I. The Journey in the Courts and Regulatory Agencies

A. Introduction

Over the past four decades, historic mining-related environmental contamination in the Silver Valley and the broader Coeur d'Alene Basin in north Idaho have been addressed and known as the massive Bunker Hill Superfund Site cleanup. However, before CERCLA, there was a long history of legal and regulatory actions that sought to address environmental and health issues related to the mining contamination.

B. 1900 -1950: Early Legal and Legislative Actions

1. Farmer Lawsuits (See also Cliff Villa and Bill Boyd outlines)

Beginning in 1903 a number of law suits (Hill, McCarthy, Doty, Polak) were brought by farmers along the South Fork of the Coeur d'Alene River against upstream mining companies seeking injunctive relief and real and personal property damages relating to the discharge of mine wastes to the River and its tributaries. These actions were mainly brought as common law causes of action such as negligence, nuisance and trespass. The mining companies vigorously defended themselves and the farmers were generally unsuccessful in obtaining anything but nominal damages. However, both state and federal courts did recognize mining water rights did not include an unfettered right to load streams with mine wastes and injure downstream farmer water rights. (Hill v. Standard Mining 1906) These decisions posed enough of a threat to the mines that they organized themselves to buy out downstream farmers or purchase so-called "overflow" (pollution) easements to forestall further claims. In 1930 the 9th Circuit upheld the validity of such easements (Luama v. Bunker Hill). By the late 1930s about 26,000 acres were subject to such easements. Some mining companies also responded to these early suits by trying to control mine wastes with dams and primitive tailings dumps. Easements were also later purchased for particulate discharges from the smelter complex.

2. Legislative Action/ Coeur d'Alene Commission

In 1929 the Coeur d'Alene Press ran a series of articles which highlighted extensive damage to lands, water quality and fisheries caused by the discharge of mine wastes to the Coeur d'Alene River and its tributaries. These articles and opinion pieces spurred public indignation and eventual legislative action. In 1931 the Idaho Legislature created the CDA River and Lake Commission to investigate and make recommendations. The Commission consisted of the Chairs of the Shoshone and Kootenai County Commissions and the Idaho Attorney General. The Commission invited participation by

federal agencies including the Forest Service, the Public Health Service and the Bureau of Mines. Around this time, and partially in response to public outcry and the Commission's investigation, the mines collectively initiated an extensive dredging operation to remove mine wastes from the river near Cataldo. The dredging operation continued until 1968. The 1933 Commission report documented serious and pervasive impacts to water quality, lands and fisheries and made a series of recommendations, including the cessation of unrestrained discharges by the use of tailings impoundments. The legislature took no further action. The depression of the 1930's reduced mining somewhat in the Silver Valley, only to see dramatic increases in the late 30's and 40's as the demand for metals soared as a result of WW2

C. 1950-1980 The Rise of Early Environmental Standards and Regulatory Authority

Prior to WW2, pollution and public health issues were generally the province of the states with little federal involvement. But in most states, including Idaho, requirements and resources to address such issues were limited or non-existent. Beginning in the late 40's, consistent with the expansion of the federal government as part of the New Deal of the 30's and WW2, Congress slowly began to address both air and water pollution. Statutes enacted through the 50's and early 60's, though largely ineffective at the time, were precursors of the current Clean Water and Clean Air Acts. By 1968 Silver Valley mines were required to construct tailings impoundments to stop the discharge of tailings directly to streams and River. In 1968 Idaho formed an Air Quality Control Commission and federal and state air agencies began trying to impose limits on both sulfur dioxide and lead emissions from the Bunker Hill Smelter Complex. Regulatory requirements regarding SO2 and particulate emissions, including lead, were introduced and litigated through the late 70's. The smelters took some actions throughout this period such as construction of sulfuric acid plants, tall stacks and early pollution control devices (bag houses) to limit or disperse air emissions.

1970-1972 Clean Water Act and Clean Air Act enacted. EPA is created by President Nixon. Idaho adopts the Environmental Protection and Health Act and the Idaho Department of Health and Welfare (IDHW) creates a fledgling Division of Environmental Quality.

1972 National and local concern is raised by serious health problems caused by lead smelter emissions from an ASARCO lead smelter in El Paso Texas. An early toxic tort lawsuit is settled by ASARCO.

1973 A portion of the Bunker Hill smelter bag house was damaged by fire with the result, along with increased production, that lead emissions dramatically increase.

1973-4 Investigations initiated by IDHW discovered that local children, particularly those living near the lead smelter, had extraordinarily high levels of lead in their blood. Blood lead levels in some children were among the highest ever reported at that time. In response, IDHW and the local Panhandle Health District form the Shoshone Lead Health Project to further investigate and provide medical support and direct intervention in extreme cases. Many of the homes nearest the smelter were purchased by the BH company.

