

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

In re:	§	Case No. 05-21207
	§	
ASARCO LLC, et al.,	§	Chapter 11
	§	
Debtors.	§	Jointly Administered
	§	

**MOTION FOR ORDER APPROVING COMPROMISE AND SETTLEMENT
BETWEEN ASARCO LLC AND VARIOUS GOVERNMENTAL ENTITIES
REGARDING THE TRI-STATE MINING DISTRICT SITES**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 20 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

A HEARING HAS BEEN SET ON THIS MOTION FOR TUESDAY, NOVEMBER 13, 2007 AT 9:00 A.M. IN CORPUS CHRISTI, TEXAS; AND EXPEDITED TREATMENT OF THIS MOTION WILL BE REQUESTED. WE WILL ALSO ASK THAT THE COURT REQUIRE THAT OBJECTIONS TO THE MOTION BE FILED BY NOVEMBER 9, 2007.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

TO THE HONORABLE RICHARD S. SCHMIDT, UNITED STATES BANKRUPTCY JUDGE:

ASARCO LLC ("ASARCO" or the "Debtor") respectfully files this Motion for Order Approving Compromise and Settlement Between ASARCO LLC and Various Governmental Entities Regarding the Tri-State Mining District Sites (the "Motion").

I. PARTIES, JURISDICTION, AND VENUE

1. On August 9, 2005 (the "Petition Date"), ASARCO filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in this Court. On April 11, 2005, several of ASARCO's wholly-owned direct or indirect subsidiaries (the "Asbestos Subsidiary Debtors"¹) filed their voluntary petitions in this Court (the "Subsidiary Cases"). Later in 2005, several of ASARCO's other wholly-owned direct or indirect subsidiaries (the "2005 Subsidiary Debtors"²) filed similar petitions for relief in this Court. Further, on December 12, 2006, three more ASARCO subsidiaries (the "2006 Subsidiary Debtors"³) filed similar petitions for relief with this Court (collectively with ASARCO, the Asbestos Subsidiary Debtors and the 2005 Subsidiary Debtors, the "Debtors"). The Debtors' cases are collectively referred to as the "Reorganization Cases."

2. The Debtors remain in possession of their property and are operating their businesses as Debtors-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. An official committee of unsecured creditors was appointed in the Subsidiary Cases, and an official committee of unsecured creditors has also been appointed in ASARCO's case. No trustee or examiner has been appointed in any of the Reorganization Cases.

3. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This Court may hear and determine this Motion under the standing order of reference issued by the

¹ The Asbestos Subsidiary Debtors consist of the following five entities: Lac d'Amiante du Québec Ltée (f/k/a Lake Asbestos of Quebec, Ltd.); Lake Asbestos of Quebec, Ltd.; LAQ Canada, Ltd.; CAPCO Pipe Company, Inc. (f/k/a/ Cement Asbestos Products Company); and Cement Asbestos Products Company.

² The 2005 Subsidiary Debtors are: ASARCO Consulting, Inc.; Encycle, Inc.; ALC, Inc.; American Smelting and Refining Company; AR Mexican Explorations Inc.; AR Sacaton, LLC, an Arizona limited liability company; Asarco Master, Inc.; Asarco Oil and Gas Company, Inc.; Bridgeview Management Company, Inc.; Covington Land Company; Government Gulch Mining Company, Limited; and Salero Ranch, Unit III, Community Association, Inc. Encycle/Texas, Inc. also filed a petition for relief; but its case, which was later converted to a chapter 7 case, is being administered separately.

³ The 2006 Subsidiary Debtors are: Southern Peru Holdings, LLC; AR Sacaton, LLC, a Delaware limited liability company; and ASARCO Exploration Company, Inc.

United States District Court for the Southern District of Texas under 28 U.S.C. § 157. Consideration of this Motion is a core proceeding under 28 U.S.C. § 157(b). Venue of this proceeding is proper in this district under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are section 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure.

