

Memo

To: Hon. Ronald Bush, United States Magistrate Judge, District of Idaho

From: Darrell G. Early, Div. Chief Natural Resources Division, Idaho Attorney General's Office

cc:

Date: Wednesday, June 12, 2019

Re: Federal Bench and Bar Conference Presentation – Coeur d'Alene Basin Clean-up.

- I. What remains to be done?
 - a. Discussion of the scope of the clean-up that remains.
 - i. Remaining yards in OU-2 and OU-3 – At this point largely residual yards where consent not granted previously.
 1. Since 2002, over 6,500 properties have been cleaned up in the Box and Basin!
 - ii. Continued Identification of recreational sites and remedial actions to address exposure risks
 1. Example – Beaches along rivers where high concentrations of lead are found in the sands.
 - iii. Central Treatment Plant Upgrades; Completion of Groundwater extraction system at the Central Impoundment Area; Ongoing treatment of contaminated water to improve water quality in the reach of the S.Fk. Coeur d'Alene River from Kellogg downstream to the confluence with N. Fk. Coeur d'Alene River (Enaville).
 - iv. RODA Work in Basin – 2012 ROD Amendment 146 sites were identified in the upper basin for source control. The RODA also identified 11 sites where water treatment would be necessary (some onsite / some involving piping contaminated water to the Central Treatment Plant. These include sites in most of the major tributaries to the S.Fk....
 1. Canyon Creek – removal of tailings and moving the soils repository; Potential groundwater extraction and treatment at CTP;
 2. Ninemile Creek – examples in the presentation of the type clean-up being done by the Trust at the following mine & millsites to remove and cap waste rock and tailings.
 - a. Interstate Callahan Mine & Millsite;
 - b. Success Mine and Millsite;

- c. Tamarack Mine and Millsite;
- v. Natural Resource Damage Restoration Plan
 - 1. Trustee Council (USFS, USFWS, Coeur d'Alene Tribe, IDFG & IDEQ).
 - 2. Settlements with mining companies have mostly all contained a monetary award for natural resource damages. (Approximate \$140,000,000) Federal Agencies, State and Tribe negotiated Memorandum of Agreement to create a Trustee Council and develop a "Restoration Plan." Plan was finalized and EIS/ROD was issued in 2018. Due to size of site, extent of damage to numerous species and habitats, Plan is a programmatic plan rather than selecting individual actions. Plan sets up a process and criteria for selection of restoration actions by Trustee Council. Council is solicited and awarded projects in 2018 for 2019; ongoing solicitation for 2020 projects
- vi. Bunker Hill Mine – Water Treatment and Remedial actions to control mine water. Original OU3 ROD specified work to be performed up-gradient of the Bunker Hill Mine to reduce the water infiltration and Acid Mine Drainage issues at the Mine thereby reducing the volume of contaminated water requiring treatment at the CTP. This work has not been implemented to date. The mine owner recently settled with EPA and agreed to contribute \$20,000,000 to EPA payable over time;
- vii. Lower Basin – The Lower Basin from Enaville to Harrison is highly contaminated with discharged tailings. These lie in both the riverbed itself and in the adjacent wetlands and littoral lakes where they were deposited during past flooding. Removal or remediation of these areas is challenging and at this time impractical due to the continued loading of the river from upstream and flooding that redeposits riverbed sediments into adjacent wetlands. Original OU-3 ROD and 2012 OU3 ROD Amendment do not specify particular removal or remedial actions in the Lower Basin. Instead the RODA identifies strategies and goals and indicates that "pilot projects" will be implemented to study the effectiveness of various actions. I will provide an example of one of these pilot projects (Schlepp Wetland) and show how it has provided a safe feeding and stop-over area for waterfowl. Consistent with the adaptive management approach of the RODA, and taking into consideration the need to address sources of continuing contamination upstream of the lower basin, the RODA anticipates future ROD Amendments to address lower basin site selections and remedial actions as clean-up is completed in upper basin. Challenge is to preserve funds so that there is funding for lower basin work.