D. 1977-1983 Toxic Tort Actions

1977-1983 A toxic tort action (Yoss and Dennis) was filed on behalf of 9 children for injuries allegedly caused by lead smelter emissions. The case went to trial in late 1981 and after more than a month was settled for payments to be made over time, apparently in the range of $7-9 million. An additional suit (Prindiville) brought on behalf of several dozen additional children was similarly settled in 1983 for payments reportedly worth about $23 million.

The point of the above examples and quick overview is simply that prior to CERCLA there was a long history of legal actions, legislative action and regulatory requirements that addressed, though with limited effect, mining related pollution in the Silver Valley.

E. Enter CERCLA(Superfund)

1980—CERCLA enacted to provide a comprehensive means of addressing hazardous substance releases that endanger public health and the environment. It provided a broad liability scheme and authorized the US and states, to seek damages for and remediate hazardous substance releases. It also authorizes federal, state, and tribal governments, referred to as “natural resource trustees,” to seek damages for natural resource injuries caused by releases of hazardous substances. Damages include the cost of restoring damaged natural resources and the value of the natural resource services lost to the public pending restoration, including interim lost human uses of those functions.

1981 Gulf Resources, which had acquired the BH Company in 1968, closed the Bunker Hill Mine and Smelter Complex citing low metal prices, the lack of available concentrates and environmental regulatory burdens. Other causes likely included the age of the facilities and the failure of Gulf to allocate resources to adequately maintain and upgrade the facilities. Closure was a major economic disaster for the Silver Valley and Idaho.

1983—The “Bunker Hill Mining and Metallurgical Site” which became commonly known as the Bunker Hill Superfund Site was listed on EPA’s first National Priorities List (NPL). The area of concern included the smelter complex and nearby communities such as Kellogg and Smelterville. The listing and early investigations focused on a 21 square mile area (3X7) which composed the so-called “Box”

CERCLA set in motion 1. Lawsuits for response costs, cleanups and natural resource damages and, 2. Regulatory/ administrative processes to investigate releases and design and implement cleanups.

1. Lawsuits by Governments For Response Costs and NRD

A. Idaho

1983 (December) Idaho files a lawsuit in federal court for response costs and natural resource damages against the BH Company/Gulf pursuant to CERCLA and state statutory authorities. The timing of the lawsuit and similar actions brought in Idaho, Montana, Colorado and California concerning historic mining areas, related to the simple fact that CERCLA’s statute of limitations was poised to run out in January of 1984. Idaho’s suit was hotly contested and controversial within state government and the legislature. The Idaho Legislature refused to appropriate funds to the Office of the Attorney General for litigation of the case. BH/Gulf sought contribution from other mining companies. The suit was settled in relatively short order, in 1986, for $4.5M. Participating mining companies included BH/Gulf, ASARCO CdA Mines, Sunshine Mining, (but not Hecla). An entity composed of state, local and mining representatives called the Silver Valley Natural Resource Trustees was created to expend the settlement funds. Cleanup actions were implemented to improve water quality by removing contaminated tailings and soils from creek drainages during the 90’s.

B. Tribe

1991—Coeur d’Alene Tribe files CERCLA action against mining companies and UP. CdA Mines settle in 1992 for 350K. The action was stayed and then later joined with a 1996 action brought by the United States.

C. United States (See Cliff Villa outline)

1996—United States files its CERCLA suit for response costs and natural resource damages outside the Box. Defendant mining companies included ASARCO, Hecla, Coeur d’Alene Mines and Sunshine. The US and Tribe suits were joined. Lengthy,

voluminous discovery, motions and interlocutory appeals commenced. Among other affirmative defenses, the defendants contended that the NPL listing was confined to the 21 square mile Box, which, by action of the statute of limitations, would have barred the NRD claims outside the Box. The EPA position, which prevailed in 2000 after wrangling up to the 9th Circuit, was that the NPL listing of the Bunker Hill "facility" included all areas "where hazardous substances came to be located."

2001—The US/Tribe CERCLA lawsuit is tried for 6 months before Judge Lodge in Boise regarding liability for response costs and natural resource damages; not the extent or amount damages. (See Cliff Villa outline)

2001—Partial Consent Decrees (US, CdA Mines and Callahan; US, Tribe and Sunshine). Tribe settlement with ASARCO $5M.?

2009—ASARCO Bankruptcy Settlement. $482M to EPA for Basin cleanup through CdA Work Trust with EPA as beneficiary, $80M to federal NRD Trustees for Basin NRD) (significant increase in copper prices facilitated amount; Grupo Mexico funded settlement to acquire ASARCO mines)

2011—HECLA Settlement. $263M total; $197M to EPA/Idaho for Basin cleanup through CdA Work Trust, ($52M to Idaho for Bunker Hill Treatment Endowment to operate the CTP), $66M for Basin NRD to NRD Trustees (US, Idaho, Tribe). (Significant increase in silver prices facilitated settlement).

2. Administrative Actions to Investigate Releases, Design Remedies and Implement Cleanup

A. Box Cleanups (See Rob Hanson outline)

1986—EPA and Idaho begin limited cleanup actions in the Box to remove and replace contaminated soils from residential yards in the Box.