II. RELIEF REQUESTED

4. The Debtor seeks approval pursuant to section 363(b)(1) of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure of its compromise and settlement with the United States of America on behalf of the United States Environmental Protection Agency (“EPA”), the United States Department of Interior in its own capacity and in its capacity as trustee on behalf of the Cherokee Nation, the Eastern Shawnee Tribe of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, the Wyandotte Nation, the Peoria Tribe of Indians of Oklahoma and the Ottawa Tribe of Oklahoma (“DOI”), and the Bureau of Indian Affairs (“BIA”, and together with the EPA and the DOI, “United States”); the Kansas Department of Health and the Environment on behalf of the State of Kansas (“State of Kansas”); the State of Missouri Attorney General on behalf of the State of Missouri (“State of Missouri”); and the State of Oklahoma on behalf of the Oklahoma Secretary of the Environment and Oklahoma Department of Environmental Quality (“State of Oklahoma”, and together with ASARCO, the United States, and the States of Kansas and Missouri, the “Parties”).

III. BACKGROUND AND SUMMARY OF PROPOSED SETTLEMENT

5. The Tri-State Mining District Sites (“Tri-State Site”) consist of the Tar Creek Superfund Site, the Cherokee County Superfund Site, the Oronogo-Duenweg Lead Mining Belt (Jasper County) Superfund Site in Jasper County, Missouri, and the Newton County Mine Tailings Superfund Site (collectively, the “Sites”).

6. The EPA, pursuant to its authority under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (“CERCLA”), previously added each of the Sites to the National Priority List.

7. The following proofs of claim relating to the Tri-State Site were filed:

- (a) Claim Nos. 8375, 10745 and 10746 filed by the United States;
- (b) Claim Nos. 11086 and 11094 filed by the State of Kansas;
- (c) Claim Nos. 11116 and 11134 filed by the State of Missouri; and
- (d) Claim Nos. 7989, 10544 and 10857 filed by the State of Oklahoma.

The listed claims for the Tri-State Site were scheduled for hearing as part of the Band 3 sites of the Case Management Order Establishing Procedures for Estimation of ASARCO LLC’s Environmental Liabilities (“CMO”).

8. The Parties participated in mediation of these claims over a period of four days in mid-September. As a result, they have been able to reach agreements resolving their disputes as to the Tri-State Site.

9. The agreement is set forth in a settlement agreement (the “Settlement Agreement”) to which ASARCO, the United States and the States of Kansas, Missouri and Oklahoma are the parties and which resolves all claims against ASARCO asserted by these Parties in regards to the Tri-State Site. A true and correct copy of the Settlement Agreement is attached hereto as Exhibit A.

10. More specifically, the Settlement Agreement provides as follows:

(a) The United States on behalf of EPA and the BIA will have an allowed general unsecured claim in the total amount of \$91,000,000 which shall be allocated as follows:

- Tar Creek Superfund Site EPA Response Costs - \$32,689,800;
- Tar Creek Superfund Site BIA Response Costs - \$310,200;

- Cherokee County Superfund Site - \$25,114,000;
- Oronogo-Duenweg Lead Mining Belt (Jasper County) Superfund Site - \$21,402,000; and
- Newton County Mine Tailings Superfund Site - \$11,484,000.

(b) The State of Kansas will have an allowed general unsecured claim in the total amount of \$3,250,000.

(c) The State of Missouri will have an allowed general unsecured claim in the total amount of \$3,250,000.

(d) The State of Oklahoma will have an allowed general unsecured claim in the total amount of \$7,500,000.

(e) The United States on behalf of DOI will have an allowed general unsecured claim for past natural resource damage assessment costs in the total amount of \$2,000,000.

(f) The United States on behalf of DOI, the Kansas Department of Health and Environment on behalf of the State of Kansas, the State of Missouri on behalf of the Director, Missouri Department of Natural Resources, and the State of Oklahoma will have a joint, indivisible allowed general unsecured claim for natural resource damages in the total amount of \$51,000,000 which is to be allocated as follows:

- Tar Creek Superfund Site - \$24,225,000;
- Cherokee County Superfund Site - \$9,690,000;
- Oronogo-Duenweg Lead Mining Belt (Jasper County) Superfund Site - \$11,140,000; and
- Newton County Mine Tailings Superfund Site - \$5,945,000.