viii. Lake Coeur d’Alene – The Lake is included in the boundary of the Bunker Hill Superfund Site. It has been described by some as the largest tailings repository in the site because the bottom of the lake is heavily contaminated with tailings deposits containing heavy metals. In 2002 EPA, the State and at the time the Tribe agreed not to select a remedy for the Lake due to the complexity of removal or remedial actions and that risks associated with any remedy might exceed the risks of leaving the material in place and letting nature take its course. Instead the Parties selected the Lake Management Plan (LMP) a cooperative program between the State of Idaho and the Coeur d’Alene Tribe as an alternative to control the contamination in the lake by assuring that it stays in place and does not become mobile in the environment. The primary control strategy for doing this is to monitor and on a voluntary basis encourage the reduction of nutrients into the lake. Nutrients like phosphorous and nitrogen pose a risk because they promote the growth of aquatic plants and algae which in turn consume oxygen in the lake. If the oxygen levels in the lake are depleted sufficiently, the lake can become “eutrophic” and “turn over.” If this occurs it is likely that much of the heavy metal contamination in the lake will become remobilized into the water column and move out of the lake into the Spokane River.

1. Recently the Coeur d’Alene Tribe as indicated they no-longer support the no-remedy solution and do not believe the LMP sufficient to protect. They have asked EPA to revisit this issue.
2. A “catch 22” twist to this issue is that the dissolved concentrations of zinc, cadmium and arsenic coming downriver from the upper basin act as a biocide in the lake to suppress aquatic growth. As clean-up proceeds in the upper basin to address this and lower the concentration of dissolved metals in the lake, the risk for eutrophication actually may increase.

b. Discussion of the Trust

i. To include the Trustee and the power he has.,

1. The principal of using an environmental clean-up trust was a novel way to approach settlement with a PRP. Per DOJ policy a Trust is only available in situations where there is a bankruptcy filed by a PRP.
2. The Cd. Alene Trust was created to stand in the shoes of the PRP – Asarco, Inc. and at the direction of EPA implement clean-up actions consistent with the ROD’s selected remedy. In effect it creates a “friendly” PRP. At the same time, the Trust is not limited in the management of the settlement dollars to payment into the Superfund (which is otherwise mandated when EPA/DOJ recover funds from a PRP).
3. The Trust operates consistent with the “Prudent Investor Rule” and the general fiduciary obligations of any trust. The Trust is charged with accomplishing as much clean-up as can be achieved with the

available funds, thus it has a fiduciary obligation to plan the use of its resources and the investment of the trust res so as to maximize the “bang for the buck.” - Insert language from Trust Instrument.

4. The Coeur d’Alene Work Trust has so far proven to be a boon to the clean-up, starting with a beginning balance of \$436,000,000.00, in trust principal, the Trust has since it began work spending significant funds but as of today has a balance of \$535,000,000. This has allowed by far more clean-up to be planned than would have been possible if the funds had been paid into Superfund where the rate of return is very low.
- c. What is undone?
- i. What is the most worrisome of the contamination that remains?
 1. Lower Basin Riverbed Contamination and Adjacent Wetland and Lake Contamination. The continued movement of contaminated riverbed sediment and accompanying recontamination of adjacent areas poses a challenge and significant ecological and human health threat. Waterfowl along the lower river continue to suffer mortality due to lead ingestion. Wetlands are non-diverse and habitat impaired because only certain plants can live in the contaminated soils. This diminishes the survival rates for wetland dependant species.
 2. Continued movement of contamination into Lake Coeur d’Alene. Recreational areas along the river cannot be cleaned up due to ongoing recontamination during high water so human exposures continue. This is largely being addressed through education and signing efforts until permanent protective measures can be developed.
 3. Remedy Protection and Long Term Stewardship
 - a. significant portion of the human health protection remedy is dependent upon the maintenance of protective barriers. This requires ongoing government supervision and the expenditure of local and state resources.
 - i. Institutional Controls Program
 - ii. Roads.
 1. Many roads in valley were constructed using waste rock or tailings as road base. Asphalt barriers protect against exposure to contamination underlying. Potholes and road deterioration allow for exposure. Cities and Counties generally in charge of roads, but when roads are part of remedy shouldn’t CERCLA be responsible.
 - iii. Water and Sewer Infrastructure
 1. Cities are responsible for maintaining water and sewer piping. Infiltration into sewer

system by contaminated groundwater results in metals contamination into the city wastewater treatment plant. Expense for treatment beyond local community means. Cities and Counties could sue for contribution against PRP's but political will to do so not there. Cities resistant to EPA demands to treat to meet WQ standards, but EPA unsympathetic in light of Cities refusal to use available legal remedies.

