CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

—

CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

—

UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES FOREST SERVICE'S REBUTTAL BRIEF

I. ARGUMENT

The USDA Forest Service (Forest Service) would like to respond to one line of reasoning by the Atlantic Richfield Company (Atlantic Richfield) made in it prehearing brief for the California Regional Water Quality Control Board for the Central Valley Region (Water Board). At one point, the company stated, "the USFS has assumed responsibility for the cleanup under the consent decree."[1] On the contrary, the Forest Service is exercising its discretion to perform the cleanup under CERCLA at the Tailings Site—but it is not required to do so. The Forest Service did not assume any of the company's responsibilities through the consent decree. The Forest Service is not liable for the mine contamination, under the terms of the consent decree or otherwise.

The Walker Mine Tailings Site (Tailings Site) is on the Plumas National Forest, and it is part of the public land owned by the citizens of the United States. The national forests are administered by the Forest Service, and the agency's varied responsibilities are set forth in a series of Federal laws like the National Forest Management Act.[2] This is not the place for an extended discussion of the complex land management process Congress has established (and is always changing), but it is worth pointing out that, for over a century, the administration of minerals on national forests have been divided between the Forest Service and the Department of Interior (Interior).

Over the decades, numerous mining companies—including Atlantic Richfield itself—have argued that the Forest Service is liable for some or all of the cleanup costs associated with mine sites operated under the 1872 Mining Law, but all of those arguments have been rejected

[1] Atlantic Richfield Brief at 31.
[2] 16 U.S.C. 1600, *et seq.*

by the courts that have heard them.[3] These companies have asserted a variety of claims based on various theories of ownership and operation of hardrock mining claims, but none of these arguments have withstood judicial scrutiny.

Of course, the case law is quite different when a Federal agency has actively operated a facility and violated environmental laws, such as at military bases and weapons plants. In those circumstances, Federal agencies have properly been compelled to comply with the environmental laws they violated. But that is not the situation before us.

Further, Atlantic Richfield specifically alleges in its brief that the Walker Mining Company received "approval to build the tailing reservoir and impoundment in 1920."[4] In fact, the Forest Service did not have regulatory authority to approve or disapprove mining operations until the 1970's, over fifty years later.[5] As noted in the exhibits submitted by Atlantic Richfield, it was Interior, not the Forest Service, that had the authority in 1919 and 1920 to determine the allowed uses of public land by miners.[6] Unfortunately, in that era, Interior did not have authority to regulate most mining activity on public land either. Nor did any California agencies for that matter. Nonetheless, both the Forest Service and Interior did what little they could under Federal law to protect public land. That said, it was a time when miners did pretty-much as they pleased.

It is particularly hard to take at face value Atlantic Richfield's suggestions in its brief that, almost a century ago, Interior and the Forest Service could have—and should have—kept their corporate predecessors from causing the damage they did. Atlantic Richfield fails to cite any case law supporting this theory of liability, and as best as we can determine, there isn't any.

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[3] *United States v. Atlantic Richfield Co., Inc.*, No. CV-89-39-BU-PGH (D. Mont. Nov. 1, 1994); *Similarly, Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1133-34 (D. Idaho 2003); *United States v. Friedland*, 152 F. Supp. 2d 1234 (D. Colo. 2001); *Idaho v. M.A. Hanna Co.*, No. 83-4179 (D. Idaho Dec. 12, 1994).

[4] Atlantic Richfield Brief at 29.

[5] *See*, 36 C.F.R. 228.

[6] *See, e.g.*, Atlantic Richfield Exhibit 15.

In summary, the Forest Service respectfully requests that the Water Board decline to issue the proposed compliance order for the Tailings Site. With regard to the upcoming hearing, because the Water Board lacks subject matter jurisdiction over the Forest Service, the Forest Service does not plan to participate in the hearing. Of course, if the Water Board does issue a compliance order to the Forest Service, the agency reserves its right to challenge the validity of that order through administrative appeals and/or litigation.