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4 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

5
6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 vs.

9 NEWMONT USA LIMITED AND DAWN
MINING COMPANY, LLC,

10 Defendants.

NO. CV-05-020-JLQ

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER**

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13 **I. INTRODUCTION**

14 This action involves claims brought under the Comprehensive Environmental
15 Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. (1988).
16 The parties are litigating who must pay past and future costs incurred in the environmental
17 cleanup of the soil, surface water and groundwater surrounding an inactive open pit uranium
18 mine called the Midnite Mine located on the Spokane Indian Reservation in the State of
19 Washington. The dispute involves just three parties: the United States of America, Newmont
20 USA Limited ("Newmont") and Dawn Mining Company, LLC ("Dawn"). The United States,
21 acting through the Environmental Protection Agency (EPA), has incurred response costs
22 preparing for cleaning up the mine. Newmont and Dawn are the entities from which the EPA
23 seeks to recover its response costs under § 107 of CERCLA. Newmont and Dawn
24 counterclaim against the United States for contribution under § 113(f) of CERCLA. Both
25 sides contend the evidence demonstrates that the other should be held primarily or entirely
26 responsible for the cost of remedying the contamination at the site.

1 The court has already held at the summary judgment stage that the United States has
2 met its burden of proving 1) The Midnite Mine is a “facility” within the meaning of
3 CERCLA; 2) There has been a release of hazardous substances from the facility; 3) The
4 government incurred costs in response to the release; and 4) Dawn qualifies as an “operator”
5 of the Site. Having proven these four elements, the United States has established Dawn’s
6 liability as a responsible party. In addition, the court held as a matter of law that the United
7 States is an “owner” of the Site under CERCLA, 42 U.S.C. § 9601(20)(A), subjecting it to
8 potential liability upon the CERCLA contribution claims of the Defendants. *United States v.*
9 *Newmont USA Ltd.*, 504 F. Supp. 2d 1050 (E.D. Wash 2007) (Ct. Rec. 290). Finally, the
10 court determined that the United States has incurred \$12,867,441, plus interest, in response
11 costs through December 31, 2004. This amount included \$520,000 which the court deemed
12 not recoverable, and \$1.88 million in sampling costs which are in dispute. The remaining
13 amounts have been deemed recoverable.

14 These rulings left for trial the following issues: 1) whether Newmont qualifies as an
15 “operator” of the Site and is therefore liable under CERCLA; 2) whether the \$1.88 million
16 expended by the EPA on sampling is recoverable; and 3) the extent and scope of liability of
17 all parties deemed liable on the cost recovery and the contribution claims. This third aspect
18 involves issues of divisibility, allocation, and the request for declaratory judgment(s) as to
19 future costs. The case was tried before the court over six days on July 7-14, 2008. The court
20 heard live testimony from twelve witnesses, received all or part of a dozen testimonial
21 depositions, and admitted over 1600 exhibits. See Ct. Rec. 484 [Post-Trial Order]; Ct. Rec.
22 490 [Final List of Admitted Trial Exhibits]. The parties stipulated to a number of facts in
23 their Joint Pre-Trial Order, approved and filed July 3, 2008 (“JPTO”). See Ct. Rec. 474. For
24 additional background facts, the court refers the to the undisputed facts contained in the
25 summary judgment record and the stipulated facts contained in the JPTO.

1 Following the trial, the court received supplemental briefing and held a hearing on
2 August 25, 2008 to hear final argument on all remaining issues, including the recoverability
3 of the \$1.88 million in disputed response costs associated with EPA’s sampling. Following
4 the hearing, the court received additional briefing from both Dawn and the United States on
5 the issue of the disputed sampling costs. The court also re-opened the trial record for the
6 purpose of receiving additional materials pertaining to Dawn’s financial condition and
7 potential orphan share.

8 Having carefully considered the testimony presented and gauging the credibility of the
9 witnesses, along with the voluminous evidentiary record, and the comprehensive pre- and
10 post-trial briefs and other submissions, the court makes the following Findings of Fact and
11 Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).¹ For the reasons set
12 forth fully below, the court finds that Newmont is liable as an operator of the Midnite Mine

13
14 ¹ To the extent that any of the Findings of Fact may be deemed Conclusions of Law,
15 they also shall be considered conclusions. Likewise, to the extent that any of the Conclusions
16 of Law may be deemed Findings of Fact, they shall be considered findings. *See Miller v.*
17 *Fenton*, 474 U.S. 104, 113-14, 106 S.Ct. 445, 451-52, 88 L.Ed.2d 405, 413-14 (1985) (noting
18 the difficulty, at times, of distinguishing findings of fact from conclusions of law).
19 Throughout the Findings of Fact section, the court cites to exhibits and portions of the record
20 that support the findings. These citations are by no means exhaustive. The court's factual
21 findings reflect the facts that were proven to be more likely true than not, based on the entire
22 record. By including some citation to portions of the record the court finds particularly
23 relevant, the court does not mean to suggest that these are the only portions of the record that
24 support that factual conclusion. Rather, in many cases, the court believes that other portions
25 of the record provide similar factual support.
26

1 for its actions in both managing, directing, conducting, and overseeing the operations at the
2 Midnite Mine, and that the recoverable costs incurred by the United States include the \$1.88
3 million in sampling disputed by Dawn. Having found the elements of liability under
4 CERCLA § 107(a) have been met, the court directs the entry of final judgment in favor of the
5 United States on its claim against the direct defendants, Newmont and Dawn, for recovery of
6 response costs and also declaring Dawn and Newmont jointly and severally liable for any and
7 all “future” response costs that the United States may incur (or already incurred after
8 December 31, 2004) at the Midnite Mine Site consistent with the National Contingency Plan
9 (“NCP”). In addition, the court directs entry of final judgment on the Defendants’
10 contribution claims against the third-party defendant, United States, declaring the United
11 States severally liable for one-third of all recoverable response costs.

12 **II. FINDINGS OF FACT**

13 **A. U.S. DEVELOPMENT OF DOMESTIC URANIUM SUPPLIES**

14 The Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755, created the United
15 States Atomic Energy Commission (AEC) and gave the AEC control of all fissionable
16 material and facilities involved in the production of fissionable material within the United
17 States. The Act encouraged the participation of private industry in the production of
18 fissionable material; it allowed private individuals and companies to locate and mine uranium
19 ore deposits and it allowed private mills to process the ore under AEC licenses. Ex. 2354.

20 In October 1947, the AEC established the Division of Raw Materials, which
21 spearheaded development of a domestic uranium supply. The AEC issued a series of circulars
22 starting in April 1948, and created incentives for uranium exploration and production. In
23 February 1949 the AEC issued Circular 5, which consolidated previous circulars, raised the
24 minimum price for uranium ore, and established premium prices for higher grade ore.
25 Circular 5 was revised and expanded in March 1951 and remained in effect until March 1962,
26

1 serving as a key set of regulations governing the AEC's procurement program. Exs. 2354, 2049.

2 To stimulate exploration and production, the AEC, which was the sole buyer of
3 uranium in the United States at the time, offered long-term contracts to mining companies
4 under which the government would pay a relatively generous price for uranium until 1962,
5 when the contracts were set to expire. This stimulus program led to increased exploration.
6 Ex. 2354.

7 On April 17, 1959, the AEC released a press release of the remarks of Jesse C. Johnson,
8 Director of the Division of Raw Materials, US AEC, that were for delivery to the Wyoming
9 Mining Association. Ex. 2049. Mr. Johnson observed that "[p]art of our responsibility in the
10 Raw Materials program is the assessment of the uranium resources which may be available
11 to meet the future demand for atomic power." Ex. 2049. The AEC's "uranium procurement
12 program, since its inception, has been directed toward the development and utilization of our
13 domestic resources," and that the goal was "to make this country self-sufficient in a vital
14 strategic mineral." Ex. 2049.

15 The AEC's domestic uranium procurement program was vital to the strategic position
16 of the United States:

17 In 1948 we had an urgent military requirement for uranium. Probably no military
18 program undertaken by this country in peacetime has been considered more important,
19 or given higher priority, than the atomic weapons program following the breakdown
20 of the 1946-1947 discussions in the United Nations Atomic Energy Commission for
21 control of nuclear weapons. Events of the succeeding years, particularly in 1949, 1950,
22 and 1951, called for a series of expansions greatly increasing uranium requirements.
23 Most of our uranium then was coming from the Belgian Congo. The problem there
24 was to maintain the production rate – the possibilities for expansion were limited.

25 Ex. 2049.

26 Depending on Africa to satisfy the United States' need for uranium was problematic
because of the vulnerability of this "highly strategic material" during transportation, both
overland in Africa and oversea from Africa to the United States. Ex. 2049. Uranium was
strategically important because of its use in atomic weapons, because "[a]tomic power for

1 propulsion already has become a military necessity," and because [a]tomic energy for
2 industrial power is considered essential to meet the world's growing energy requirements."
3 Ex. 2049. Despite the AEC's uranium procurement program, even into the 1950s known
4 uranium ore reserves in the United States were low; the United States was still acquiring 83%
5 of its uranium from foreign sources. Ex. 2049. However, by June of 1962, after mining
6 commenced at the Midnite Mine, 47% of the United States' uranium purchases came from
7 domestic sources. Ex. 2049.

8 **B. THE EARLY PERIOD: SPRING 1954-FALL 1956; EXPLORATION FOR ORE AND THE**
9 **DEVELOPMENT OF THE MIDNITE MINE**

10 *The Discovery of Ore on the Spokane Indian Reservation.* In the spring of 1954, Jim
11 and John LeBret, brothers and members of the Spokane Tribe, discovered uranium on the
12 Spokane Indian Reservation at what would become the site of the "Midnite Mine",
13 approximately 45 miles north of Spokane, Washington. Although they had experience as
14 prospectors, the LeBrets had no experience in mine development, mine operations, or mine
15 management. Quivik ¶ 42; Loncar Test. 85:17-24. Robert Hundhausen, who at the time
16 worked as a mining engineer for the United States Bureau of Mines, visited the discovery and
17 advised the LeBrets that "the deposit warrants exploration and development"; that "the deposit
18 be called to the attention of the Atomic Energy Commission"; and that they should seek to
19 obtain a lease of the land. He recommended that they find someone suitable to help them
20 exploit the mine. Exs. 001 at MIDFLQ0059, 0117, 2007. Prior to this time, no significant
21 uranium deposits had been found in the Pacific Northwest. Ex. 611.

22 *The Land.* As the court found in its Memorandum Opinion and Summary Judgment
23 (Ct. Rec. 290), the land containing the discovered ore exists on the Spokane Reservation
24 which was created by Executive Order of President Rutherford B. Hayes dated January 18,
25 1881, which set aside the land "for the use and occupancy of the Spokane Indians," without
26 relinquishing title to the Tribe. Ex. 5018. Title to the majority of the Midnite Mine site
(approximately 571 acres) is held by the United States in trust for the use and benefit of the

1 Spokane Tribe. An adjoining 120 acre parcel of the land which eventually encompassed the
2 Midnite Mine consists of allotted Reservation land, known as the “Boyd allotment”.

3 *The Creation of MMI.* The LeBret brothers and four of their relatives, John C. LeBret,
4 Samuel E. LeBret, Clair Wynecoop and Thomas E. Wynecoop, obtained a mining lease from
5 the United States for approximately 571 acres of reservation land encompassing the deposit
6 "for the sole purpose of prospecting for and mining minerals." Ex. 2358A. This lease, Lease
7 No. 14-20-503-107, was executed on July 15, 1954, and was signed by Floyd H. Phillips, the
8 United States Superintendent of the Colville Indian Agency (an agency of the United States
9 Department of Interior) “for and on behalf of the Spokane Tribe of Indians.” *Id.* Though not
10 signed by a member of the Spokane Tribe, the negotiation of the lease was also later approved
11 by the Spokane Tribe (*see* Ex. 5253 [Spokane Resolution 1954-16 dated July 30, 1954]). The
12 lease was thereafter approved by the United States Department of Interior on October 1, 1954.
13 Ex. 2358A.

14 The LeBrets and Wynecoops formed a new corporation, Midnite Mines, Inc. ("MMI"),
15 on December 6, 1954 in order to investigate the uranium showings. Quivik ¶44; Exs. 611,
16 007, 2007. On December 15, 1954, they assigned their mining lease to MMI. Ex. 2358B.
17 That assignment was approved by the Spokane Tribe in Spokane Resolution 1954-29 (Ex.
18 5258; Smith ¶ 14) and by the United States Department of the Interior on April 26, 1955 (Ex.
19 2358B). That same month, MMI shipped 54 tons of rock to the AEC plant in Utah for testing
20 and after it became apparent ore occurred in economical mineable quantities, MMI and the
21 AEC entered into a contract (AEC contract number 362-F) which allowed MMI to deliver
22 2,400 tons of uranium ore to the AEC. Exs. 611; 1792; 2354; Quivik ¶ 56. To gain further
23 information about the nature and extent of the Midnite Mine’s ore body, in early 1955, the
24 AEC began its own preliminary program of diamond drilling. Exs. 611, 2354.

25 *Newmont.* MMI did not have the management, technical or financial capabilities to
26 develop and operate the Midnite mine. Quivik ¶¶ 36, 45. In early April 1955, Hundhausen

1 left his position with the Bureau of Mines to work for and assist MMI with exploration and
2 development efforts. Hundhausen put MMI in touch with a Portland banker, Spencer
3 Hinsdale, who knew Fred Searls of Newmont Mining Corporation (“Newmont”) and had
4 experience in mining investments. Quivik ¶ 49; Ex. 001 at MIDFLQ0059, 0117. Hinsdale
5 contacted Searls to inquire whether Newmont, who had been conducting uranium exploration
6 on the Colorado Plateau, was interested in participating in the venture to develop and exploit
7 the uranium mine. Ex. 001 at MIDFLQ0059, 0117.

8 Newmont had experience in managing mining operations throughout the world. Ex.
9 098. Newmont possessed the resources, knowledge, and experience for mining and
10 extracting ore. Lattanzi ¶¶ 60-62; Quivik ¶¶ 50-54, 130-36; Exs. 001, 002, 007, 046, 114,
11 958a.

12 In April 1955, Newmont sent G.W.H. “Hal” Norman to visit the Midnite Mine. Dr.
13 Norman was an employee of Newmont’s wholly owned subsidiary Newmont Exploration
14 Limited (“Newmont Exploration” or “NEL”) and worked at the Montrose, Colorado, office.
15 Dr. Norman reported to Searls that “the subject property has merit and should be tied up if
16 reasonable terms can be arranged.” Lattanzi ¶ 81; Quivik ¶ 58, Exs. 006, 007.

17 *The 1955 Agreement.* Newmont was sufficiently interested in the property that it
18 entered into an agreement with MMI to exploit the mining lease held by MMI. This
19 Agreement, the 1955 Agreement, was executed on April 20, 1955. The 1955 Agreement
20 provided for the establishment of a new company, later named Dawn Mining Company
21 (“Dawn”). Under the terms of the Agreement, Newmont would own 51% and MMI would
22 own 49% of the shares of the newly created company. Lattanzi ¶¶ 14, 63; Exs. 007, 009, 284.
23 MMI’s contribution to the business venture of Dawn was the mining lease and the contract
24 to provide ore to the Atomic Energy Commission. U.S. Ex. 007; Ex. 2012; *See also* Quivik
25 ¶ 60. Newmont’s contribution to the venture included its experience and expertise in
26 conducting mining operations. Lattanzi ¶ 15.

1 Clause 1 of the 1955 Agreement gave Newmont the right to designate the majority of
2 the Board of Directors and the Executive Committee with Newmont personnel for the life of
3 the operation and to nominate all of the officers of Dawn for the life of the operation. Lattanzi
4 ¶¶ 14, 63; Quivik ¶ 59; Exs.7, 008a, 009, 917d, 302. Newmont would nominate four
5 members to Dawn's seven-member Board of Directors, and MMI would nominate three. An
6 executive committee consisting of three directors would also be formed. Newmont would
7 nominate two members of this committee, and MMI would nominate one. Clause 1 of the
8 1955 Agreement further provided that Spencer Hinsdale (the Portland banker), who had no
9 prior position with either Newmont or MMI, would be Dawn's first President.