(g) ASARCO's obligations to perform work pursuant to any outstanding Consent Decree, Unilateral Administrative Order or Administrative Order on Consent, including but not limited to Cherokee County Superfund Site Operable Units 3 and 4 (Baxter Springs and Treece) Consent Decree (Civ. Action No. 99-1399-WEB; D.C. Kan. Jan. 12, 2000) ("Cherokee CD"); Newton County Mine Tailings Superfund Site Administrative Order on Consent (EPA Docket No. VII-96-F-0022; July 9, 1996 and June 18, 1997); Unilateral Administrative Order (EPA Docket No. 07-2002-0114; April 15, 2002); and Oronogo-Duenweg Lead Mining Belt Superfund Site Consent Decree (Civ. Action No. 00-0975; W.D. Mo. Jan. 19, 2001) ("Oronogo CD"), will be fully resolved and satisfied and Debtor will be removed as a party to such orders or decrees, subject to the approval by the U.S. District Court for the District of Kansas for the Cherokee CD and the U.S. District Court for the Western District of Missouri for the Oronogo CD.

(h) ASARCO, on the one hand, and the United States and the States of Kansas, Missouri and Oklahoma, on the other hand, covenant not to sue or assert claims or

causes of actions against each other, with the scope of these covenants described in greater detail in Articles V and VI of the Agreement.

(i) ASARCO is entitled to protection from contribution actions or claims as provided by section 113(f)(2) of CERCLA, 42 U.S.C. §§ 9613(f)(2), for matters addressed in the Settlement Agreement.

(j) This Settlement Agreement is subject to a thirty (30) day public comment period following notice published in the Federal Register, which may take place concurrently with this Court's approval process. The United States reserves the right to withdraw or withhold its consent if the public comments regarding the Settlement Agreement disclose facts or considerations that indicate that this Settlement Agreement is inappropriate, improper, or inadequate. At the conclusion of the public comment period, the United States will provide the Court with copies of any public comments and its response thereto.

(k) This Settlement Agreement is conditioned upon the entry of orders by the United States District Court for the District of Kansas and the United States District Court for the Western District of Missouri, modifying existing consent decrees.

(l) The Settlement Agreement is subject to approval by this Court.

11. ASARCO hereby seeks authority to enter into the Settlement Agreement, and compromise its controversy with the other Parties in accordance therewith.

IV. LAW AND ARGUMENT

12. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure permits this Court, following notice and a hearing as provided by Bankruptcy Rule 2002, to approve a compromise of controversy. Rule 9019(a) provides:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a). Approval of a compromise is within the sound discretion of the bankruptcy court. *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602-03 (5th Cir. 1980) (decided under Bankruptcy Act). Settlements are considered a "normal part of the process

of reorganization” and “desirable and wise method[] of bringing to a close proceedings otherwise lengthy, complicated and costly.” *Jackson Brewing*, 624 F.2d at 602 (citations omitted).

13. Neither Bankruptcy Rule 9019(a) nor any section of the Bankruptcy Code explicitly sets forth the standards by which a court is to evaluate a proposed settlement for approval. However, the standards for approval of settlements in bankruptcy cases are well-established and focus upon whether the proposed settlement is reasonable and in the best interests of creditors. In *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968), the seminal case on approval of settlements in bankruptcy cases, the United States Supreme Court held that the trial court must make an informed, independent judgment as to whether a settlement is fair and equitable, and explained as follows:

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

309 U.S. at 424. *See also AWECO*, 725 F.2d at 298-99 (reversing settlement with unsecured litigation claimant due to insufficiency of facts to determine whether settlement was fair and equitable to other creditors); *American Can Co. v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 605, 608 (5th Cir. 1980) (noting that “there must be a substantial factual basis for the approval of a compromise.”).

