FOR THE ATLANTIC RICHFIELD COMPANY:**

Date: \_\_\_\_\_

\_\_\_\_\_  
STEPHEN A. ELBERT  
Chairman & Chief Executive Officer  
28100 Torch Parkway  
MC 27  
Warrenville, IL 60555

Date: \_\_\_\_\_

\_\_\_\_\_  
STEPHEN H. FOSTER  
Holland and Hart  
P.O. Box 639  
401 North 31st Street, Suite 1500  
Billings, Montana 59711

Approved as to Form and Content:

Date: \_\_\_\_\_

\_\_\_\_\_  
JEAN A. MARTIN  
Atlantic Richfield Company  
6 Centerpointe Drive, Room 557  
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**FOR NORTHWESTERN CORPORATION:**

Date: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. HANSON  
Chief Executive Officer  
NorthWestern Corporation  
125 S. Dakota Avenue  
Sioux Falls, South Dakota 57104-6403

**FOR CLARK FORK AND BLACKFOOT L.L.C.**

Date: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. HANSON  
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