10 Clause 6 of the 1955 Agreement provided that work at the Site would commence
11 promptly:

12 [D]uring the initial period following execution of this agreement, while [Dawn] is
13 being organized...the work of uncovering and developing the properties...should be
14 continued diligently. Accordingly, Newmont shall have the exclusive right to enter
15 said properties, under the consent and license of Midnite, with the requisite personnel,
16 mining equipment and supplies, for the purpose of commencing a program of
17 development of said properties which shall tend to determine the grade, extent and
18 continuity of the mineralization now indicated...It is agreed that Newmont may delegate
19 the actual mining and development activities herein provided to a wholly-owned
20 subsidiary, on the understanding which is hereby confirmed that Newmont shall
21 guarantee the performance of all work so delegated. It is further agreed that all work
22 done at the said properties prior to the assumption of such work by [Dawn] shall be
23 done under the supervision of Newmont and at its initial cost and expenses as herein
24 provided. During said initial period, all development ore mined shall be stockpiled on
25 the property and shall become property of [Dawn] when formed.

19 *Ex. 007.*

20 Clause 10 of the 1955 Agreement further provided:

21 It is the declared intention of the parties hereto that [Dawn] shall serve as the exclusive
22 vehicle through which they shall cooperate in the business of mining exploration,
23 prospecting, development and exploitation of mining prospects and properties...

23 *Id.*

24 The 1955 agreement required Newmont to provide the financing, equipment, supplies,
25 and personnel for the development program but left it to the discretion of Newmont's
26 engineers whether to provide additional financing after they weighed the advisability of the
27 expenditure by Dawn and determined whether the interests of Newmont would be served. Ex.

1 007. Newmont and Midnite also entered into a Supplemental Agreement of the same date.
2 That supplemental agreement related primarily to meetings of the Executive Committee.
3 Lattanzi ¶ 67, Ex. 009. The 1955 Agreements are the type of agreements one would expect
4 to see between an unsophisticated group of prospectors and an experienced mining company.
5 Lattanzi ¶¶ 15, 64.

6 *Incorporation of Dawn.* Dawn was incorporated on April 27, 1955, one week after the
7 execution of the 1955 Agreement. Newmont conducted all the arrangements for incorporating
8 Dawn including filing incorporation papers, holding an incorporators meeting, adopting by-
9 laws and electing the initial Board of Directors (which occurred the same day as the day of
10 incorporation). Quivik ¶ 66; Exs. 008a, 306, 954a, 1020, 1023, 2012. The same day as its
11 incorporation, Dawn's first Board of Directors was elected. A day later, on April 28, 1955,
12 the Board met for the first time and elected Spencer Hinsdale as Dawn's President and
13 authorized Robert Hundhausen (who had assisted MMI with its exploration work) to serve
14 as Dawn's first General Manager.

15 On May 9, 1955, there was a special meeting of the Dawn Board of Directors, and at
16 that meeting the board authorized certain officers of Dawn to execute, sign and deliver all
17 documents that would be required to facilitate the assignment of the lease to Dawn. Ex. 2015.
18 MMI assigned the lease to Dawn on May 16, 1955. Ex 1056. This assignment was approved
19 by the Department of the Interior on August 17, 1955. Ex 1056. Dawn held the lease for the
20 life of Dawn's operations. *See* Ex. 852.

21 During the entire operational life of the mine, only two officers of Dawn were not on
22 the payroll of Newmont or a wholly owned Newmont subsidiary: Messrs Hinsdale and
23 Hundhausen. Quivik ¶ 39(b); Ex. 917d.

24 *Initial Work at the Mine.* Various exploration and mining activities took place at the
25 Midnite mine between the execution of the 1955 Agreement and the commencement of Phase
26 I mining and stripping operations in the fall of 1956. Activities occurring at the site during

1 this early period included mapping, drilling, stripping overburden, bulldozer trenching,
2 excavating, forming adits, stockpiling ores, creating waste dump areas, and shipping ore.
3 Dahl ¶ 4; Lattanzi ¶ 17; Exs.004, 006, 011, 261, 263, 264, 278, 1204 at 2.

4 After entering into the 1955 Agreement, Newmont immediately conducted and directed
5 operations at the Midnite mine, including exploration, geological studies, and development
6 of the mine producing small ore lots to ship to the Atomic Energy Commission. Lattanzi ¶
7 17; Quivik ¶¶ 37, 68, 69, 74-83; Loncar ¶ 3; Exs. 004, 006, 015, 019, 020, 021, 278.
8 Newmont provided all of the financing for start up of mining activities at the Midnite Mine.
9 Exs. 007, 168. For example, Newmont provided the mining equipment. Lattanzi ¶ 82; Exs.
10 165, 168. The purpose of this initial work was to determine whether the quantity, continuity
11 and grade of mineralized material existed to support an economic mining operation.

12 Mr. Hundhausen, who was already onsite assisting with the development efforts,
13 continued to do so after the 1955 Agreement and after being named General Manager of
14 Dawn. Mr. Hundhausen reported to Spencer Hinsdale, Dawn's first president. See e.g., Ex.
15 1824, Tabs 1 – 8 (Reports of Hundhausen to Hinsdale). However, Mr. Hundhausen did not
16 have any authority over NEL employees conducting the work at the mine. Lattanzi ¶¶ 109;
17 Loncar ¶ 14; U.S. Ex. 184; Loncar Test. 16:10-22; Loncar Test. 26:4-19. See also Lattanzi
18 ¶¶ 103-109, U.S. Exs. 006, 008a, 026, 027, 182, 183,184. The reports of Mr. Hundhausen to
19 Mr. Hinsdale covering the period from May 1, 1955 to July 1, 1955, summarize the operations
20 of the Mine during this period. Ex. 1824, Tabs 1-8. These reports evidence Mr. Hundhausen
21 interacted with third parties regarding the development of the mine, but do not evidence
22 Hundhausen was directing or making any of the decisions regarding the mining operations
23 outlined in his reports and being carried out by NEL employees at the Mine.

24 Mr. Hundhausen lacked operating experience and this was the basis for Newmont's
25 later decision not to name him general manager of the mine in 1956. On June 21, 1955 NEL's
26 Hal Norman identified this in a letter he wrote to his Newmont boss, Fred Searls, regarding

1 Mr. Hundhausen's role at the Mine: "Hundhausen I am sure would be the first to recognize
2 that he has had no operating experience and that his main experience lies in proving up
3 additional ore reserves at prospects in various parts of the country." Ex. 27. Norman goes
4 on to advise that the "wisest course to follow" would be to persuade Hundhausen to devote
5 his time to the discovery of ore, his area of expertise, and only give him "very general
6 supervision" over operations. *Id.*

7 Mr. Hinsdale was a banker and had no experience in mining operations. Lattanzi ¶¶
8 96-97. Mr. Hinsdale did not supervise the NEL employees conducting exploration and
9 development in 1955. Lattanzi ¶¶ 96-102; Loncar ¶ 14.

10 Additionally, Newmont provided some of the onsite personnel in 1955, whom
11 managed, supervised and directed early mine operations and exploration efforts. Lattanzi ¶¶
12 82-83. 115; Ex. 261. In 1955, invoices and payment information demonstrates that NEL was
13 charging Dawn for the salaries of the following individuals: Messrs. Pete Loncar (named
14 "mine superintendent" for the Mine), G.W.H. Norman, Joe Kalliokoski, R.F. Sheldon (named
15 "Chief engineer and geologist" for the Mine), H.E. Pickett, Leonard Chase, James Wilson
16 (named "Assistant engineer" for the Mine), Ben Short and A.A. Schierman. Exs. 433d-e,
17 433h, 470e, 933b, 942b, 1824 tab 1.

18 One of these individuals, Pete Loncar, an employee of NEL since the 1940s, was
19 assigned by his boss, Hal Norman of NEL, to the Midnite Mine to "supervise mining
20 exploration and development operations." Lattanzi ¶¶ 83-84; Loncar ¶ 3 - 5; Loncar Test.
21 7:25-8:22; Ex. 011. He supervised bulldozing to expose near surface ore and the excavation
22 of the mine adit, and also ensured compliance with the AEC contracts. In April 1955, it was
23 NEL employees Loncar, Kalliokoski, and Norman who met with Hinsdale and Hundhausen
24 to help them select the location for an exploration adit. Ex. 1027. Mr. Norman reported the
25 details of their decision regarding the location of the adit to NEL management in New York.
26 Ex. 1027.

1 The purpose of the adit opening was to appraise the positive results from earlier
2 surface exploration drilling, to assess the physical character of the mineralized material, and
3 to obtain additional, mineralized material to ship to the AEC. Ex. 1204. The adit was started
4 in May 1955 and was excavated by laborers employed by Dawn. Ex. 1824, Tab 1 (June 17,
5 1955 Hundhausen to Hinsdale report). The exploration adit was approximately 550 feet in
6 length. By spring of 1955, NEL had extracted enough uranium ore from the adit to make its
7 first shipment to the AEC. By the end of May 1955, nine car loads of ore had been shipped
8 out of the production from the adit. Exs. 169, 524. Mr. Loncar supervised driving the adit.
9 Loncar Test. 13:2-8. Mr. Loncar decided where to put the waste from the adit. Loncar Test.
10 13:9-24. Almost all of the material excavated from the adit was shipped offsite to the AEC
11 for testing.

12 R.F. Sheldon, a geological engineer with Newmont Exploration reported that in the
13 summer of 1955, there was an intensive development program consisting of 25,000 feet of
14 wagon drilling, 550 feet of underground work, geological engineering and radiometric
15 mapping, bulldozer trenching, stripping of selected areas, and limited mining in three of the
16 uranium ore bodies. Ex. 611; *see also* Ex. 262 (report stating that in the two-week period
17 between June 16 and July 1, 1955: bulldozer trenching and stripping operations had been
18 conducted; 21 drill holes had been completed to a total depth of 2,356 feet; an adit had been
19 excavated to 96 feet; and twelve train car loads of ore had been shipped off-site during this
20 period).

21 On September 13, 1955, Fred Searls of NEL wrote to Mr. Hinsdale regarding the initial
22 work performed by NEL at the Midnite Mine. Mr. Searls noted that this work “resulted in a
23 total expenditure of \$120,000. Strictly construed according to our Dawn contract, Newmont
24 Exploration’s role in performing this work was that of contractor for Newmont Mining
25 Corporation, so that it is the latter company which is entitled to the \$120,000 reimbursement
26 from Dawn Mining Company.” Ex. 470e.

1 By the fall of 1955, Dawn and the AEC had executed a series of small quantity ore
2 procurement contracts under the AEC's Uranium Ore Procurement Program. Under this
3 program, the AEC performed geologic surveying, free testing and assaying, and guaranteed
4 minimum ore prices as set forth in the program circulars. Dawn executed at least three
5 contracts under this program. Ex. 2354. One of these contracts, executed on November 17,
6 1955, provided that the AEC, which "in the acquisition of uranium source material is
7 interested in encouraging the domestic production of uranium concentrate from new uranium
8 producing areas," would purchase from Dawn 500 tons of uranium ores "for the purpose of
9 metallurgical testing and research." Exs. 2025, 2026. By November 30, 1955, Dawn had
10 shipped the complete 500 ton mill sample as required by the November 17, 1955 contract.
11 Ex. 2029. Ore from Dawn's early exploration efforts was shipped to the AEC in accordance
12 with these small quantity ore procurement contracts. Exs. 1031; 918a; 918b; 1078; 1792. The
13 hope was that enough ore could be located to justify the establishment of an AEC ore-buying
14 station nearby. Ex. 1021, 1070, 1071, 1072, 1077, 1078, 1081.

15 *Hopes for Mill or Ore-buying Station.* In June 1955, the AEC had expressed its hope
16 that ore reserves at the Mine would justify building a mill and that a mill could be built and
17 operational "without any unnecessary delays." Ex. 2017. That same month, Dawn requested
18 permission to stockpile ore at the Mine and proposed to the AEC that the AEC establish an
19 ore-buying depot near the Mine. Ex. 2018. The AEC rejected the ore-buying depot concept
20 and informed Dawn by letter in September 1955 that, to obtain a long-term uranium supply
21 contract, Dawn would have to "give serious consideration to the construction" of a mill to
22 process ore. Exs. 2021; 1021; 1037; 1055; 1060; 1063; 1090. The AEC expected that Dawn
23 would "take on the obligation of building a plant" provided that a reasonable agreement could
24 be reached with the AEC regarding the production of concentrate from that plant. Ex. 2030.

25 Because the AEC was the only purchaser of uranium at the time, securing a contract
26 with the AEC was a critical driver to the development of the Mine. Ex. 1792. Dawn was

1 willing to construct a mill "provided its current negotiations with the Atomic Energy
2 Commission terminate in a signature of a concentrate purchase contract" that was satisfactory.
3 Ex. 2035. The question of whether enough ore existed at the property to justify the costly
4 expenditure of a mill remained. Connochie ¶47; Exs. 1071; 2042. Dawn responded to the
5 AEC that it anticipated "considerable difficulty in justifying" construction of a mill unless
6 more uranium ore was identified either at the Mine or in the immediate area." Ex. 2023.
7 Assessments of the property indicated that significant mineralization likely existed on the
8 nearby Boyd allotment.

9 The AEC's insistence on the construction of a costly mill as a part of the transaction
10 also changed the economics of Newmont's potential investment in Dawn. Connochie ¶43; Ex.
11 2042. By December 1955, Newmont officials had concluded that the Midnite prospect
12 merited development of a mine and mill. Quivik ¶ 84; Ex. 023. Newmont attempted to
13 persuade MMI to bring in Hecla Mining Company to invest in Dawn in order to support mill
14 construction and "take over the management and be responsible for the operation of the Dawn
15 Mining Company." Lattanzi ¶¶ 71, 116; Quivik ¶ 84; Exs. 004, 023; Connochie ¶¶44-46 (and
16 exhibits cited therein). When that effort failed, Marcus Banghart, Newmont Vice President
17 of Operations wrote to Hecla, "We are proceeding on the basis that we will be running the
18 show and are making a study as to whether or not it would be to our best advantage to operate
19 the mine and farm out the milling to others, or whether to plan on an integrated operation of
20 the mine and mill." Ex. 24. In February 1956, he wrote to Plato Malozemoff of Newmont
21 that he was confident that Robert Fulton and Don Hargrove would do a good job in "mining
22 the show." Ex. 025. Mr. Banghart also wrote that Frank McQuiston would help with AEC
23 negotiations and mill planning. At this time, neither Banghart, Malozemoff, Fulton, Hargrove
24 nor McQuiston were Dawn officers, directors, or employees. They were Newmont employees
25 or associates. Quivik ¶¶ 85-90.

1 In December 1955, Mr. Banghart wrote to Dawn's President, Mr. Hinsdale. Mr.
2 Banghart informed Mr. Hinsdale that Newmont did not intend to use Mr. Hundhausen as the
3 manager of the mine. Lattanzi ¶¶ 110, 113; Quivik ¶¶ 92- 95; Exs. 026, 176f, 331b. Mr.
4 Hundhausen's lack of experience in mining operations had been noted by Dr. Norman of
5 Newmont Exploration as early as June 1955. Quivik ¶ 96; Ex 027 (Hundhausen has "no
6 operating experience"); Ex. 026 (Marcus Banghart of Newmont wrote: Hundhausen's "record
7 does not show any experience in a management capacity of an operation such as
8 contemplated. Therefore, we do not intend to use him as the responsible manager of the
9 property."). By January 1956, Newmont had decided that Robert Fulton would become
10 Dawn's General Manager. Quivik ¶¶ 97-99; Ex. 028.

11 *The Year 1956.* In the spring of 1956, the United States Bureau of Indian Affairs
12 ("BIA") informed Dawn that the Boyd allotment was available, and Dawn submitted a bid in
13 early June. Ex. 1122. Three weeks later, the BIA informed Dawn that its bid for the property
14 had been successful. Ex. 1127. In June, 1956, Dawn was granted its second mining lease for
15 the 120-acre Boyd allotment by the United States Superintendent of the Colville Indian
16 Agency and on June 25, 1956, the Acting Area Director of the United States Bureau of Indian
17 Affairs approved this lease.

18 With the acquisition of the Boyd allotment lease, there was apparently enough ore
19 available to justify building a mill. Newmont then agreed to advance Dawn funds "for use
20 in financing the construction and operation of its treatment plant . . . aggregating not more
21 than \$2,000,000 upon terms to be agreed upon." Ex. 1818 (05/29/1956 Newmont Board of
22 Directors Minutes; 08/28/1956 Newmont Board of Directors Minutes).