14. Generally, the role of the bankruptcy court is not to decide the issues in dispute when evaluating a settlement. Instead, the court should determine whether the settlement is fair

and equitable as a whole. *TMT Trailer*, 390 U.S. at 424; *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993).

15. In deciding whether to approve a settlement, the following factors must be considered:

- a. the probability of success in the litigation, with due consideration of the uncertainty in fact and law;
- b. the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- c. all other factors bearing on the wisdom of the compromise.

Jackson Brewing, 624 F.2d at 602 (citing *TMT Trailer*).

16. Under the rubric of the third, catch-all provision, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second the court should consider “the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Id.* at 918 (citations omitted).

17. ASARCO believes that the Settlement Agreement meets the standards and is reasonable, fair and equitable. The Settlement Agreement resolves ASARCO’s liabilities regarding the Tri-State Site with respect to the United States and the States of Kansas, Missouri and Oklahoma, and thereby allows those claims to be removed from the CMO. ASARCO believes that the Settlement Agreement represents a fair and reasonable resolution of the amount of such claims, in light of the relevant facts relating to the Tri-State Site. Moreover, the Settlement Agreement saves significant attorneys’ fees and expenses that would otherwise be

expended in prosecuting the estimation of these issues, and will also allow valuable Court time to be allocated to contested claims under the CMO.

18. Further, the Settlement Agreement eliminates the substantial litigation risks faced by both sides. Estimation of the liabilities addressed by the Settlement Agreement would require the Court to resolve a number of hotly contested issues. For example, the United States and the States sought to hold ASARCO jointly and severally responsible for the claims associated with the past and future response costs and natural resource damages at the Tri-State Site. According to the governments' experts, these claims exceeded \$700 million. ASARCO's experts contended that the environmental harms at the Tri-State Site are divisible or allocable on an equitable basis, resulting in a direct share for ASARCO of less than \$20 million. The issues of divisibility and allocability are among the most, if not the most, strongly argued issues on both sides, with among the greatest financial consequences of any of the environmental legal questions in this case.

19. In addition, the Parties disputed many technical issues that would have significant impacts on the ultimate value of an allowed claim. Among these were the basis and methodologies for estimating the natural resource damages and future response costs. For example, the United States, the States and ASARCO disputed whether primary restoration was a proper methodology for estimating damages to natural resources, as an estimate based on primary restoration resulted in damages that were substantially greater than the damages as calculated by ASARCO's experts. In addition, the United States, the States and ASARCO disputed the issue of whether it was appropriate to include substantial indirect costs in estimating future response costs and the appropriate discount rate and cost basis year for calculating future response costs or the costs of primary restoration. The future cost estimates as determined by the

governments' experts were more than \$200 million more than the estimates of ASARCO's experts based simply on the inclusion of indirect costs and the use of a different discount rate. Both the governments' experts and ASARCO's experts advanced seemingly cogent arguments in support of their particular estimation approach. The large differences in their claim estimates and legal arguments over issues such as whether ASARCO would be entitled to divisibility or allocation highlight the substantial litigation risks for both sides that are avoided by the Settlement Agreement.

20. Finally, the Settlement Agreement will aid cleanup, remediation, and natural resource restoration activities at the Tri-State Site as a consequence of the funds to be paid to the United States and the States pursuant to the Settlement Agreement. The Settlement Agreement thereby promotes the public health and welfare.

21. The Settlement Agreement is the product of arms-length and often contentious bargaining.

22. For these reasons, ASARCO believes that approval of the Settlement Agreements is in the best interests of its creditors and its estate.

V. CERTIFICATE OF SERVICE

23. In compliance with Bankruptcy Local Rule 9013(f), ASARCO will file or cause to be filed as a separate document a Certificate of Service containing the names and addresses of the parties served, the manner of service, the name and address of the server, and the date of service.

WHEREFORE, ASARCO respectfully requests that the Court enter an order granting the Motion and granting such other and further relief as is just and proper.

Dated: October 26, 2007

Respectfully submitted,

BAKER BOTTS L.L.P.

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