iv. Long term Water Treatment

1. EPA limited to 10 years of water treatment. After that it is a state responsibility if the clean-up is funded by Superfund. Not required to provide "assurance" where PRP funded remedy is in place. State cannot commit resources that are not required by law. So long as PRP money is being spent on remedy, State is not required to commit resources.
2. Settlement w/ Hecla established a trust fund held by State managed by EFIB to fund water treatment. State is using similar mechanism to Work Trust to grow the *res* of the trust so it can maintain long-term water treatment using Settlement dollars. Agreement with EPA specific that if the money ever runs out, State reserves rights.
3. Still need to address the contribution of the Mine Owner. Original CTP built and operated by the Mine to treat AMD. EPA took over when Mine went defunct. State and EPA should not have to pay for ongoing water treatment responsibility of owner. See discussion above of settlement with owner.

4. Lake Coeur d'Alene – See discussion above

- a. Repository for 70 million tons of mine waste
- b. Ongoing contamination from continued contributions
- c. Nutrient Loading and Eutrophication

ii. Who is addressing it? How will lawyers and the Courts be involved?

1. Players:

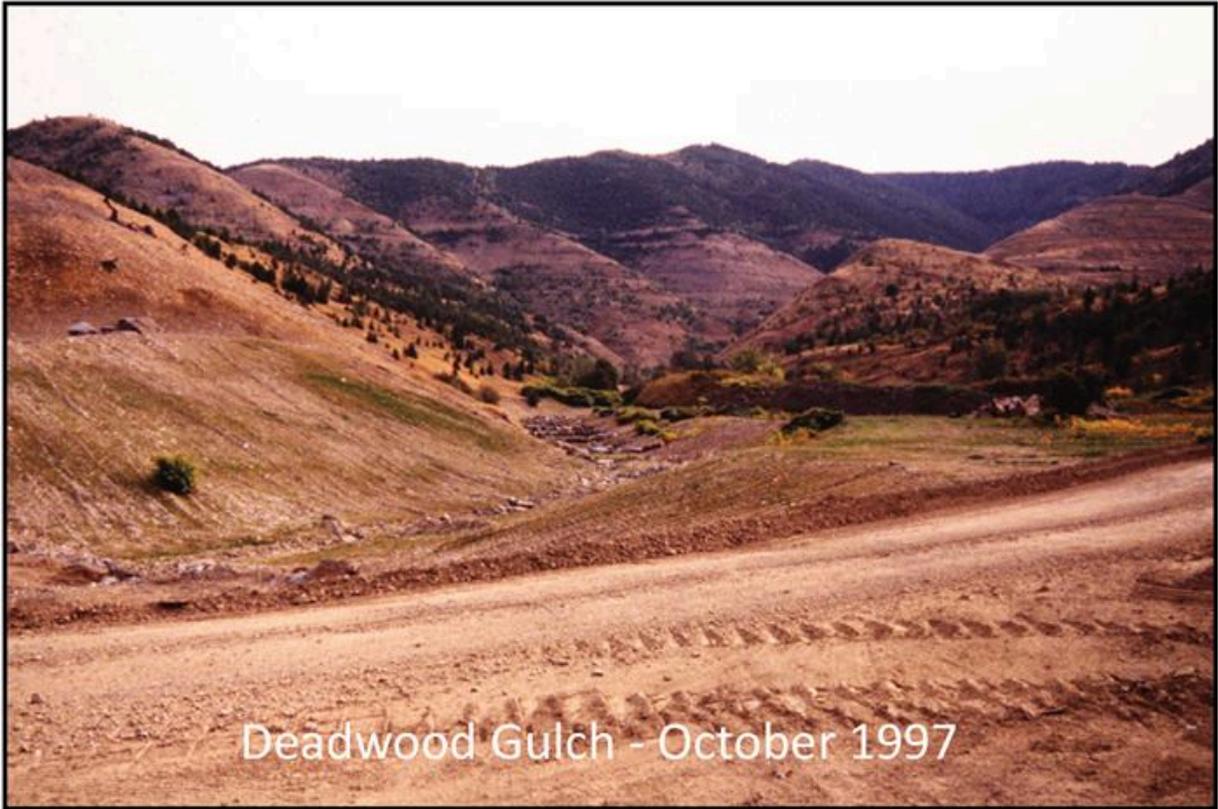
- a. CdAlene Work Trust
- b. State of Idaho
- c. EPA
- d. Local Communities