23 On August 8, 1956, Plato Malozemoff (President of Newmont Mining Corporation and
24 Vice-President/Director of Dawn) and John Grunow (Newmont employee and Secretary of
25 Dawn) executed a contract on behalf of Dawn with the AEC for the production and sale of
26 uranium concentrate. Ex. 2359A. The contract called for Dawn to construct a mill "as

1 promptly as possible” near Ford, Washington (20 miles away from the Mine) for processing
2 uranium-bearing ore. Ex. 2359A. Dawn agreed to operate its mill to produce ore using the
3 AEC's specifications, and the AEC agreed to purchase all of Dawn's uranium concentrate
4 (U308) with a processing cap set at 80,000 tons of ore in any six month period, and 2.7
5 million tons of ore during the term of the contract, which was to expire on March 31, 1962.
6 Ex. 2359A. The contract provided for a supplemental payment of \$1.27 per pound of
7 concentrate produced until Dawn recouped its mill construction cost of \$3.1 million. Ex.
8 2354.

9 The contract was "authorized by and executed under the Atomic Energy Act of 1954,
10 in the interest of the common defense and security." Ex. 2359A. Further, the contract stated
11 that "the [AEC] desires to increase the domestic production of source materials by having
12 uranium-bearing ore tributary to the area of Ford, Washington, processed for the recovery of
13 uranium, to be sold to the [AEC] in the form of uranium concentrate." Ex. 2359A. Days after
14 signing the contract with the AEC, Dawn hired Western Knapp Engineering Co. to build the
15 mill and Isbell Construction Company to perform the initial stripping and mining work.
16 With the necessary leases and the AEC contract in hand, Dawn was able to obtain the
17 additional financing required to build the mill. By October 1956, Dawn and the Chemical
18 Corn Exchange Bank had executed an agreement providing for up to \$4.0 million in loans to
19 construct the mill. Ex. 1159.

20 At this point, the three prerequisites to the full-scale development and operation of the
21 Mine were in place: (1) sufficient ore reserves; (2) a mill to process the ore; and (3) a contract
22 for a guaranteed quantity of uranium concentrate at a guaranteed price. Connochie ¶50.

23 *The Creation of Waste During the Early Period.* NEL continued to conduct exploration
24 activities in 1956 even after it had determined the Midnite mine prospect merited
25 development. For example, in September 1956, Mr. Norman of NEL reported on the
26 development and exploration activities at the mine in the East Boyd ore body conducted by

1 NEL during the period from August 16 to September 13, 1956 which included bulldozer
2 stripping, drilling, and trenching. Exs. 263, 274.

3 The development and exploration activities conducted at the mine prior to full scale
4 mining operations began generated thousands of tons of mineralized material at the mine in
5 the form of ore, protore, and waste rock – all of which contained some amount of hazardous
6 substances such as uranium or other metals. Dahl ¶¶ 4-13; Lattanzi ¶¶ 92-93; Exs. 006, 011,
7 169, 178c, 261, 262, 263, 278. During this period the AEC received 4,859 tons of ore from
8 the Midnite Mine. Ex. 1848.

9 Ore is mineralized rock which can be mined and processed at a profit. Material which
10 is of no economic value is considered waste rock. Lattanzi ¶ 40; ROD at 2-11; *see also* Ex.
11 1850 n.2. Protore is a term used to describe rock which contains uranium in amounts that
12 cannot be extracted at a reasonable profit and therefore does not qualify as ore, but could
13 potentially become ore under different economic circumstances. ROD at 2-11; *see also* Ex.
14 1850 n.3. Although protore is technically “waste,” it is often stockpiled separately so that it
15 may be processed if economic conditions change. Lattanzi ¶¶ 41-43. During this time, the
16 ore, protore, and waste rock generated by the development and exploration activities was left
17 on site, exposed to the elements. Ex. 169; Loncar ¶ 4. In addition, some of the activities
18 themselves (for example stripping overburden and excavating) resulted in or contributed to
19 the generation of acid rock drainage. Dahl ¶¶ 8; Exs. 006, 011, 169, 178c, 261, 262, 263, 278;
20 *see also*, Lattanzi ¶¶ 17-18.

21 **C. THE 1956 MANAGEMENT AGREEMENT**

22 On July 1, 1956, Dawn and Newmont entered into a four-page Management Agreement
23 (the "1956 Agreement"). Ex. 1133.

24 The Preamble to the July 1, 1956 Agreement states:

25 WHEREAS Dawn requires management, technical and administrative services in
26 connection with the conduct of its corporate activities in the State of Washington and
desires to have available for its operations the advice and technical assistance of men

1 experienced in mining and treatment of ores such as will be produced from its
2 properties, which Newmont is willing to provide to the extent and for the consideration
herein expressed;

3 Ex. 1133.

4 Clause 1 of the 1956 Agreement specifies that "*Newmont shall, subject to the Board*
5 *of Directors of Dawn, act as a manager of all the operations and corporate affairs of*
6 *Dawn.*" U.S. Ex. 004 (emphasis added); Lattanzi ¶¶ 20, 71; Quivik ¶¶ 38, 101-103. The
7 Agreement contemplated that Newmont would provide Dawn with "management, technical
8 and administrative services in connection with the conduct of its corporate activities." *Id.*
9 These services included the provision of accounting services, legal advice, marketing and
10 relations with the public and government agencies.

11 . Clause (2)(a) of the 1956 Agreement specified Newmont's compensation, providing
12 that Dawn would pay to Newmont, "in consideration of its services hereunder, a fee equal to
13 one percent (1%) of the gross sales prices of uranium concentrates produced in the Dawn
14 mill." It also provided that Dawn must reimburse Newmont for the salaries of certain
15 Newmont personnel being provided to Dawn. Lattanzi ¶¶ 72, 127; Quivik ¶¶ 104, 105; U.S.
16 104.

17 Clause (2)(b) of the 1956 Agreement, addresses how certain types of support personnel
18 were to be retained by Dawn. More specialized services, including "metallurgical,
19 engineering, legal or accounting consultants," were to be "retained in the name of Dawn and
20 paid by Dawn."

21 Newmont used similar types of agreements with other subsidiaries. Quivik ¶ 106; Exs.
22 031, 032; *see also* DeGuire 113:7-15 (Newmont had management agreements with Idarado
23 and Resurrection).The 1956 Management Agreement remained in effect through the
24 operational life of the mine. Lattanzi ¶ 124, Ex. 034. During the term of the Management
25 Agreement, Newmont received the management fee from Dawn. Quivik ¶ 249; Ex. 083; *see,*
26 *e.g.,* Ex. 298.

1 Two meetings occurred on July 31, 1956 where the new agreement was discussed and
2 Newmont's role addressed: a shareholder's meeting and a Board of Directors meeting. In the
3 shareholder's meeting, the minutes recognized that Messrs. Fulton and Hargrove, and
4 "additional skilled personnel has [sic] been loaned to Dawn by various affiliates of Newmont
5 Mining Corporation, and that equitable charges were being made to Dawn Mining Company
6 by the employers of said personnel...." Lattanzi ¶ 119, Ex. 033.

7 At the meeting of the Dawn Board of Directors, the Dawn Board ratified the
8 Management Agreement. Lattanzi ¶¶ 22, 124; U.S. Exs. 033, 034. The Dawn Board minutes
9 reiterate that Newmont would be providing "for the management by Newmont Mining
10 Corporation of the corporate affairs and operations of Dawn Mining Company..." Ex. 034.
11 The minutes also explained that under the new Agreement, Newmont would:

12 [U]ndertake to provide Dawn Mining Company with all services of its New York
13 Personnel, including engineers, attorneys, accountants, purchasing and clerical staff,
14 for which Newmont would receive reimbursement of a fixed sum of \$500 per month
until production commences, and thereafter would receive a fee equal to 1% of the
gross sales price of uranium concentrates produced.

15 Ex. 1139.

16 Minutes from a subsequent meeting of Newmont's Board of Directors on August 28,
17 1956 describe the 1956 Agreement as "providing the terms and conditions upon which
18 Newmont Mining Corporation shall act as manager of the corporate activities of Dawn
19 Mining Company in the State of Washington." Ex. 1818.

21 **D. PHASE I MINING OPERATIONS: 1956-1964**

22 Full scale mining operations occurred at the Midnite Mine in two phases. Phase I
23 mining began in 1956 under the AEC contract.

24 The actual Phase I mining and stripping was conducted by a contract-operator named
25 Isbell Construction Company ("Isbell"), under contracts between Dawn and Isbell dated
26 August 15, 1956 and March 4, 1957. Exs. 1148 and 1177. Isbell commenced operations in

1 early September. Exs. 1146; 1148; 1824, Tab 10. Mining was conducted by open pit method.
2 Lattanzi ¶¶ 33, 40. Ores from the mine were processed at the Dawn mill. Lattanzi ¶¶ 32-34.
3 The resulting product was uranium concentrate, or “yellowcake.” Lattanzi ¶¶ 33, 35. Isbell
4 was required by contract to provide and pay for all of the required supervisory personnel,
5 labor, tools, equipment, transportation and other requirements necessary to conduct the onsite
6 mining and stripping operations. Maps and plans appended to the Isbell contracts delineated
7 road locations, the areas to be stripped and mined, waste dump locations, and where ore was
8 to be delivered on the Site. The mining plans attached to the initial Isbell contract were drawn
9 up by Dawn General Manager Robert Hundhausen, with the assistance of a Dawn-paid
10 consulting mining and civil engineer named R. M. Belliveau. Ex. 1129. During Phase I, Isbell
11 and its employees determined the best way to excavate down the face of the hill in
12 conformance with the mining plans. Depending on the nature of the material to be excavated,
13 Isbell would either dig or blast the material that needed to be removed.

14 Dawn was responsible for classifying material excavated by Isbell. According to Peter
15 Loncar, this was his job and it consisted of making sure Isbell did not mix ore and waste or
16 remove ore as waste, and so forth. Deposition of Peter N. Loncar (1/17/08) at 37; Ex. 1799
17 (Declaration of Peter Loncar, dated January 10, 2008) at ¶8. Mr. Loncar did this by
18 continually checking the radioactivity levels of the excavated material and then indicating to
19 Isbell what was ore, protore or waste. Loncar Dep. at 36. Isbell would then load the material
20 onto its trucks and take it to the proper location on the Site. Ore from the Mine was
21 transported by contract haulers to Dawn's mill for processing.

22 During Phase I, the AEC inspected the mill regularly and the U.S. Geological Survey
23 (“USGS”) also inspected the Mine site operations. USGS prepared reports describing various
24 aspects of the operation such as the progress of mining operation, Dawn’s ore weighing
25 process, and the number of employees on the site. Ex. 2044, 2045, 2005.

1 In 1960, the AEC and Dawn entered into another contract substantially similar to the
2 1956 contract, but with the following differences: the contract did not include a negotiated
3 concentrate pricing, but instead adopted a flat base rate for ore concentrate; the contract
4 permitted Dawn to sell uranium concentrate to licensed third parties with the approval of the
5 United States, and specified exactly which independent producers and which properties Dawn
6 could purchase ore from. Exs. 1792, 1210. This contract expired in 1966 and supported
7 Dawn's operation through the termination of Phase I operations. Id.; Ex. 1792.

8 The AEC's domestic uranium program was originally set to expire on December 31,
9 1966, but in November 1962 the AEC announced that a modified version of the program
10 would continue through December 31, 1970. Ex. 2060. This so called "stretch-out" program
11 was to slow the pace at which mills produced uranium concentrates. Ex. 1792. Under the
12 program, milling companies could elect to delay delivery of part of their contract
13 commitments to 1967-1968. In return, the AEC would purchase additional concentrates from
14 the company between 1969 and 1970 in an amount equal to that deferred. The AEC's uranium
15 procurement program ended on December 31, 1970, at which time the stretch-out program
16 expired. Ex. 2354.

17 On December 20, 1962, Dawn requested that it be permitted to defer delivery of
18 480,000 pounds of U3O8, which were at that time contracted for delivery to the AEC before
19 1967. Ex. 2061. Dawn proposed that it deliver the deferred U3O8 amounts between 1967
20 and 1970. Ex. 2061. In response to Dawn's proposal that it defer delivery of 480,000 pounds
21 of U3O8, the AEC asked Dawn to confirm "the production capability of" the Mine. Ex. 2063.
22 The AEC rejected Dawn's proposal to defer delivery of 480,000 pounds of U3O8 because
23 "[s]uch an arrangement does not provide for continuous mill operation through 1970 as
24 contemplated by" the procurement program. Ex. 2064. Dawn therefore did not participate
25 in the "stretch-out" program. Ex. 1792, 2065.

1 *Renewing the Property Leases.* Because the original land leases were set to expire, new
2 leases were entered into in 1964 again with the United States Superintendent of the Colville
3 Indian Agency and the individual allottees associated with the Boyd allotment. The Tribe
4 authorized the leases. Ex. 2066, 2067, Ex. 2358G. The 1964 set of leases contained
5 substantially similar terms to the initial leases and were prepared by the United States. Dawn
6 received no property interest other than the leasehold itself. Both the initial and later leases
7 provided various authorities and responsibilities to the United States and not to the Spokane
8 Tribe. The leases provided that the Tribe and the allottees would be paid royalties pursuant
9 to a schedule set by the United States, and required Dawn to submit monthly reports to the
10 BIA and to pay rents and royalties directly to the Superintendent of the Colville Indian
11 Agency for the use and benefit of the Tribe or allottees, or directly "to the Treasury of the tribe
12 where the tribe is organized." Exs. 1002, 1131, 1226, 1227.

13 The leases also allowed the United States Superintendent of the Colville Indian Agency
14 to audit Dawn's accounts and books, and authorized the United States Secretary of the Interior
15 to suspend operations under certain circumstances, grant permission for assignments of the
16 lease, collect the bond, inspect the property, approve the lessee's attempt to terminate the lease
17 upon a satisfactory showing that full provision had been made for the conservation and
18 protection of the property, approve or disapprove of the location of roads, required Dawn to
19 hold the United States harmless from any negligent construction, and allowed termination of
20 the lease for violation of its terms and conditions. Exs. 1002; 1131; 1226; 1227.

21 The 1964 lease also contained the following provision regarding "damages":

22 The lessee shall conduct all operations authorized in this lease with due regard to
23 preventing unnecessary damages to vegetation, timber, soil, roads, bridges,
24 cattle-guards, fences, and other improvements, including construction, operation, or
25 maintenance of any of the facilities on or connected with this lease which causes
26 damage to the watershed or pollution of the water resources. On termination of
operations under this lease, the lessee shall make provisions for the conservation,
repair, and protection of the property and leave all of the areas on which the leases has
worked in a condition that will not be hazardous to life or limb, and will be to the
satisfaction of the Superintendent.

1 Ex. 2358G.

2 The United States granted these leases to Dawn "for the sole purpose of prospecting for
3 and mining minerals." *See e.g.*, Exs. 1226 & 1227 at Art. I. Dawn was required to diligently
4 carry on mining and exploration. *Id.* at Art. III(3). Article III(5) of the 1964 leases mandated
5 that "[t]he land described herein shall not be held by the lessee for speculative purposes, but
6 for mining the minerals specified." *Id.* at Art. III(5). The United States had the authority to
7 cancel the lease for a breach of these terms. In fact, the ultimate decision to terminate Dawn's
8 leases was based, in part, upon a determination that Dawn's operations were not producing
9 minerals in paying quantities. Exs. 1632; 1641.

10 *End of Phase I.* Dawn's Phase I operations at the Mine ended in the fall of 1964 after
11 sufficient ore had been stockpiled to fulfill Dawn's obligations to the AEC. The AEC contract
12 obligations were satisfied by Dawn in 1966. All of the uranium ore produced by the Midnite
13 Mine prior to 1966 was either sold directly to the AEC in the form of ore or was sold to the
14 AEC in the form of uranium concentrate. Ex. 2354 (AEC Stip, ¶11).

15 According to a Yearly Production Summary of Dawn's, from 1955 to 1964, the Mine
16 produced 4,362,511 total tons of ore, protore and waste. Ex. 1516. Dawn's Phase I operation
17 produced 1,138,283 tons of ore to be processed at the Dawn mill. Ex. 1849. The Phase I
18 operations also produced 2,964,354 tons of waste rock and 294,016 tons of protore. Ex. 1849.
19 While most ore was hauled off-site for processing, the waste rock and protore were not
20 removed from the Mine site. Ex. 959b (EPA, September 2006 Record of Decision ("ROD")
21 at 2-11. Thus, the extracted materials remaining at the Mine site consist primarily of protore
22 and waste rock. *Id.* After Phase I operations ceased, no additional mining occurred at the
23 Midnite Mine until August 1969.

