



Gregory Evans

## Asarco Sues EPA To Nix \$34M Superfund Claims

By **Samuel Howard**

*Law360, New York (April 19, 2010)* — Asarco LLC is suing the U.S. government to scratch \$33.6 million in claims the reorganized mining giant maintains have been wrongly and tardily imposed in connection with the cleanup of a Superfund site in California.

The complaint, lodged April 5 in the U.S. District Court for the Eastern District of California, claims Asarco doesn't owe a penny for vast contamination at the Blue Ledge Mine site because the company never did more than provide financing decades ago to the owner of the long-abandoned copper mine.

Seeking \$33 million for past and future costs of addressing contamination, the defendants — the U.S. Environmental Protection Agency, the Department of Agriculture and the Forest Service — have been barking up the wrong tree because Asarco never carried any liability as an operator or owner of the mine site in the Rogue River National Forest, according to the complaint.

"At best, Asarco provided financing to the parent corporation of a subsidiary corporation that owned and operated Blue Ledge Mine in 1923. However, Asarco did not at any time obtain a direct ownership interest in Blue Ledge Mine, or manage, direct or conduct the mining operations that occurred at the mine site," Asarco said.

While the financing agreement gave Asarco a 30 percent stake in the parent company, Asarco did not assume the mining companies' liabilities. Those companies leased the site to a third-party operator in 1929, according to the complaint.

Largely removed from any of the mine activities, Asarco is simply not liable under the Comprehensive Environmental Response Compensation and Liability Act, according to the complaint.

Furthermore, the defendants are barred from seeking recovery from Asarco because they failed to submit their claims in time during Asarco's recently concluded Chapter 11 bankruptcy proceeding.

The EPA did not file its proof of claim until 16 months after the deadline established by the bankruptcy court and was properly discharged under the reorganization plan, confirmed Dec. 9, 2009, Asarco said.

“Under the plan, late-filed claims that otherwise would be discharged pursuant to the foregoing may receive a distribution from Asarco’s bankruptcy estate only if such late filing is authorized upon a showing of excusable neglect,” Asarco said.

The lawsuit seeks a declaration that Asarco is not liable for any of the defendants’ claims in connection with the Blue Ledge Mine, as well as costs of litigation.

Representatives for the EPA could not be reached for comment Monday.

Gregory Evans, counsel for Asarco and partner at Milbank Tweed Hadley & McCloy LLP, said that the company is taking initiative to head-off the EPA’s claims and ensure that liable parties alone pay for the environmental damage.

“Asarco is not willing to tolerate what has become a customary and expensive delay in the resolution of liability under CERCLA,” Evans said. “When the facts are clearly in your client’s favor, and the costs of defense are only going to go up, it is appropriate to bring the matter before the court sooner, rather than later.”

Completing one of the most complex reorganizations in recent history, Asarco exited bankruptcy in December after paying \$1.79 billion in environmental claims.

Asarco’s plan administrator was given more than \$3.6 billion to pay off creditors — \$2.2 billion of which came from Asarco parent Grupo Mexico SAB de CV in the form of \$720 million in cash and \$1.5 billion in bank financing.

The \$1.79 billion cleanup and restoration sum will go toward past and future costs incurred by state and federal agencies at more than 80 sites in 19 states that were contaminated by mining operations, according to the EPA.

Asarco is represented by Milbank Tweed Hadley & McCloy LLP.

The case is Asarco LLC v. U.S. Department of Agriculture et al., case number 2:10-cv-00802, in the U.S. District Court for the Eastern District of California.

--Additional reporting by Ben James