- e. Natural Resource Trustee Council
 - f. BEIPC
- 2. With the litigation by and large over and the major settlements in place, there will be less role for the litigation attorney and the Courts. Lawyers will continue, however, to play a role in facilitating agreements and resolving disputes between the various governmental entities and facilitating the transition of land ownership from the EPA to the State and from the Trust to third parties. For example, attorneys continue to play a key role in the NRD Trustee Council process advising the decision makers on implementation of their roles on the Trustee council. Attorneys will also play a role in the land use and real property arena as redevelopment occurs in contaminated areas. Businesses coming into the Basin want to acquire property without attendant liability. To do so they must comply with BFP criteria and negotiate property transaction details to assure compliance.
- iii. What is the continuing role of the federal government?
 - 1. EPA continues to oversee the CdAlene Work Trust
 - 2. If/When the Trust no longer has funding – EPA will have to complete remedy using Superfund money.
 - 3. The Federal Trustees (USFS and USFWS) play a significant role on the Trustee Council. Federal NEPA and NRD rules and regulations will govern a significant amount of the work done in the NRD context.
- iv. What is the continuing role of the State of Idaho?
 - 1. State continues to play important role even though it is no longer implementing the Yard's Program.
 - 2. State will take over operation of the CTP at the end of 2021
 - 3. State required to perform long term operations and maintenance of remedy that is paid for with Superfund \$ but is not required to contribute under CERCLA for PRP conducted remedies (Cd' Alene Work Trust).
 - a. ICP settlements; Legislative Funding
 - 4. State continues to oversee operation of repositories for the ICP.
 - 5. State continues to participate in the design and roll-out of various remedies specific remedies. E.g. CTP Groundwater Treatment
 - 6. State is a substantial landowner in the basin due to the requirement in CERCLA that EPA cannot hold land. State will continue to acquire land as EPA turns over various parcels upon completion of remedy. State is actively working with local community leaders to help redevelop contaminated lands and improve the economy of the local community. E.g Galena Ridge Golf Course; Government Gulch redevelopment. Proceeds from the sale of lands acquired per CERCLA go to fund long term O&M obligation of State

7. BEIPC is facilitated by the State and provides a clearinghouse of information to the community and an opportunity to comment on work plans and schedules.
 - v. What is the continuing role of the Coeur d'Alene Tribe?
 1. Tribe is active participant in the Restoration Partnership
 2. Tribe is pressing on EPA for additional remedy in both the lower basin and in the Lake.
- II. What can be said to identify important things that have transpired as a result of the work of lawyers and the lawsuits that focused on this larger subject? Who has benefitted? (People, fauna, flora.) How have Idahoans generally benefitted? How have visitors benefitted?
- a. The Basin was one of the first sites identified in the NCP for action. Many of the legal battles fought and/or negotiated form the predicate example for how other sites around the country are addressed. Legal rulings obtained in Idaho influence the negotiation of cases in other parts of the United States.
 - i. Judge Lodge's ruling in the NRD context on joint ownership of migratory resources (i.e. joint trusteeship) preventing the fragmenting of the trustees influences the way other NRD cases are pursued.
 - ii. The creativity of attorneys in pursuing fraudulent conveyance actions against Asarco, coupled with some fortuitous events in the global economy resulted in one of the largest settlements in CERCLA history.
 - iii. The use of the work trust concept has been used in other cases since the Asarco settlement (e.g. Tronox/Kerr McGee) and proven to be a benefit to CERCLA clean-ups. I have even used it at the State level to address a non-CERCLA clean-up site.
 - iv. The work of attorneys in negotiating settlements with the PRP's is also important. The results of those facilitated agreement has speeded clean-up and prevented the waste of precious clean-up dollars on litigation expenses. Some of those attorney negotiated agreements have been unique (e.g. Trail of the Coeur d'Alenes – Rails to Trails settlement).
 - v. In addition, attorneys have been heavily involved in negotiating the sometimes difficult relationship between the State, Federal Government, Tribe and local communities. Facilitating and finding solutions in often times politically and emotionally charged situations often times fell to legal counsel when the clients couldn't find a way past the history of their relationships.
 - vi. To this day, attorneys for the various governmental and tribal participants act to smooth over sharp disagreements and find common ground to achieve mutual goals. (e.g. Trustee Council)
 - b. As illustrated by some of the images, the Coeur d'Alene Basin is markedly different today as a result of the clean-up and economic development that flowed from the CERCLA process and the settlements obtained. Things like the Trail of the Coeur d'Alenes, the Galena Ridge Golf development exist because of the creativity of attorneys who worked on these cases. While the mining industry has faded as an economic driver in the basin and some attribute that to financial

burden CERCLA imposed, larger economic forces had a significant role. Clean-up has provided significant high paying jobs in the basin many of which go to local companies.