24 **E. INTERIM PHASE: SUSPENSION OF MINING FROM 1965-1969**

25 Operations at the Mine were suspended in 1965 and the Mine was left idle "until the
26 commercial demand for uranium revived the market." Ex. 837; Nelson ¶¶ 4-5 (Ct. Rec. 409).

1 In 1966, the AEC suggested that the commercial uranium market was "getting off the ground"
2 and that "companies considering future nuclear power plants were beginning to demand an
3 inventory on hand before a plant would be planned and designed." Ex. 2073. During the
4 period the mine was shut down, Newmont continued to conduct exploration activities.
5 Lattanzi ¶ 206, 209. During this time, Newmont also negotiated sales contracts and took the
6 lead in rehabilitating the mill. Lattanzi ¶¶ 210-211; Exs. 204, 272.

7 In 1967 and 1968, there were negotiations with General Public Utilities Corporation
8 (GPU) and Jersey Central Power and Light as potential buyers of Dawn's concentrates.
9 During these negotiations, Newmont made assurances that it was "manager for Dawn" and
10 that "Newmont has been appointed and is acting as manager for Dawn." Quivik ¶¶ 261-267;
11 Ex. 272, 962e, 962f. The Mine reopened in 1968 when it became apparent to Dawn to be
12 profitable to mine uranium again and resumed production in 1969. Exs. 837, 1516.

13 **F. PHASE II MINING OPERATIONS: AUGUST 1969-NOVEMBER 1981**

14 The Mine started operating again in 1969, and the Mill started operating again in 1970.
15 Nelson ¶¶ 4-5. Phase II mining operations were conducted to provide mill feed to support
16 contracts between Dawn and various private electric utilities, not the AEC. Exs. 837, 5134A,
17 5134G, 5134H, 5134I. During Phase II, onsite mining and stripping was performed by N.A.
18 Degerstrom ("Degerstrom"), a Spokane-based contract-operator. *See* Ex. 1837.

19 During Phase II, Degerstrom provided and paid for all of the required supervisory
20 personnel, labor, tools, equipment, transportation, material, explosives and other requirements
21 necessary to conduct the onsite mining and stripping operations. Ex. 1837 (Degerstrom
22 Contracts).

23 Degerstrom maintained a substantial onsite workforce. For example, in 1980,
24 Degerstrom had an onsite workforce of sixty people, of which 50% were members of the
25 Spokane Tribe. *See* Ex. 1446 at 4. Degerstrom also maintained a large fleet of equipment at
26 the Mine. *See* Ex. 1446, Figure 5. Maps and plans appended to the Degerstrom contracts

1 delineated road locations, the initial areas to be stripped and mined, waste dump locations, and
2 where ore was to be delivered on the Site. Mine planning was done by Dawn's mine
3 Superintendent and his staff, who also oversaw the mining and stripping operations, tracked
4 the mine plans, conducted surveys, employed ore control procedures, and made operational
5 corrections as necessary in response to conditions in the pit(s). During Phase II, ore from the
6 Mine was transported by contract haulers to Dawn's mill for processing.

7 After mining resumed, various government agencies, including the BIA and USGS,
8 resumed their inspections of activities at the Mine. In 1972, Dawn initiated a reclamation
9 program to refill old, mined-out pits with waste rock from new pits and to restore the surface
10 elevation of the old pits to their original elevation. Ex. 2110.

11 *Royalty Negotiations, 1974-1976.* According to provision III(1) of the two land leases
12 executed in 1964, the royalty rate was subject to "reasonable adjustment" ten years after they
13 were executed. Exs. 5125, 5133; Smith ¶ 24. In 1974 Dawn, the Tribe and the individual
14 Allottees attempted to negotiate new royalty formulas, but were unsuccessful. Ex. 2080.

15 Though the lease provisions called for the adjustment to be made by the Secretary of
16 the Interior, the negotiations initially involved only the Tribe, Dawn and Newmont, and the
17 Allottees, but did not include the BIA or other components of the Department of Interior.
18 Smith ¶ 26. However, the BIA, through James Stevens, Superintendent of the Spokane
19 Agency, "participated in all phases of negotiations." Ex. 2080. The BIA wrote to Dawn,
20 "[r]epresentatives from this Department will be pleased to participate in these discussions if
21 the parties desire." Ex. 5141; Smith ¶ 26. Copies of the letter were sent to the Tribe and the
22 Tribe's attorney, Robert Dellwo, and to the individual allotment owners and their attorney,
23 Willard Sharpe. Ex. 5141; Smith ¶ 26.

24 When negotiations in 1974 failed, the matter was forwarded to the United States
25 Commissioner of Indian Affairs by the BIA Area Director. The Tribe advocated for a certain
26 proposed royalty amount, and Dawn a different amount. The Tribe had also sought the

1 assistance of the USGS in crafting a new royalty schedule. The USGS subsequently
2 developed a uniform royalty rate which was different from what either party had advocated
3 for. The BIA Area Director recommended that the Tribe's proposed royalty amount be the
4 adjusted amount. Ex. 5147; Smith ¶ 29.

5 While the matter was under consideration by the Commissioner, the Tribe urged the
6 Commissioner to return the matter to the BIA Area Director, in the hopes the parties could
7 continue negotiations. When negotiations failed BIA's Mr. Stevens stated that "it is apparent
8 that since the parties were not able to negotiate a royalty rate that the Secretary of the Interior
9 is empowered to establish a reasonable rate." Ex. 2080. The Area Director of the Portland
10 Area Office of the BIA then adopted a new royalty rate formula, the uniform royalty rate
11 developed by USGS, on May 16, 1975. Exs. 2083, 2084. Both Dawn and the Tribe appealed
12 the Area Director's decision (Ex. 2095) and re-commenced negotiations. Ex. 5156; Smith ¶
13 42. After a year of negotiations, on March 1, 1976, Dawn and the Spokane Tribe reached a
14 compromise on the royalty calculation issue, and executed an agreement that asked the
15 Secretary of the Interior to adopt an adjusted royalty rate that had been agreed to by the
16 parties. Ex. 2088. The BIA Area Director approved the compromise on September 9, 1976.
17 Exs. 2088, 5181, 5182; Smith ¶ 44.

18 *1976-1981: Reclamation and Mining Activities Change; Mine Ordered to Cease*
19 *Operating.* Dawn submitted a partial mining plan to USGS on March 18, 1976. Ex. 2092.
20 Dawn and the USGS agreed that the plan submitted by Dawn would serve "as notification of
21 Dawn Mining's intended mining activities for 1976" (Ex. 2096), and that Dawn would submit
22 a more comprehensive formal plan for future mining to USGS at a later date. Ex. 2096, 1328,
23 1337, 1338, 1352. Later that year, the USGS requested from Dawn further details on Dawn's
24 plans for the Mine. These details included plans for drilling holes, plans for mining methods
25 and mine layout, locations of orebodies, maps of proposed pits, a map of waste disposal areas,
26

1 descriptions of how to handle protore and controlling grade, and a summary of reclamation
2 plans. Exs. 2082, 2087.

3 In December, 1976, Dawn submitted a more detailed mining plan ("Statement of
4 Mining Plans") describing its projected mining plans for 1977-1980. Ex. 1359 (also 2099,
5 2101). At the same time, Dawn submitted a "Statement of Proposed Drilling Program" which
6 described planned exploration and development activities for the upcoming mining season.
7 Ex. 1360. At least by 1977, the BIA, Dawn, and the Spokane Tribe realized that
8 "pollution-related reclamation and restoration costs" would be significant, and the parties
9 renegotiated the royalty agreement accordingly. Ex. 2103. The parties estimated that the total
10 reclamation cost would \$2,448,000 plus 15% overhead. Ex. 2103. During 1977, Dawn
11 continued to provide additional information to the USGS, including plans for construction of
12 new dump sites, projections of ore and waste production and descriptions of reclamation
13 activities. Exs. 1367, 1369. In June of 1978, the USGS informed the BIA that Dawn's 1977
14 proposed mining plan was generally acceptable, though it could not be fully approved until
15 Dawn provided more detail regarding environmental protection and reclamation measures.
16 Ex. 1379.

17 On January 30, 1979, Dawn's resident manager, Jack Thompson, Jr. reported to the
18 USGS and BIA that a mine drainage problem had developed at the Mine. Ex. 2118. During
19 the summer of 1978, water started flowing from the base of the waste dumps at a rate of 10
20 to 40 gallons per minute, and the water contained a white precipitate. Ex. 2118. Dawn
21 responded to the drainage issue by stopping the pumping of water from "Boyd 2 East" on to
22 the dumps, digging trenches to impound the seepage of water from the dumps, and testing the
23 water. Ex. 2118. After it was determined that the precipitate was a mixture of "aluminum
24 salts" and gypsum, and that elevated levels of uranium and radium were present, Dawn built
25 a "more substantial" impoundment for the seepage, discontinued pumping "Boyd 2 East" pit
26 water, initiated a formal water sampling program, and initiated studies to examine alternatives

1 for controlling mine effluents. Ex. 2118. Thompson's January 30, 1979 memorandum sought
2 approval of several proposed control measures including the construction of a clay-lined
3 pollution control dam to collect the seepage and the pumping of pit sump water from Pit 3 to
4 Pit 4. Ex. 2118.

5 In February of 1979, the BIA and USGS partially approved Dawn's plan, subject to the
6 agencies' oversight of the project. Exs. 1402, 1405. In addition to approving Dawn's
7 proposed plan, the USGS required Dawn to take specific actions to address the recently
8 discovered uranium precipitate being deposited in certain drainages at the site, specified
9 certain materials and methods which should be used in the construction of Dawn's proposed
10 pollution control dam, and required Dawn to conduct additional monitoring. Ex. 1405.

11 On March 5, 1979, Dawn proposed that it modify its mining plan because it had
12 discovered a new body of high-grade ore to the north of Pit 3. Exs. 2126, 2127. In order to
13 monitor the effectiveness of the pollution control dam, which at the time was under
14 construction, on March 20, 1979, Dawn asked the BIA for permission to install two
15 monitoring wells and a weir to the south of the Mine. Ex. 2129. On April 3, 1979, Dawn
16 asked the BIA and the Spokane Tribal Council to grant Dawn a mining easement so that
17 Dawn could access approximately 2500 to 3000 tons of ore. Ex. 2130. Dawn prepared a
18 "Preliminary Report of the Proposed Reclamation Plan" on November 14, 1979. Exs. 2131,
19 2133. That report stated that "[t]he goal of the Midnite Mine Reclamation Project is to
20 provide for the postmining usefulness, productivity, and scenic values of the land on the
21 permit property, due to the recontouring and revegetation of the areas disrupted by the mining
22 practices." Exs. 2131, 2133.

23 The USGS prepared an Environmental Analysis of the Mine dated December 3, 1979.
24 Ex. 2132. That report noted that "[t]otal royalties paid on production from tribal and allotted
25 lands amount to approximately \$6 million," and that the Mine "is an important source of
26 income to the Spokane Indian Tribe." The report concluded that "the environmental impacts

1 of the proposed action [the proposed change in Dawn's mining plan] are not likely to be
2 highly controversial." Exs. 2132, 2144, 2145, 2147. Confirming that mining royalties were
3 a significant source of income for the Tribe, a member of the Tribal Council stated in 1980
4 that 57% of the Spokane Tribe's income came from mines on the reservation. Ex. 2152.

5 In January 1980, in cooperation with the USGS and the Bureau of Mines, Dawn developed
6 and submitted a proposed reclamation plan to the USGS, the BIA and the Spokane Tribe,
7 pursuant to the mineral leasing regulations. Exs. 1431 (also 2134); 1434 (also 2136). The
8 plan covered both the Mill and the Mine.

9 In February of 1980, the USGS itself undertook a hydrologic investigation of the site.
10 Ex. 1464. The objectives of this study were to evaluate Dawn's effluent control operations
11 and evaluate the quality of the water both on-site and in the surrounding drainages. *Id.* As
12 part of this work, the USGS evaluated Dawn's water quality monitoring network, installed
13 new water monitoring wells of its own, made recommendations for Dawn to install new wells,
14 sampled surface and groundwater for the presence of contaminants, and studied the
15 hydrogeologic characteristics of the site *Id.* Dawn complied with the USGS'
16 recommendations. Ex. 1471.

17 In early April of 1980, Dawn sent to USGS, BIA, and the Spokane Tribe a "Mine
18 Drainage Report" that presented results of an interim monitoring program; that program
19 showed the effectiveness of the pollution control dam. Ex. 2140. Dawn again verified the
20 success of the pollution control dam in a report to USGS, BIA, and the Spokane Tribe on June
21 3, 1980 (Ex. 2143), and on July 28, 1980 (Ex. 2149).

22 In response to Dawn's January reclamation plan, on April 21, 1980, USGS sent a letter
23 to Dawn that requested more information regarding Dawn's timetable for reclamation, specific
24 areas to be reclaimed, a time frame for Dawn's proposed reclamation demonstration projects,
25 a discussion of the measures for handling the water that had been accumulating in the Mine's
26

1 open pits, and an explication of Dawn's projected costs for reclamation. Exs. 5230, 1444;
2 1453; Courtright ¶ 46.

3 On July 1, 1980, the USGS issued a "Finding of No Significant Impact" on the Mine's
4 plan of operations from 1980 to 1983. Ex. 2146. The USGS observed that

5 Our environmental assessment indicates that unavoidable adverse environmental
6 impacts will result from the proposed action, including ground disturbance, noise and
7 dust production, removal of vegetation, destruction of wildlife habitat, and soil erosion.
8 However, these impacts will be adequately mitigated by the measures described in the
9 environmental assessment, and therefore will not be significant.
10 Ex. 2146.

11 Dawn responded to the USGS's April request for additional information in a two-page
12 letter dated August 22, 1980. Ex. 5232; Courtright ¶ 47. Dawn's response regarding the
13 complicated problem of ground water degradation from infiltration and percolation of water
14 through disturbed rock was simplistic and general. Ex. 5232; Courtright ¶ 47. With respect
15 to this issue, Dawn explained that it was conducting the research and design work on a water
16 treatment plant and that the contamination would "be minimized by reducing the inventory
17 of waters in the pits." Ex. 5232; Courtright ¶ 47. No explanation about how the inventory
18 of waters would be minimized was provided. Ex. 5232; Courtright ¶ 47. Dawn's approach
19 to long-term management simply stated that "[t]he long term solution may take many different
20 paths. Advances in water treatment technology seem likely in the future based on the current
21 high level of research on this subject here and abroad." Ex. 5232.

22 The USGS was not satisfied with Dawn's August response to the reclamation aspects
23 of the open pits with regard to water. So in January 1981, the USGS wrote Dawn again
24 explaining its concerns and requesting additional information on this issue. Exs. 1453; 1460.
25 The USGS would not approve Dawn's proposed reclamation plan until this information was
26 furnished. Ex. 1460, 1492. In the spring of 1981, Dawn began to focus its mining exclusively
on Pit 3, which it described in March letters to the Tribe and the USGS.

1 On March 2, 1981, Dawn sent a letter to the Tribe that described to the Tribe Dawn's
2 "extremely serious financial situation," and conveyed its plans to mine high grade ore from
3 a single pit (Pit 3) and combine that with previously mined and stockpiled lower grade ore.
4 Ex. 5195; Courtright ¶ 14; Smith ¶ 46. According to Dawn, this action would save mining
5 costs while production of uranium (from the combination of high and low grade ore) would
6 occur at normal rates. Ex. 5195; Smith ¶ 46.

7 On March 23, 1981, the District Mining Supervisor for the USGS responded to Dawn's
8 letter to the Tribe interpreting it as an indication of a "change of plan." Ex. 1467. The USGS
9 instructed Dawn, citing the terms of the leases and federal regulations, to immediately
10 suspend mining operations until it submits and receives approval of a revised mining plan.
11 Ex. 1467.