RI/FS regarding populated areas of the Box—IDHW Lead; RI/FS for non-populated areas—Gulf Resources Lead

1991--A Record of Decision (ROD) is issued by EPA and IDHW for remediation of populated areas within the Box (See Rob Hansen outline, basically, the remedy selected including soil removal and replacement where 1,000 ppm or greater lead and ICP; principle goal was to reduce blood lead levels to 1% 15ug/dl or greater and 5% 10ug/dl or greater).

1992—A ROD for remediation of the non-populated areas of the Box (smelter complex, etc.) is issued by EPA and IDHW (See Rob Hansen outline; basically, major elements

were revegetation of hillsides, removals in Smelterville flats, CIA stabilization, demolition and landfilling of smelter complex).

1994—Box Populated Area Consent Decree between EPA/IDHW and mining companies for cleanup of the residential areas of the Box (consistent with the 1991 Box ROD for populated areas) under EPA and IDHW oversight. [UMG-ASARCO, Hecla, Sunshine, Cda Mines). Mining company expenditures totaled about $40 million by 2001. 1995 Consent Decree with UP and Stauffer for remediation of discrete areas of the Box.

Cleanup of the non-residential portions of the Box was undertaken by EPA and Idaho following Gulf/BH bankruptcy at an approximate cost of $212 million by 2001. (Cost sharing for government funded remediation is 90% federal—10% State).

B. Basin Cleanups (See Rob Hanson and Darrell Early outlines)

1996—Blood Lead testing of children living in area of areas outside Box began by IDHW and Panhandle Health District. Results demonstrated elevated blood lead levels in many children outside the Box.

1997—EPA initiates limited removal actions to remove and replace contaminated soils at residences, schools and recreational area outside the Box

1998—EPA commences RI/FS for areas outside Box, igniting a firestorm of negative reactions from mining companies, local communities and elected state officials. "Superfund "stigma'. "Expansion of the Box." Concerns result in an Investigation of EPA by the EPA National Superfund Ombudsman initiated at the request of Idaho's congressional delegation. A "Consensus Process" is initiated by Idaho state officials to avoid the so-called "expansion." The Basin RI/FS ground on. IDHW took on the lead role for conducting the Human Health Risk Assessment as part of the RI.

2000—Union Pacific Consent Decree (Trail of the Coeur d'Alenes) (US, Idaho, Tribe, UP) UP received broad releases including NRD and response costs in the form of covenants not to sue. Idaho and Tribe received federal and mutual covenants not to sue and UP protection from any takings claims. Agreed work included removals and replacements to create safe recreational areas, construction of 72 mile paved trail to cap contaminated ballast, construction of bridges, restrooms, and other trail amenities, funding of IDPR and Tribe to manage public use, annual and long-term maintenance of trail surface. Citizens Against Rail Trial appeal to DC Circuit Court of Appeal (concerning federal rail trail approval).

2001—(October) Proposed Plan (precursor of ROD) for Basin is released by EPA. The result is another firestorm of mostly negative reactions; 3,300 comments are submitted during public comment period.

2002—Interim Basin ROD is issued by EPA with IDEQ concurrence. Interim remedy selected, addressing residential cleanups (removals/replacements/ICP) and partial, prioritized ecological cleanup(removals/capping/stabilization and possible water treatment in upper Basin, other selected actions in lower Basin; estimated at about $340 million. FInal ecological remedy not included (then estimated at $1.3B).

2002—Idaho legislation creates the Basin Environmental Improvement Project (BEIPC) to coordinate Basin cleanup and restoration. Participation includes Idaho, the local Counties, and, by MOA, Washington, US, and CdA Tribe. The BEIPC functions primarily as a clearing house and coordinating mechanism between federal, state, tribal and local governments (counties). The BEIPC does not retain or ultimately control settlement funding; money and ultimate authority is retained by individual, or combinations of, governments, trusts and endowments. Nevertheless, over time the BEIPC has fostered and routinized public participation, transparency, cooperation and consensus between the governments and the public.

2012—ROD Amendment (RODA) for Upper Basin. $635 M

Ongoing Basin Cleanup using, mainly, settlement funds through CdA Work Trust (See Darrell Early outline).

C. NRD Restoration (See Darrell Early outline)

200? NRD Assessment completed by United States and Tribe

2018—Basin Restoration Plan (ROD and EIS) Plan is completed by the NRD Trustees (US, Idaho, Tribe) for partial restoration or replacement of mining related damage to natural resources in the CdA Basin. Actions are funded by the NRD settlements (mainly Hecla and ASARCO), totaling about $140m. The Plan provides a process for soliciting and directly implementing or funding individual projects to improve habitat, particularly wetlands and riparian areas. Coordination with remediation actions is a priority. . Intention is $2-6M of work per year for 20-30 years. (See Darrell Early outline).