- III. What do local people think about what has transpired over the last 30-35 years? Has there been a change in how they view what was done?
- a. I can't speak to the early days of this. Over the past twelve years, I have seen a transition in attitudes. While some people continue to believe that the clean-up is a waste of money, now that the litigation is over, local communities seem to be more supportive of the clean-up since it no longer is seen as a threat to the major employers. In addition, through the outreach efforts of EPA and the State and the creative use of CERCLA clean-up projects to also benefit community infrastructure (i.e. remedy protection, roads, recreational opportunities) local communities are beginning to look more favorably on the clean-up.



Deadwood Gulch - October 1997



Deadwood Gulch - October 2018



UPRR Rail Line along Couer d'Alene River 1



Upper Waste Rock Dump Success Mine 1



Yards Program Remediating Play Area 1



Remedy Protection Work 1



Tundra Swans on Schlepp Wetland 1



Flooding during Spring Melt 1

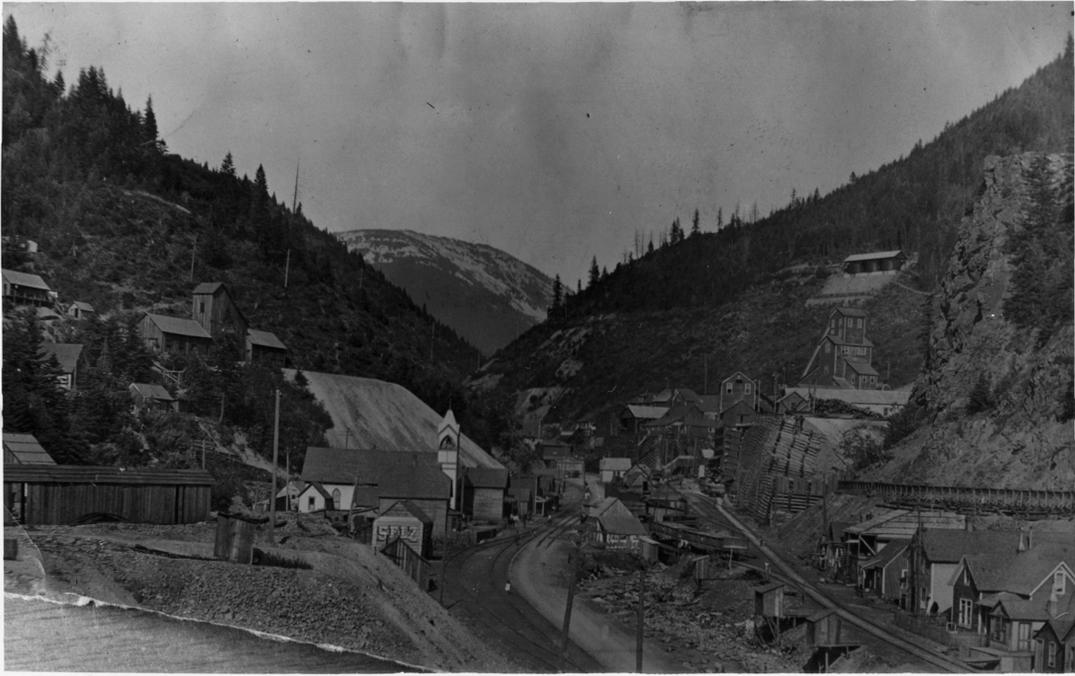


Remedy Protection Work 2



More work at Success Mne 1

Burke, Idaho - About 1915







Recreation Area Remediation 1



Before and After Interstate Calahan Mine 1



Groundwater Extraction CIA 1



Interstate Callahan Mine remediation 1



Waste Consolidation Area - Ninemile Crk 1



Central Treatment Plan Upgrades 1



Road Project/ Remedy Protection 1