12 On March 23, 1981, the Tribe also expressed its opposition to Dawn's proposal to
13 modify its mining plan, stating in a letter that the plan "is of great concern to the Spokane
14 Tribal Business Council." Ex. 2157 (also 5196); Courtright ¶ 15; Smith ¶ 47. The Tribe also
15 stated that "[i]t is absolutely necessary to the welfare of the Tribe that our ore deposits be
16 mined in a complete, orderly, systematic fashion, assuring the extraction of all the ore-mineral
17 bearing rock." Ex. 2157. The Tribe indicated that Dawn's proposal could cause adverse
18 financial effects to the Tribe because it would focus only on the high grade ore found in Pit
19 3, leaving unmined and unprocessed lower grade ore that, by itself, would not be economical
20 to mine. Ex. 5196; Courtright ¶ 15; Smith ¶ 45. The Tribe copied its letter to the USGS and
21 BIA, and supported an immediate suspension of mining operations. Ex. 5196; Ex. 5221;
22 Courtright ¶ 15, 19; Smith ¶ 45, 47.

23 On March 26, 1981, Dawn argued in response to the USGS that it was only changing
24 its mining emphasis or schedule, not its mine plan, and Dawn refused to suspend operations.
25 Ex. 5198 (also 1468); Smith ¶ 49.

1 As a result, on April 7, 1981, the BIA Superintendent of the Spokane Agency issued
2 Dawn a “Notice of Noncompliance”, stating that Dawn’s operations being conducted in Pit
3 3 and Pit 3 extension were not in compliance with the approved mine plan. Ex. 5199 (also
4 1472). Dawn was ordered to stop mining activities on Pit 3 and Pit 3 extension pending the
5 submittal of a proposed modification of the mine plan. Id. On April 8, 1981, Dawn formally
6 requested a change to the mining schedule; “[i]n general the change in the schedule reflects
7 a switch in mining emphasis entirely to Pit 3 and a delay in Pit 4N mining.” Ex. 2163.

8 Citing to the authority granted under the mineral leasing regulations, on April 23, 1981,
9 the USGS followed the BIA with its own order that required Dawn to suspend operations in
10 Pit 3 and Pit 3 extension unless and until it either resumed mining under the existing approved
11 mine plan or submitted a new plan for approval. Ex 5201, 1473; Courtright ¶ 16; Smith ¶ 50.
12 The order was issued because of Dawn’s failure to abide by the April 7, 1981 Notice of
13 Noncompliance from the BIA. Ex. 5201. On April 27-28, 1981, Dawn appealed the USGS
14 order and requested approval of a modification to its existing mine plan. Exs. 5204, 5203;
15 Smith ¶ 50. In support of its appeal, Dawn submitted additional information. Exs. 5204,
16 5207.

17 A meeting was held on May 22, 1981 to address issues related to Dawn’s appeal. Ex.
18 5210. A May 28, 1981 letter sent to Dawn by the USGS outlined the results of the meeting
19 and the additional detailed information requested of Dawn, which included a profitability
20 statement for Pit 3. Ex. 5210; Courtright ¶ 17. The letter also sought an evaluation of costs
21 for mine reclamation and the consequent amount of bond needed for the reclamation. Ex.
22 5210; Courtright ¶ 17. The letter summarized the goal of the USGS, BIA, and the Tribe as
23 seeking assurance that “the extraction of the uranium resource will be done in a systematic,
24 planned, orderly manner.” Ex. 5210; Courtright ¶ 17. On July 14, 1981, following its review
25 of the additional information submitted in June by Dawn, USGS initially approved the change
26 in Dawn’s mine plan. Ex. 5216; Courtright ¶ 18; Smith ¶ 50.

1 Nonetheless, USGS remained concerned about Dawn’s approach to its operations at
2 the Midnite Mine. Ex. 5219; Courtight ¶ 18. An August 26, 1981 internal memorandum
3 characterized Dawn’s views as “myopic” and “symptomatic of the present state of cooperation
4 between the lessee [Dawn] and the lessor [Tribe]. . . . It is absolutely vital that [Dawn]
5 understand and accept the fact that they must be responsive not only to the spirit and letter of
6 the regulations and lease agreement but that they must also recognize the need for Tribal
7 involvement in those areas where Tribal interests must be protected.” Ex. 5219; Courtight ¶
8 18. The memorandum stated further that

9 [T]he Spokane Tribe entrusts the stewardship of their mineral estate to the BIA and the
10 USGS. If they were told prior to signing a lease agreement that the mining supervisor
11 will not be allowed to review and approve changes to a mining plan during the life of
12 the agreement, then it is highly unlikely that the Tribe would believe that their mineral
13 deposits are receiving proper or adequate protection. Precluding the mining supervisor
14 from reviewing significant changes in the mining schedule would be tantamount to a
15 total abrogation of the regulatory responsibilities entrusted to the USGS through the
16 regulations and the lease agreement.”

17 Ex. 5219; Courtight ¶ 18.

18 The Tribe also remained concerned about USGS decision approving Dawn’s mine plan.
19 Ex. 5217; Courtight ¶ 19; Smith ¶ 51. The Tribe called a special informational meeting. Ex.
20 5217; Smith ¶ 51. The notice for the meeting expressed concern about the “possibility of the
21 Spokane Tribe receiving no royalty payments until 1982.” Ex. 5217.

22 The Tribe appealed and sought reconsideration of the USGS’ decision. Exs. 5218,
23 5220, 5221; Courtight ¶ 19; Smith ¶ 51. The Tribe outlined its arguments that Dawn’s
24 proposed plan would constitute high-grading of the ore deposit to the detriment of the Tribe.
25 Ex 5221; Courtight ¶ 19; Smith ¶ 51. The Tribe argued that Dawn’s plan would make it less
26 likely that the remaining low grade ore would be mined and the ultimate goal of maximum
recovery would not be achieved. Ex. 5221; Courtight ¶ 19.

 The Tribe’s written request included material that had not previously been

1 presented to USGS. Ex 5221; Courtright ¶ 19. The Tribe also suggested that Dawn's
2 argument that it faced significant financial problems was not a reason to allow the change, but
3 a "red flag that Dawn, in order to meet its current financial crises, has every motivation to
4 high grade and gut the mine rather than manage it and plan for its long range future." Ex
5 5221; Courtright ¶ 19. The Tribe suggested that any financial problems troubling Dawn were
6 not related to its mining plan but were the product of its habit of distributing dividends out
7 of income that they should have held in reserve for future operations. Ex 5221; Courtright
8 ¶ 19. The Tribe's request was supported by analyses of a mineral economist, a BIA geologist,
9 and the Tribe's mining consultant, which had not been presented previously to USGS. Ex
10 5221; Courtright ¶ 19; Smith ¶ 51.

11 Based upon the Tribe's additional information and analysis, on September 30, 1981,
12 the USGS issued an order to Dawn to cease mining, milling, and processing ore removed from
13 Pit 3, though Dawn could continue to remove overburden and stockpile protore removed from
14 Pit 3. Ex. 5223; Courtright ¶ 20; Smith ¶ 52. The order stated it would remain in effect until
15 Dawn submitted and received approval of a revised mining plan that fully addressed USGS's
16 concerns about future operations at the mine. Ex. 5223; Courtright ¶ 20. This effectively
17 ended active operations at the mine. Active mining has not occurred at the Midnite Mine after
18 fall, 1981. Smith ¶ 52.

19 Dawn challenged the decision through administrative appeals and into federal
20 court. The USGS prevailed in that litigation. *Dawn Mining Co. v. Watt*, 543 F. Supp. 841
21 (D.D.C. 1982), *aff'd without opinion*, 704 F.2d 1293 (D.C. Cir. 1983).

22 *End of Phase II.* Operations ceased on November 6, 1981 and no mining has occurred
23 at the Site since then. Ex. 2175.

24 Dawn's Phase II operation produced 34,001,626 total tons of ore, protore, and waste
25 rock. Ex. 1516. This total consisted of 1,998,203 tons of ore processed at the Dawn mill;
26 31,206,689 tons of waste rock; and 1,192,530 tons of protore. Ex. 1850. Of the

1 approximately 34 million total tons of ore, protore, and waste rock produced during the entire
2 operation of the Mine, approximately 89% of the total material produced occurred during the
3 second period of operation.

4 **G. COMMAND OF THE MINE AND IMPLEMENTATION OF THE 1956 MANAGEMENT**
5 **AGREEMENT**

6 Between the 1920s to the time Dawn was organized in the mid-1950s, Newmont
7 transformed itself from a company that invested in mining properties to a company that
8 made its profits by holding and operating mining properties. Quivik Test. ¶¶ 50-54,
9 132-135. During this time, Newmont developed an operational management structure
10 that allowed Newmont not only to oversee the financial performance of its subsidiaries,
11 but also to manage their operations. Id. ¶¶ 136-146. Newmont also put in place
12 management agreements with a number of its subsidiaries, including Dawn. Exs.
13 31, 32; Quivik ¶ 106.

14 In the mining industry, it is common to appoint one party as the "operator" or
15 "manager" of a mine. The operator is given responsibility for managing the mining
16 operations, typically subject to a board of directors or management committee. Lattanzi ¶ 21.
17 As the term is used in the mining industry, the operator is responsible for and has supervision
18 of the day to day operations of a project. Lattanzi ¶ 21.

19 The duties which Newmont undertook under the Management Agreement, as spelled
20 out by the Dawn board, are those typically performed by the operator. Lattanzi ¶ 27.
21 Newmont fulfilled its commitment to manage Dawn's operations primarily by placing or
22 appointing Newmont personnel in key management positions at Dawn. Quivik ¶ 39. One key
23 position was that of the Resident Manager. Lattanzi ¶ 27. See also Lattanzi ¶¶ 25, 73.

24 Newmont's audits of Dawn demonstrate that Newmont viewed its "key control" over
25 Dawn as being "the Resident Manager's personal involvement in day-to-day matters."
26 Lattanzi ¶ 141; Ex. 223; *See also* Lattanzi ¶¶ 142, 200, 202, 203; Exs. 206, 207, 208, 211

1 (operating budget for Dawn “approved by the Resident Manager and submitted to Newmont
2 for approval”).

3 *The Resident Manager.* Pursuant to Newmont’s duties under the 1956 Management
4 Agreement to manage the operations of Dawn, Newmont provided a Resident Manager to
5 Dawn. Lattanzi ¶ 128, 240, 250; Ex. 84; DeGuire 108:18-109:4. There were six Resident
6 Managers of the Mine. They were:

7 *Robert Fulton* (June 1956 -April 1958);

8 *Jack Crowhurst* (April 1958-January 1960);

9 *James Pike* (February 1960 - July 1965);

10 *Earl Craig* (1969 - November 1978);

11 *Jack Thompson* (November 1978- June 1981); and

12 *Marcel (or Mac) DeGuire* (August 1981-).

13 From 1956 until the mine ceased operations, the Resident Manager had an onsite office
14 and was managing and directing the overall operations at the mine and mill, including
15 reclamation activities. Lattanzi ¶¶ 75, 120-121; Quivik ¶¶ 39(a), 138, 213; Thompson, Sr.
16 60:3-6.; Humphrey 11:24 - 13:7; Ridinger 135:13-136:6 (testifying the Resident Manager
17 was “king of the heap”); Exs. 034, 035. Mr. Thompson also acknowledged that at Newmont
18 subsidiaries, the Resident Managers had responsibility for reclamation activities. The Resident
19 Managers made decisions relating to mine operations, including mine planning, waste
20 disposal, and other environmental matters including the handling of contaminated water.
21 Lattanzi ¶¶ 166-167; Quivik ¶ 220. Resident Managers would direct the development of,
22 modify, review, and approve the mine plans that were developed by staff. Lattanzi ¶¶ 37, 44,
23 166-167; Quivik ¶ 368; Ex. 153, 052g (Thompson, Jr. Deposition, pp. 42-44), 052h
24 (Thompson, Jr. Deposition, pp. 52-66); DeGuire 60:13-25. The Resident Manager was
25 responsible for environmental matters at the Midnite Mine. Quivik ¶ 220. The Resident
26 Managers had the degree of responsibility, authority and autonomy normally conferred on the

1 operator of the mine, as that term is understood in the mining industry. Lattanzi ¶ 149; Ex.
2 218.

3 With perhaps one exception, the Resident Managers were on the payroll of Newmont
4 or a wholly owned Newmont subsidiary. Though the Resident Managers were not on Dawn's
5 payroll, Dawn reimbursed the Newmont entities for the costs of the resident managers' salary,
6 associated overhead, and benefits. Quivik ¶¶ 39(a), 194; Lattanzi ¶ 169; U.S. Ex. 917d at
7 MDEPO001637-40. There is evidence that Newmont Board of Directors made salary
8 decisions for Dawn's Resident Managers. For example, a December 12, 1975, memorandum
9 advises of "salary action taken by the Newmont Board of Directors with respect to NSL
10 people at Idarado, Carlin and Dawn." The memo shows that Earl Craig, Dawn's Resident
11 Manager at the time, received a salary increase. U.S. Ex. 935e at NEW0159298.

12 With the exception of Robert Fulton, who was the first on site General Manager after
13 the 1956 Management Agreement was signed, none of the Resident Managers were appointed
14 by, or even ratified by, the Dawn Board of Directors. Lattanzi ¶¶ 22-23; Quivik ¶ 215; Ex.
15 034. All of the Resident Managers were appointed by Newmont from within its own ranks
16 or those of one of its subsidiaries. Lattanzi ¶ 172; *see also* Lattanzi ¶¶ 171-184; Exs. 052j
17 (Thompson, Jr. Deposition, pp. 87-90), 054, 193, 197, 198, 199, 213c (McAnany Deposition,
18 p. 20), 213e (McAnany Deposition, p. 78), 220, 221b (Delcour Deposition, p. 77), 936d, 941c,
19 942i, 961f. Many were longtime employees within the larger Newmont
20 organization. Lattanzi ¶¶ 168-170; Quivik ¶¶ 193-214; U.S. Exs. 033, 077, 183, 189, 190,
21 214, 292; *see also* Koogler 157:7-22 (when hiring Resident Managers, Newmont's preference
22 was to hire from within the Newmont organization); Jack Thompson, Sr. was a former Vice
23 president and President of Newmont Mining Corporation, joining Newmont in 1960 and
24 retiring in 1986. Thompson, Sr. 6:6 - 9:18. According to Mr. Thompson, as Newmont
25 became an operating company as opposed to a holding company, Newmont put "Newmont
26 men" in a position of responsibility. Thompson, Sr. 28:22 - 29:12.

1 Though coming from the ranks of Newmont, and appointed and paid by Newmont, the
2 resident managers were viewed by others, and held themselves out in correspondence, as
3 representatives of Dawn. Exs. 1838; 1839; 1840; 1841; 1842. Third parties also treated the
4 resident managers as a representative of Dawn. Exs. 1413, 1432; 1490; 1364; 1407; 1414;
5 1470; 1485. The resident managers reported to individuals who were both affiliated with
6 Newmont and also were appointed to serve in a position for Dawn as an officer, director or
7 offsite manager. It is noted that Earl Craig reported to Mr. Petty of Newmont for four years
8 before Mr. Petty was ever appointed a Dawn officer.

9 *Robert Fulton.* Robert Fulton was the first on-site manager appointed by Newmont.
10 He was appointed in June of 1956 pursuant to the 1956 Management Agreement, and his
11 appointment was ratified at a meeting of the Dawn board in July 1956. The Board then
12 defined, in detail, the scope of Mr. Fulton's responsibilities and authority, listing seven
13 specific items. The authority delineated was broad. It included: (1) the authority to "have
14 charge of, conserve and manage the operation of the Company's mining properties and to
15 conduct its ordinary and usual business and affairs in the State of Washington;" (2) the
16 authority to "appoint or employ, and to remove, suspend or discharge employees and agents
17 of the Company and to fix their compensation;" and (3) the authority to "purchase machinery,
18 equipment, tools, materials and supplies which are necessary in his opinion for the
19 construction of plant facilities and for the satisfactory and effective operation of the
20 Company's mining properties, provided that each capital expenditure in excess of \$10,000
21 shall require the prior express approval of the President or Mr. M.D. Banghart or Mr. P.
22 Malozemoff." Ex. 034, Ex. 1813. At the same meeting, the Dawn Board approved Mr.
23 Banghart and Mr. Malozemoff of Newmont as Vice-Presidents of Dawn and elected them as
24 Directors. Ex. 1813.

25 Although these powers were not *formally* conferred on subsequent Resident Managers,
26 the same powers were vested in all of the Resident Managers subsequent to Mr. Fulton.

1 Lattanzi ¶ 121. Fulton was on the payroll of Newmont Mining Corporation. Ex. 229.
2 Before he was Resident Manager at Dawn, Mr. Fulton had been an engineer at Newmont
3 since 1950. Quivik ¶ 195; U.S. Ex. 001. When he left Dawn as Resident Manager, Mr.
4 Fulton returned to Newmont's New York office and became vice president of exploration.
5 Quivik ¶¶ 195n, 214.

6 The powers and duties assigned to Mr. Fulton by the Dawn board are functions which
7 would typically be the responsibility of the operator of a mining project. Lattanzi ¶ 26.

8 *Jack Crowhurst.* Jack Crowhurst was Resident Manager from April 22, 1958 until
9 January 31, 1960. Quivik ¶ 198; Ex. 917d at MDEPO001637.

10 *James Pike.* James Pike was Resident Manager from approximately February 1, 1960
11 until mid-July 1965. Quivik ¶ 195; U.S. Ex. 917d.

12 During the time he was Resident Manager, Mr. Pike was on the payroll of Newmont
13 Mining Corporation. U.S. Exs. 292, 917d. During the time he was Resident Manager, Mr.
14 Pike was neither an officer nor a Director of Dawn. Ex. 917d. Prior to his Dawn assignment,
15 Mr. Pike had been manager of a Canadian Newmont operation. When he transferred to the
16 Dawn operation, he was transferred from the payroll of Newmont of Canada to the payroll of
17 Newmont Mining Corporation. Quivik ¶ 199. When he had finished preparing Dawn for
18 closure, he was transferred to Granduc and returned to the payroll of Newmont of Canada.
19 Quivik ¶ 199.

20 *Earl Craig.* Earl Craig was the Resident Manager from the time the mine reopened in
21 1969 until November 1978. Quivik ¶ 201-203; Ex. 295; *see also*, Ex. 917d. Earl Craig
22 reported to a Dawn Vice-President or a Dawn general manager at all times during his tenure
23 as resident manager. Ex. 1824. In mid-1978, Mr. Craig made the decision to install a pump
24 at one of the mine pits to send water from the pit to a sump near one of the waste dumps.
25 Quivik ¶ 367; Ex. 140.

1 Mr. Craig was originally a Dawn employee, and served as mill superintendent under
2 Mr. Pike. When the mine shut down in 1978, Mr. Craig was transferred to the Carlin mill.
3 Carlin was another Newmont property. Quivik ¶ 200. While at Carlin, Newmont put Mr.
4 Craig on the Newmont Exploration payroll. Quivik ¶¶ 201, 297; Ex. 701. Mr. Craig was
5 notified of his transfer to Dawn by a Newmont official who had no position at Dawn. Quivik
6 ¶¶ 201, 296; Exs. 050, 524. While Resident Manager at Dawn, Mr. Craig remained an
7 employee of Newmont Exploration from May 1969 until January 1971. Following that, Mr.
8 Craig was transferred to the payroll of Newmont Services Limited (“NSL”) from January 1,
9 1971 until November 30, 1978. Quivik ¶¶ 201, 240; Exs. 077, 295. On July 19, 1974, Mr.
10 Craig signed an attendance sheet for a meeting of the Spokane Tribal Council with Dawn.
11 Mr. Craig identified his affiliation as being “Newmont Services Ltd.” Ex. 714. When he left
12 Dawn as Resident Manager, Mr. Craig retired from Newmont Services. Quivik ¶ 204; Exs.
13 120, 295. During the time he was Resident Manager, Mr. Craig was neither an officer nor a
14 Director of Dawn. Ex. 917d at MDEPO001608-MDEPO001613.

15 William Humphrey was an employee of Newmont Mining Corporation with the title
16 of Vice President of Western Operations with responsibilities for the Carlin, Idarado, and
17 Midnite mines. Humphrey 10:1- 11:14. He was also a Dawn Vice President/officer. In
18 October 1978, Mr. Humphrey wrote a memorandum referring to Earl Craig as “a Newmont
19 Services Limited employee,” and noted that Craig would be retiring as Resident Manager of
20 Dawn Mining Company. Ex. 935e at NEW0159295. Mr. Craig’s application for Newmont’s
21 pension plan identifies Mr. Craig’s employer as Newmont Exploration from May 1969 until
22 January 1971. In January 1971, it shows that due to a transfer, Mr. Craig’s employer became
23 Newmont Services Limited. Ex. 935e at NEW0159390.

24 *Jack Thompson, Jr.* Jack Thompson, Jr., was Resident Manager from November 1978
25 until June 30, 1981. Prior to working at Dawn, Mr. Thompson worked for Magma Copper,
26 a Newmont subsidiary, and then at Granduc Operating Company. Quivik ¶ 205-06. It was

1 Mr. Humphrey's decision to take Mr. Thompson from Granduc and put him in charge of the
2 Midnite Mine. Lattanzi ¶ 162; Quivik ¶ 207; U.S. Exs. 052d (Thompson, Jr. Deposition, pp.
3 19-22), 052j (Thompson, Jr. Deposition, pp. 87-90), 051c (Humphrey Deposition, pp. 8-15);
4 Humphrey 19:11-13. Mr. Thompson's pension application shows that in September 1971,
5 he was transferred from Magma Copper's payroll to Newmont Services Limited. Ex. 941c
6 at NEW0158562; *see also* Ex. 941c at NEW0158610. During the time he was Resident
7 Manager, Mr. Thompson reported to Mr. Humphrey. When Mr. Humphrey resigned in 1981,
8 Thompson reported to Dawn Director Wayne Burt.

9 As Mr. Humphrey testified: Thompson had "complete authority for the operation. He
10 could make decisions about how to mine, where to mine. Labor problems, if there needs to
11 be some replacements or changes in the staff. Everything involved with the operation was
12 under his control." Humphrey 13:8-20.

13 Mr. Humphrey also testified that environmental issues at the mine were "all taken care
14 of" by Jack Thompson. Humphrey 13:25 - 14:9. Mr. Thompson had authority as to where
15 to put waste rock and protore. Humphrey 13:21-24. Mr. Humphrey testified that Jack
16 Thompson was in charge of: mine operations at the Midnite mine; dealing with mine water
17 discharges at the mine; dealing with protore issues at the Midnite mine; dealing with
18 environmental compliance at the Midnite mine; and dealing with regulators at the Midnite
19 mine. Humphrey 12:7-13:7, 93:10 - 94:7; *see also*, Lattanzi ¶¶ 158-161, 166; Exs. 051b
20 (Humphrey Deposition, p. 1), 052d (Thompson, Jr. Deposition, pp. 19-22), 177c (Lehrman
21 Deposition, p. 143); Humphrey 43:4-16 (it was Jack Thompson's decision to install spray
22 evaporation system at the mine), 93:12-94:12.

23 Sometime prior to June 1979, during the time he was Resident Manager, Mr. Thompson
24 made the decision to install a pollution control dam at the mine, and made the decision to
25 bring in truckloads of reagents to treat the material at the dam. Lattanzi ¶ 159; Ex. 393e. Mr.
26 Thompson was responsible for obtaining Dawn's environmental permits. Quivik ¶ 369.

1 In July, 1979, Mr. Thompson signed and submitted an application for a radioactive
2 materials license to the State of Washington. Ex. 142. That application states that radioactive
3 materials will be used at the Dawn mine and mill. Ex. 142 at NEW0025516, Items 1(B) and
4 2. That application also states that the Resident Manager “Reports to: Vice President -
5 Operations, Newmont Mining Corp.” Ex. 142 at NEW0025521; *see also*, Lattanzi ¶ 160;
6 Quivik ¶ 369; Ex. 142. In May, 1981, Mr. Thompson also became an officer and a director
7 of Dawn.

8 *Marcel DeGuire.* Marcel DeGuire became Resident Manager of Dawn in August 1981.
9 DeGuire 20:11-20. Mr. DeGuire had worked for Newmont Exploration at its lab in Danbury
10 for several years, then had gone to work for Exxon. From Exxon, Dawn hired him to be mill
11 superintendent. Quivik ¶ 210; DeGuire 9:1-10:25. Although Mr. DeGuire was on the Dawn
12 payroll as mill superintendent, as soon as he was made Resident Manager, he was transferred
13 to the payroll of Newmont Services. Lattanzi ¶ 169; Exs. 052c (Thompson, Jr. Deposition,
14 pp. 9-13), 055c-d (DeGuire Deposition, pp. 16-18, 20), 183, 189, 190, 214, 292; DeGuire
15 14:18-15:4, 16:21-17:1.

16 Mr. DeGuire testified he was the only Newmont Services employee on site during the
17 time he was Resident Manager. DeGuire 20:1-4, 136:17 - 137:3. While he was Resident
18 Manager at Dawn, Newmont Services provided Mr. DeGuire’s benefits, including medical
19 benefits. Additionally, Newmont Services provided Mr. DeGuire with a pension. DeGuire
20 20:25 - 21:11.

21 Mr. DeGuire’s next assignment after being Resident Manager at Dawn was as a
22 Research Metallurgist at Newmont Exploration, followed by other Newmont assignments
23 until 1996. DeGuire 9:15 - 11:5. Mr. DeGuire left the Dawn property in February 1983 to
24 move to Newmont Exploration in Danbury. DeGuire 26:6-17.

25 Mr. DeGuire made decisions related to environmental concerns and pollution control
26 issues at the mine. Lattanzi ¶¶ 163-164; U.S. Exs. 055c (DeGuire Deposition pp. 16-18),

1 055e-h (DeGuire Deposition pp. 34, 38, 40, 42), 055m-n (DeGuire Deposition pp. 159, 168).
2 DeGuire 184:13-22, 187:24-188:8. For example, in April 1982, Mr. DeGuire retained a
3 company to test whether contaminated water at Pit 4 could be treated by reverse osmosis, but
4 determined not to use that approach. DeGuire 65:3 - 66:25. Additionally, in March 1983, Mr.
5 DeGuire decided to take certain steps to “prevent any abnormal discharge of contaminated
6 water” at the mine site, including seeking approval from the federal government to pump
7 water to Pit 3 at the mine. Ex. 814; DeGuire 61:21 - 64:18, 163:15-164:12. Mr. DeGuire also
8 approved the reclamation plans that were submitted to regulatory agencies. DeGuire 40:3-19,
9 84:18 - 85:16. He took the lead in dealing with federal regulatory agencies. DeGuire 87:5 -
10 17.

11 In September 1981, Mr. DeGuire was ordered by the USGS to cease mining operations.
12 Wayne Burt told Mr. DeGuire to ignore the order. DeGuire 54:15-57:7. During the time he
13 was Resident Manager, Mr. DeGuire had authority over hiring and firing at the mine.
14 DeGuire 59:19-24. In February, 1984, Mr. DeGuire also became an officer of Dawn.
15 DeGuire 22:12-23. Sometime between 1987 and 1989, Mr. DeGuire became a director of
16 Dawn. DeGuire 31:21 - 32:2.

17 *The Mine Superintendent.* The mine superintendent was responsible for mine planning
18 and the actual mining operations, and reported to the Resident/General Manager of the Mine.
19 Ex. 1446 at NEW0013855 ("Dawn maintains its own staff...at the mine site" and that this
20 staff "is responsible for all exploration, pit design, surveying, production statistics, and ore
21 control."); Ex. 1263 at NEW0046686-87 ("mining is according to plans provided by Dawn's
22 Mine Supt., who maintains continuous check on mining and exploration activities.").

23 Mine superintendents at the Midnite Mine were: Peter Loncar (summer 1956 – 1959);
24 Keith Payne (1959 – 1964); Walter Johnson (1969 – 1972); and Don Shultz (1972 – 1982).
25 Mr. Loncar testified that it was his responsibility as mine superintendent to supervise Isbell,
26 classify materials for Isbell as ore, protore or waste, and to ensure production at the mine was

1 meeting the AEC contracts. Mr. Loncar was paid by NEL while serving as mine
2 superintendent and Dawn paid NEL for Mr. Loncar's services. All of the mine
3 superintendents after Mr. Loncar, were paid directly by Dawn and were employees of Dawn.

4 *The Dawn Board and Officers.* Dawn's Board of Directors consisted of seven
5 members, with four members nominated by Newmont and three by MMI. The Dawn Board
6 did not involve itself in managing the day-to-day operations of the Mine.

7 Dawn's Board elected the company's officers. With the exception of Mr. Hinsdale and
8 Mr. Hundhausen, every officer of Dawn during the operation of the Mine was on the payroll
9 of Newmont Mining Corporation or a wholly owned subsidiary, and served Dawn without
10 additional compensation. Quivik ¶ 39(B); Ex. 917d. The Dawn Board was not involved in
11 management of the facility. R. Thompson ¶ 20; *see also*, R. Thompson ¶¶ 21-24 (when
12 Newmont personnel participated in decisions for Dawn, the participation was seldom as part
13 of a collective decision as one would expect to find with board action); Exs. 112, 113, 114;
14 Humphrey 22:11-22, 29:20-25.

15 *Newmont's Vice President of Operations and the Off-Site General Manager.* Dawn's
16 resident managers reported to individuals who were Newmont employees and held Newmont
17 titles, but who also were at some point named as officers or directors of Dawn Mining
18 Company. From 1955-1968, the resident managers reported to Marcus Banghart, Newmont's
19 vice president for operations "with responsibility for all the mining properties for which
20 Newmont is the manager." Quivik ¶ 155; Ex. 001. However, before becoming an officer or
21 director of Dawn, Mr. Banghart was involved in overseeing the Mine. In December 1955, Mr.
22 Banghart of Newmont wrote to Mr. Hinsdale, president of Dawn, to inform Mr. Hinsdale that
23 Mr. Hundhausen was not going to be the Resident Manager of the mine property. Ex. 026.

24 David Pearce succeeded Mr. Banghart as Newmont's vice president of operations in
25 1968 and was also named a director of Dawn in 1969. Pearce had Newmont responsibilities
26

1 for three of its mines (Dawn, Carlin, and Idarado): “All three mines fall under my general
2 direction as vice president - Mining, Newmont Mining Corp.” Ex. 085.

3 In 1969, Newmont created a new layer of management to oversee operations at Dawn,
4 Carlin and Idarado. This position was the off-site General Manager, based in Ouray,
5 Colorado. Lattanzi ¶ 193; Quivik ¶¶ 223-236. The off-site General Managers were also
6 Newmont employees and were also not on Dawn’s payroll. Lattanzi ¶ 196; Ex. 057. The off-
7 site General Managers reported to Newmont officers in New York. Lattanzi ¶ 200; Ex. 206.

8 There were two off-site General Managers named between 1969 and 1976: Arthur C.
9 “Bob” Hilander and John Petty. Mr. Hilander began supervising operations of Dawn in
10 November 1968, before he was officially appointed as General Manager of Dawn in April
11 1969 (Ex. 72). Mr. Hilander received bids for Dawn’s ore-hauling contract and he hired
12 Walter Johnson to superintend work at the Midnite Mine. Quivik ¶¶ 282-292; U.S. Exs. 064,
13 068, 825a. Similarly, Mr. Petty was not named an officer or director of Dawn until 1975,
14 although he had begun overseeing Dawn operations in 1971. U.S. Ex. 917d.

15 From 1975-1981, the resident manager reported to William Humphrey, Newmont’s
16 Vice President of Western Operations and also to Wayne Burt, Newmont’s senior vice
17 president of operations. Both of these individuals also held executive positions with Dawn.

18 *Newmont’s Technical Assistance.* The 1956 Management Agreement anticipated and
19 permitted Newmont to send specialists to Dawn to provide direction and technical assistance.
20 Quivik ¶ 145. NEL, for example, conducted a variety of activities at or in connection with
21 the site throughout the operating life of the mine including development and exploration
22 activities in the 1966 - 68 time frame. Lattanzi ¶¶ 206, 209; Exs. 270, 275, 276, 280, 283,
23 466b, 961m.

24 *NSL.* In December 1970, Newmont created another wholly owned subsidiary,
25 Newmont Services Limited (“NSL”). Lattanzi ¶ 233; Exs. 052j (Thompson, Jr. Deposition,
26 pp. 87-90), 917d. Newmont stated that one function of NSL was “to make available a broad

1 assemblage of key operating personnel that can be assigned and reassigned as the need arises
2 for different talents at each subsidiary.” Quivik ¶ 237; Ex. 75.

3 NSL streamlined Newmont’s ability to move managers to its subsidiaries by enabling
4 technically skilled individuals to remain on the same payroll and have access to continuous
5 benefit packages, including health care and pension plans, over time. Koogler Depo. at 47;
6 146 – 147; Ex. 1624 (Affidavit of John H. Johnson, Jr.); Quivik ¶ 238, 250-58; *see also*,
7 Lattanzi ¶ 234; Thompson Sr. 42:4-13 (one purpose of Newmont Services was to keep and
8 have available individuals to potentially work at other Newmont subsidiaries);Ridinger
9 144:16-145:23 (Newmont Services allowed the Newmont organization to have a pool of
10 capable people who could be sent wherever they were needed. Newmont created NSL to
11 foster job security and a long term future within the Newmont organization. *See*, Lattanzi ¶¶
12 235-240. NSL personnel were assigned only to Newmont properties. Ridinger 148:3-149:13.

13 Dawn entered into an agreement dated January 1, 1971, under which Newmont
14 Services was to provide Dawn with the services of certain of its personnel. Ex. 076. Under
15 the agreement, NSL was to provide the services of Messrs. Craig, Lee and Mr. Hilander. In
16 return, Dawn was to pay NSL the allocable share of payroll benefits, taxes and insurance.
17 Lattanzi ¶ 241. In addition, Dawn was to pay to NSL a fee equal to 6 ½ percent of the
18 reimbursable salaries. Lattanzi ¶ 241; Ex. 076. The signature for Dawn on the agreement is
19 that of David Koogler, who was also vice president of NSL, and assistant to the vice president
20 of Newmont. Lattanzi ¶ 241; Quivik ¶ 240; Ex. 076, 077. The same day, NSL also signed
21 identical agreements with Newmont subsidiaries Carlin and Idarado.

22 From January through September 30, 1971, NSL charged Dawn pursuant to the terms
23 of the 1971 NSL Agreement. Lattanzi ¶ 245; Ex. 216. However, it was not until April 27,
24 1972, over a year after it was signed, that the 1971 NSL Agreement was brought before the
25 Dawn Board. Lattanzi ¶ 242; Ex. 083. Mr. Wynecoop, MMI’s nominee to the Board,
26 protested that the services provided pursuant to the 1971 agreement were also provided

1 pursuant to the 1956 Management Agreement. Lattanzi ¶¶ 242-243; Ex. 083. On May 12,
2 1972, Mr. Pearce wrote that Newmont Mining Corporation would absorb the 6 ½ percent fee.
3 The 1971 agreement was then approved by Mr. Wynecoop. Lattanzi ¶ 244; Ex. 084.

4 Two individuals provided by NSL to Dawn were David Ridinger and Dale Buob.

5 *David Ridinger.* Ridinger was Newmont's employee used to coordinate environmental
6 activities for Newmont subsidiaries as a cost-efficiency measure and to ensure that
7 subsidiaries would have a consistent approach to regulatory matters. Ex. 146g (Ridinger
8 Deposition pp. 76-77); Ridinger 76:19 - 79:1, 87:8-23. Ridinger advised Newmont
9 subsidiaries, visited them, and helped them identify environmental issues and alerted them
10 when various regulatory matters came up that would have an effect on their operations or their
11 compliance. Ridinger 76:19-23, 108:13-109:7.

12 Mr. Ridinger was on the payroll of Newmont Services from 1972 to 1980, first while
13 he was working at a Newmont subsidiary called Magma Copper and then when he officially
14 worked at Newmont Services, starting in 1978, as the Director of Environmental Affairs.
15 Ridinger 24:5-6, 31:24-32:4, 35:15-16, 36:10-13, 43:11-13. Mr. Ridinger never held a title
16 or position at Dawn. Ridinger 48:16-22.

17 While assisting Dawn, Mr. Ridinger provided recommendations to resident manager
18 Thompson regarding environmental issues at the Midnite Mine. Lattanzi ¶¶ 250-253; Exs.
19 146g-h (Ridinger Deposition, pp. 76-77, 109), 146j (Ridinger Deposition, p. 145), 222, 268,
20 269. Mr. Ridinger reviewed Jack Thompson, Jr.'s, environmental compliance work. Quivik
21 ¶ 388; U.S. Ex. 146n (Ridinger Deposition, p. 130). Dawn prepared a spill plan using the
22 model provided to them by Mr. Ridinger. Ex. 252 at MDAWNF039426-430.

23 It was Mr. Ridinger who in 1980 prepared and submitted to EPA for Dawn a document
24 called Notification of Hazardous Waste Activity for activities at the Midnite Mine, and he
25 served as the contact with EPA on this particular matter. In that document, he listed Newmont
26 as the owner of the site. Ridinger 126:6 - 127:13; Ex. 251. Ridinger sent a copy of the

1 notification to the resident manager of Dawn, Jack Thompson, on August 29, 1980, indicating
2 that Newmont would attempt to prevent EPA from listing sub-ore as a hazardous waste but
3 advising Thompson to start testing overburden and sub-ore to determine radium-226 activity.
4 Ex. 268.

5 Mr. Ridinger and Mr. Humphrey made the decision on whether or not to take a position
6 that materials at the mine were in fact subject to hazardous waste regulations (and therefore
7 whether the site needed a RCRA permit). Ridinger 129:24 - 130:25; 136:14-137:21. In
8 December 1980, Ridinger wrote EPA informing them that Dawn did not need a RCRA permit
9 and would not file a RCRA permit application. Ex. 269.

10 The resident managers were tasked with handling environmental decisionmaking for
11 Dawn. Ridinger Dep. 63:15 - 64:5; 66:12 - 19. While Ridinger did not have decision making
12 authority at Dawn, when Ridinger gave recommendations to Dawn, there was a strong
13 expectation that it would be followed. Ridinger 182:12-183:2; Thompson, Jr. Testimony, ¶31;
14 McAnany Testimony at ¶21; Humphrey Depo. at 33. Dawn did not have its own
15 environmental affairs department. Mr. Ridinger did not deal with the Dawn Board on
16 environmental issues at the mine; he dealt directly with the resident managers, and the
17 resolution of these environmental issues did not require review by the Dawn Board. Ridinger
18 Dep. 110:12 - 111:14; 111:20 - 112:14. Dawn first hired an environmental engineer, Dale
19 Deming, in April 1978. Ex. 297.

20 *Dale Buob.* Toward the end of the operating life of the mine, Newmont assigned Dale
21 Buob, a Newmont Services Limited engineer based in Tucson, to evaluate the mine water
22 problem at the Midnite Mine. Lattanzi ¶¶ 254-256; U.S. Exs. 081, 152, 224, 253, 9611.

23 In July 1981, Jack Thompson, Resident Manager at Dawn, along with Roger Ferland,
24 Newmont engineering and legal counsel, recommended that Dawn use a spray evaporation
25 system to remedy the contaminated mine water problem. U.S. Ex. 152.

1 In August of 1981, Wayne Burt, Newmont Mining's Senior Vice-President of
2 Operations, suggested to Marcel DeGuire, the new resident manager at Dawn that Dawn
3 undertake a review of alternative solutions with the objective of confirming the selection of
4 spray evaporation as the preferred course of action. Burt told DeGuire to seek the assistance
5 of Ferland in coordinating the technical and legal aspects of the project to insure the
6 attainment of the objectives set out in Ferland's July 24 memorandum. Ex. 152.

7 Given the task of evaluating the various alternatives for dewatering the mine, Mr. Buob
8 commissioned and supervised the engineering study by an outside consultant on the feasibility
9 of the spray evaporation system for the mine water. Ex. 224; Lattanzi 254-256.

10 Mr. Buob also participated in a meeting with various government and tribal entities regarding
11 Dawn's mine water problem in October 1981. Ex. 253. Subsequently, Mr. Buob reported on
12 his evaluation efforts of the Dawn mine water problem to P.J. Crescenzo of Newmont
13 Services, advising of the recommended remedial measures. Ex. 225. Mr. Crescenzo was
14 Newmont's vice president for engineering and held no Dawn title. Quivik ¶ 222.

15 *Affirmations Made that Newmont was Managing the Operations of the Midnite Mine.*

16 Newmont and Dawn made representations that Newmont was operating Dawn's mining
17 operations at the Midnite Mine. Quivik ¶ 40(a); Lattanzi ¶¶ 129-139; Exs. 099, 103, 200, 202,
18 299, 300, 301, 581, 728, 961d. There are many examples of this in the record.

19 In April 1956, Plato Malozemoff, President of Newmont Mining Corporation,
20 wrote to the Securities and Exchange Commission to discuss the possibility of building a
21 uranium mill for the Dawn mining operation. In that letter, Malozemoff explained that the
22 "actual management and operation of the Dawn properties, and also the arrangement of
23 financing for Dawn Mining Company, will be handled by Newmont Corporation." Lattanzi
24 ¶ 130; Ex. 180.

25 On October 22, 1956, John Grunow of Newmont contacted the Atomic Energy
26 Commission regarding Dawn's contract with the AEC and forwarded copies of certain

1 documents. Among the items submitted was the July 1956 Management Agreement, which
2 Grunow described as, “providing for the management of the finances and operations of this
3 company by Newmont.” Lattanzi ¶ 130; Exs. 180, 581.

4 In October 1956, the minority shareholder’s nominee to the Executive Committee
5 complained that he was not being informed of Executive Committee decisions prior to being
6 asked to ratify them. However, he was told by a Newmont employee (who was also a Dawn
7 officer) that at a Newmont property, the onsite manager is delegated a great deal of authority.
8 He was further told that this was how it would be handled at Dawn. Exs. 112, 113, 114. Mr.
9 Grunow wrote:

10 It has been a long standing policy in the Newmont group of operating companies that
11 the Manager of the operations is delegated a good deal of authority in deciding on the
12 details of operation. This will be a standing principle with Dawn as well. We never
13 contemplated that either the Executive Committee or the Board would pass on details
14 of the specifications of construction. ... Consequently, the ratifying actions by the
15 Executive Committee will be done post factum. This is the way we intended it
16 originally, and this is the way all Newmont operating subsidiaries are handled. Our
17 control of the Managers is, of course, their performance. ...”

18 Ex. 114.

19 In 1956, Newmont negotiated a loan for Dawn with Chemical Corn Bank. The Bank
20 informed John Grunow of Newmont that “[i]f the loan is to be granted, favorable
21 consideration will necessarily depend upon Newmont’s sponsorship and reputation for
22 successful operation.” Quivik ¶ 122; Ex. 037. In response, Dawn warranted certain facts to
23 the Bank, including the fact that Dawn and Newmont had entered into the 1956 Management
24 Agreement with Newmont “duly authorized, executed and delivered by each of the parties
25 thereto and valid and enforceable in accordance with its terms, providing for the management
26 of the finances and operations of [Dawn] by Newmont. Quivik ¶ 123; Ex. 039. The loan
agreement gave the bank the right to terminate the contract and call in the loan if either the
AEC contract or the Management Agreement were canceled. Quivik ¶ 124.

1 In advance of a April 12, 1962 Stockholder’s meeting, Newmont issued a proxy
2 statement which referenced Dawn as one of the “operating companies” which are managed
3 by Newmont. Lattanzi ¶ 134; Ex. 200. On November 9, 1967, Robert Fulton wrote to
4 Commonwealth Edison Company and stated, “Newmont Mining Corporation owns a 51%
5 stock interest in Dawn and is manager of its operations.” Ex. 919e.

6 In April 1968, Jacques LeRoy, Secretary of Newmont, wrote to Jersey Central Power
7 & Light Company and Metropolitan Edison Company, representing himself as Dawn’s
8 counsel and secretary, regarding the authority of Dawn to enter into a Sales Agreement with
9 these two companies. LeRoy stated that he reviewed the 1956 Management Agreement and
10 opined that, “pursuant to the aforesaid Management Agreement of July 1, 1956, Newmont has
11 been appointed and is acting as Manager for Dawn for a term commencing on July 1, 1956
12 and continuing thereafter indefinitely until cancelled by either party... .” Lattanzi ¶ 135;
13 Quivik ¶ 422; Exs. 272, 962d.

14 Dawn’s Financial statements from 1969-1971 include a note about a bank loan from
15 Seattle-First National Bank that reads “in connection with this loan, which is not guaranteed
16 by Newmont Mining Corporation, Newmont has agreed to maintain its ownership of not less
17 than 51% of the Company’s common stock and continue to provide effective day-to-day
18 control and supervision of Dawn’s management.” Lattanzi ¶ 133; Exs. 299, 300. Newmont
19 made these representations in order for Dawn to be able to secure the loan from Seattle-First
20 National Bank. In a December 1970 letter from Roy Bonebreak (who identifies himself as
21 Executive Vice President of Newmont) to Seattle-First, Newmont represented as a condition
22 of the loan that:

23 Newmont will continue to own and maintain ownership of not less than 51% of the
24 capital stock of Dawn, and will continue to provide effective day-to-day control and
25 supervision of the management of Dawn to the end that Dawn will abide by and
26 perform its obligations under such proposed Loan Agreement.

Ex. 301; *see also*, Lattanzi ¶ 132.

1 Newmont's President and Chairman, Plato Malozemoff, gave a series of speeches in
2 1969 describing how Newmont managed the operations of some of Newmont's subsidiaries.
3 Mr. Malozemoff first described how Newmont had changed over time from a holding
4 company to one that "actually . . . manage[s] properties." Ex. 46 at 2; *see also*, Ex 001 at 5;
5 Quivik ¶¶ 132-134; Ex. 958c at MEPRXC009169 (1929 Annual Report noting that mining
6 exploration was actively conducted in South Africa); 958d at MEPRXC009179 (Annual
7 Report for 1934 noting that Newmont has continued efforts for the "acquisition, development,
8 financing and operation of mines," and noting that "members of your staff are actively
9 participating in the development and operations" of several mines) (emphasis added); 958e
10 at MEPRXC009188-91 (Annual Report for 1938, noting, among other things, Newmont's
11 staff directing operations at Empire Star Mines). Newmont's holdings in 1969 fell into two
12 groups: interests held without management responsibilities, and "operations that we manage."
13 For managed operations, Mr. Malozemoff was very clear that Newmont's management
14 including the operations of the companies. *Id.* at 3 ("In addition to managing the operations
15 of 18 companies . . ."); *id.* at 4 ("In addition to the companies whose operations we manage
16 . . ."). Newmont's primary method for managing operations was to appoint "highly capable
17 men" as the resident management and give them "a high degree of autonomy." *Id.* at 3.
18 Dawn was one of Newmont's "managed" operations. Ex. 377g (1969 Annual Report to
19 Shareholders).

20 In an August 19, 1974 letter to Cleveland Electric Illuminating company, Newmont's
21 manager of marketing stated that, "Newmont operates one uranium mine – the Dawn Mining
22 Company, whose total production is sold under long term contracts." Lattanzi ¶ 136; Exs. 103,
23 202. Newmont's manager of marketing wrote to Public Service Electric and Gas Company
24 that "Dawn Mining Company is managed by Newmont, as indicated on the enclosed annual
25 report." Quivik ¶ 406; Ex. 103. On November 6, 1974, Byron Hardie of Newmont
26

1 Exploration wrote to the USGS and noted that, “Newmont acts as manager of the mine at
2 Dawn Mining Company and holds a 51% equity in the operation.” Ex. 462c.

3 In 1976 Newmont and Midnite submitted a joint proposal to the Dawn Board. That
4 document begins by recognizing “Newmont Mining Corporation (Newmont), as Manager of
5 the operations and corporate affairs of Dawn Mining Company” Lattanzi ¶ 137; Quivik
6 ¶ 408; Ex. 104. In December 1980, on Newmont letterhead, William Humphrey wrote to a
7 coal company that “[w]e manage two relatively small mining operations in the Western part
8 of the United States” and then named Dawn and Carlin. Quivik ¶ 407; Ex. 109.

9 Midnite Mines also understood and acknowledged that Newmont was managing the
10 mining operations. For example, in March 1958, Midnite Mines Board of Directors requested
11 their attorney to write to Newmont to thank the company for “the splendid businesslike
12 manner in which the mine is being developed and mined and the mill was being constructed
13 and operated.” Quivik ¶ 321; Ex. 963c.

14 Newmont also provided guarantees that Dawn would deliver uranium concentrates
15 under its sales agreements. For example, Newmont guaranteed performance of an agreement
16 with Omaha Public Power District. Quivik ¶¶ 325-327, Exs. 116, 117, 118, 291; *See also*,
17 Exs. 288 (guarantee pursuant to agreement for loan of uranium hexafluoride between Dawn
18 and Carolina Power & Light, dated 8/26/80), 289 (guarantee pursuant to Uranium Sales
19 Agreement between Dawn and Combustion Engineering, dated 5/20/75), 290 (guarantee of
20 performance dated 2/4/75).

21 *Newmont’s Conduct as Corporate Parent*. Newmont officials with no Dawn titles also
22 made management decisions for Dawn. Quivik ¶¶ 331-341. In addition, to the actions taken
23 by Newmont employees from NSL and individuals before they eventually obtained Dawn
24 titles, the following decisions were made by people who *never* held Dawn titles.

1 When the mine was preparing to reopen in the late 1960s, Newmont managed the
2 rehabilitation of the mill. This project was overseen by Eugene Tucker, a Newmont engineer
3 based in New York, who held no Dawn title. Quivik ¶¶ 268-274.

4 Harry Volkman was the Newmont officer in charge of purchasing for all
5 Newmont subsidiaries. In 1968, Volkman hired Elof Enbon to serve as Dawn's purchasing
6 agent, and he placed Enbon on Dawn's payroll. Volkman never held a Dawn title. Quivik ¶¶
7 279-281; Exs. 021, 096, 124.

8 On September 19, 1980, Mr. P.E. Lapat of Newmont signed an agreement with Impact
9 Environmental Consultants Limited. That agreement related to a uranium mill compliance
10 analysis. Mr. Lapat signed on behalf of "Newmont Mining Corporation - Dawn Mining Co.,"
11 despite the fact that he held no Dawn title. Ex. 467f.

12 Newmont's participation in Dawn's management went beyond the participation of
13 normal parental oversight and evidenced actual involvement in the operations of the facility.
14 R. Thompson ¶ 11.

15 Through the closure of the Midnite Mine in 1981, there is not a single mining operation
16 conducted under the name of Newmont Mining Corporation. Quivik ¶ 159.

17 Between 1958 and 1965, Dawn provided an average of \$1 million per year in dividends
18 to Newmont. Lattanzi ¶ 55; Ex. 001 at 26.

19 Newmont USA Limited has assumed the liabilities of Newmont Mining Corporation,
20 its predecessor company that existed from 1921 until 2000. Ex. 285 at 30.

21 Newmont USA Limited has assumed the liabilities of Newmont Exploration Limited.
22 Ex. 285 at 29.

23 **H. THE MIDNITE MINE AFTER THE CESSATION OF ACTIVE MINING OPERATIONS**

24 *The Environment and Inherent Impact of Mining.* The processes used to conduct
25 open pit mining (such as drilling, stripping overburden, trenching, excavating, forming adits,
26 stockpiling and storing excavated material) are intrusive in nature and result in the release

1 of hazardous substances. Open pits produce waste, and waste dumps are a matter of
2 environmental concern because of the materials they contain. Lattanzi ¶¶ 48-49. Dealing with
3 environmental issues is an inherent aspect of any mining operation.

4 At the Midnite Mine, far more waste than ore was produced. Lattanzi ¶ 50. Hazardous
5 substances, including cadmium, chromium, copper, nickel, zinc, lead, lead 210, radium 226,
6 uranium 234, uranium 238, polonium 210 and radon, have been released at the Midnite Mine
7 as a result of mining activities carried out from 1955 through 1981. Dahl ¶ 13; Ex. 284.

8 Additionally, Midnite was operated on a seasonal basis with no mining over the winter.
9 When operations resumed in the spring, a considerable amount of water accumulated in the
10 bottom of the open pit. This water had to be pumped out of the pit before mining operations
11 could resume. Lattanzi ¶ 24; Exs. 001, 033, 035, 075, 377d-g, 378a, 936d.

12 Mine operations during the second period of operation caused water quality
13 and water management problems that linger to this day. “Mining in Pit #3 encountered
14 significant amounts of groundwater which interfered with mining activities[,] and dewatering
15 of the pit became necessary. These dewatering activities created a seepage area at the toe of
16 the waste rock pile downgradient of the pit area.” Ex. 837 at 6; *see, e.g.*, Ex. 959b, ROD at
17 2-11, 2-65 - 2-66.

18
19 The primary environmental problem at the Mine is acid rock drainage, or
20 ARD. *See, e.g.*, Ex. 959b, ROD at 2-11 (“In summary, the primary sources of contamination
21 are exposed uranium-bearing rock, with the primary release mechanisms being ARD and
22 radioactive decay. Contaminant migration pathways include surface water flow, groundwater
23 flow, wind erosion and deposition, and sediment transport.”), 2-29 (“[s]urface water quality
24 at the Site reflects the impacts of ARD, with elevated sulfate, radionuclides, and metals
25 concentrations”), 2-64 (in summarizing the need for remedial action: “The uranium mining
26

1 operations at Midnite Mine have resulted in widespread distribution of contaminated surface
2 materials in and near the Mine area . . .”).

3 Acid rock drainage is directly related to the production of ore, protore and
4 waste rock at the Mine because the mining activities that generate ore, protore and waste rock
5 greatly accelerate the natural weathering of the rock. ROD at 2-11; *see also* ROD at 2-28
6 (describing problematic surface materials as including ore, protore and waste rock). The
7 mined, exposed rock surfaces oxidize and, in the presence of certain sulfide minerals, acid
8 rock drainage causes water that contacts the exposed rock surfaces to become acidic. ROD
9 at 2-11. Then, “[t]he acidified water dissolves minerals (including metals and radionuclides)
10 in the rock, mobilizing the minerals into groundwater and surface water.” *Id.*

11 *The Midnite Mine from 1981-2000.* After Dawn’s mining operations ceased in 1981,
12 various agencies were involved in requiring, monitoring, approving, disapproving, and
13 evaluating action at the Mine, especially actions to deal with water and drainage at the site
14 throughout the 1980s.

15 The BIA, the BLM, and the Tribe worked to get Dawn to either: (1) resume mining with
16 an approved mining plan; or (2) begin the process of reclaiming the mine site as required by
17 the terms of the leases and regulations. Smith ¶ 60. Despite these efforts, Dawn failed to
18 resume mining or reclaim the site to the degree necessary. Smith ¶ 60. As a result, Dawn’s
19 mining lease rights were terminated in 1990. Smith ¶ 60.

20 The BLM and BIA have certain responsibilities at Indian trust land leased
21 for mineral development. Under the regulations promulgated by the Secretary of the Interior
22 pursuant to 25 U.S.C. § 396d, a BLM official acts as the “authorized officer” and is tasked
23 with certain actions after BIA has approved a mineral lease of trust land. Courtright ¶ 11.
24 The responsibilities of the BLM are set forth in both BIA and BLM regulations, and include
25 using BLM’s expertise to review and approve mine and reclamation plans, and monitoring
26

1 compliance with approved mine and reclamation plans. 25 C.F.R. §§ 211.4 and 212.4; 43
2 C.F.R. §§ 3590.0-7 and 3590.2; Courtright ¶ 12.

3 Between 1983 and 1993, BLM issued eleven mine orders to Dawn regarding Dawn's
4 activities at the Mine and the conditions present there. Courtright ¶ 24. Mine orders are
5 issued by BLM when a "failure to comply with the established requirements threatens
6 immediate, serious or irreparable damage to the environment, the mine or the deposit being
7 mined, or other valuable mineral deposits or other resources." 43 C.F.R. § 3598.4©;
8 Courtright ¶ 24.

9 The repeated issuance of such mine orders is unique. Courtright ¶ 25. For the other
10 approximately 30 mines in the State of Washington, BLM has issued a combined total of
11 approximately three mine orders from 1984 to the present. *Id.* BLM did not issue any mine
12 orders to the lessee at the Sherwood Uranium Mine, which was another open pit uranium mine
13 located approximately five miles from the Midnite Mine on the Spokane Indian Reservation.
14 *Id.* ¶ 26.

15 The following facts recount some of the reactions, of both Dawn, the United States
16 agencies, and the Tribe, regarding the Mine after the suspension of operations.

17 During the 1981 calendar year, the year the mine ceased operating, Dawn undertook
18 several reclamation activities at the Mine, including: planting 9,136 Ponderosa Pine seedlings
19 over 25.5 acres at the Mine, fencing the southern portion of the Mine, placing topsoil onto the
20 Pit 3 waste dump, placing topsoil on the Pit 3 East dump, grading topsoil that had been placed
21 onto dump slopes, and hydroseeding 24.4 acres, including the Pit 2 waste dump, the Pit 3 East
22 dump, and an area near Pit 3. Ex. 2176.

23 The United States Minerals Management Service ("MMS") was also involved in
24 evaluating environmental conditions at the Mine. In May of 1982, after reviewing water
25 monitoring data collected by Dawn and the USGS, the MMS wrote to Dawn proposing that
26 it install a new network of monitoring wells and institute a new regime of water quality

1 sampling. Ex. 1522. In October of 1982, the MMS' Stephen Tyley recommended to the
2 MMS' District Mining Supervisor that the MMS direct Dawn to intercept certain surface
3 water runoff and utilize the pollution control pond to store those waters. Ex. 1529. Tyley also
4 recommended that DOI conduct a new study to resolve the effluent problems at the site. *Id.*

5 In February of 1983, the BLM informed Dawn that its proposed reclamation plan
6 submitted in January 1980 was inadequate and would have to be revised to provide more
7 information regarding rehabilitation of the pits, overall site contouring and drainage, the
8 ultimate disposition of protore at the site, water treatment, revegetation, radiation control, air
9 quality and post-reclamation monitoring. Ex. 1537.

10 In February 1983, the BIA and BLM created two "work groups" to deal with
11 environmental issues at the site. Ex. 1554. The "management group" and the "study
12 management group" included individuals from the BIA, the BLM and the Regional Solicitor's
13 Office. *Id.* The study group coordinated with the Water Resources Division of the USGS to
14 determine short-term actions to "immediately manage mine drainage." *Id.* By the spring of
15 1983, the study management group had commenced a water sampling program at the site;
16 begun monitoring of the water level in pits 3 and 4; had taken actions to control standing water
17 in the pollution control pond; and was engaged in inspecting the Mine area for other problems
18 including uncontrolled erosion and landslides. *Id.*

19 The weather in the spring of 1983 created higher runoff volumes and influx into the
20 pollution control pond such that it created a situation reaching "critical proportion" where the
21 control pond was filled to capacity. Exs. 1552, 1547.

22 BIA Order 3/17/1983: On March 17, 1983, the BIA, invoking "paragraph 16 of Lease
23 No. 14-20-0503-823," in a letter to Dawn's Resident Manager, Marcel DeGuire, stated that
24 because certain surface runoff at the site contained unacceptable concentrations of
25 contaminants sufficient to constitute a human and livestock health hazard, it had begun
26

1 erecting fences around the property to keep livestock out. Ex. 1546. The agency also ordered
2 Dawn to take "whatever steps are necessary to prevent further degradation of water
3 resources in the mining area." Ex. 1546. On March 28, 1983, Dawn responded to the order
4 advising the BLM of its plan to pump water out of the pollution control pond into Pit 3. Exs,
5 1547, 2200, 2203; Nelson ¶ 27

6 BLM Order 4/12/1983: Also in the spring of 1983, invoking "the authority of 30 C.F.R.
7 Part 231.4" (the regulations governing the leasing of hard rock minerals on public lands), the
8 BLM directed Dawn to take immediate action to lower the level of water in the pollution
9 control pond and neutralize the water's pH. Exs. 1544; 1550 (also 5234). Dawn complied
10 with these mandates. Exs. 1547; 1553.

11 By May, 1983, both Pits 3 and 4 had become filled with water. Ex. 1558.

12 On May 10, 1983, immediately after the United States Court of Appeals affirmed the
13 lower court's decision upholding the USGS' September 30, 1981 suspension order, BLM
14 wrote to Dawn and explained that the administrative responsibilities that the USGS had
15 exercised at the time of the order had been transferred to BLM, and reiterated that it expected
16 compliance with the suspension order. Ex. 5104; Courtright ¶ 35.

17 Dawn responded on May 19, 1983 informing the BLM that the submission of a revised
18 mine plan in accordance with the USGS September 1981 order would be complicated by the
19 presence of water in both pits 3 and 4 and the currently depressed market for uranium. Ex.
20 1558. Dawn's Resident Manager, Marcel DeGuire, expressed his opinion that Dawn, the
21 agencies and the Tribe should meet to discuss the future of the site before a useful mining plan
22 could be formulated. *Id.*

23 In August 1983, Dawn was requested to consider several "short-term emergency mine
24 water management actions to prevent potential uncontrolled over topping from Pit 4 and the
25 pollution control pond." Ex. 5234. On August 30, 1983, the BLM and BIA met and discussed
26 the critical water levels, the lack of an approved reclamation plan, mine plan, or adequate bond

1 at the Mine. Ex. 1563. At this meeting, the agencies decided that Dawn should pump water
2 from Pit 4 and the pollution control pond in order to establish a freeboard for fall and winter
3 precipitation and that Dawn should also improve surface drainage control ditching. *Id.*

4 In September 1983, Dawn began siphoning water from Pit 4 to Pit 3. Nelson ¶ 31; Exs.
5 2211, 2215.

6 BLM Order: 10/12/1983: On October 12, BLM issued a detailed directive ordering
7 Dawn to take the actions previously ordered and other actions at the site to address concerns
8 regarding water in the pollution control pond, water in Pit 4, surface drainage and seepage
9 control, and slope maintenance. Ex. 1566. BLM's order sought to compel Dawn to take the
10 interim measures of: (1) capturing seeps of water from the Mine site so that the water could
11 be pumped up to a pollution control pond; and (2) installing and operate a pumping system to
12 transfer water from the pollution control pond to Pit 3. Ex. 5234; Courtright ¶ 49. The BLM
13 also informed Dawn that its long-term water management system submitted a part of the 1981
14 plan was not acceptable.

15 In December 1983, Dawn commenced construction of surface drainages at the Mine.
16 Nelson ¶ 31; Ex. 2219.

17 Approximately four years after BLM issued the October 12, 1983 order, Dawn
18 submitted a plan to address the serious water contamination problem that was adequate for
19 BLM's partial approval. Courtright ¶ 51. On May 22, 1987, BLM partially approved Dawn's
20 plan to collect contaminated water at various locations at the Mine site – where water seeps
21 were appearing and from the pollution control pond – and pump that contaminated water into
22 Pit 3 for temporary storage. Ex. 5108; Courtright ¶ 51. The long range plan called for Dawn
23 to construct a water treatment facility but BLM's order did not grant authority to operate the
24 facility because Dawn had not yet obtained the permits it needed to do so. Ex. 5108;
25 Courtright ¶ 51.

1 BLM Order 9/5/1984: On September 5, 1984, the BLM ordered Dawn, again pursuant
2 to the leases, to implement corrective action to improve water quality, minimize run-off,
3 correct erosion, and improve the general "safety and good housekeeping" of the site. Ex.
4 1580.

5 Dawn prepared a proposed operations plan for the Mine in January of 1985 that
6 described, among other things, a pilot program for treating mine water with a reverse osmosis
7 system and Dawn's intent to apply for a Clean Water Act "NPDES" discharge permit to treat
8 and discharge mine water. Ex. 2230. Dawn did in fact apply for a NPDES permit in 1985.
9 Nelson ¶ 33; Exs. 2232, 2237, 2245. The permit was issued on September 30, 1986. Ex.
10 2245.

11 BLM Order 6/16/1986: The BLM viewed Dawn's proposed plan as insufficiently
12 detailed and technical to pass as an acceptable mine and reclamation plan. Ex. 5235. On June
13 16, 1986, the BLM issued an order pursuant to 43 CFR 3570.0-2(b) and 3571.1(a) and 43 CFR
14 3570.0-7 requiring Dawn to demonstrate how it would meet the terms and conditions of its
15 leases. Citing the need to complete the mine reclamation, the declining quality of water, the
16 deterioration of mine workings, and the "still unresolved issues which brought about the
17 September 1981 partial suspension order", the BLM mandated Dawn submit a revised mine
18 plan within 90 days, or cease operations. Ex. 1611, 5235; Courtright ¶ 36.

19
20 In response, on September 9, 1986, Dawn submitted a proposed operations plan
21 incorporating and supplementing the 1985 plan. Ex. 5259; Courtright ¶ 36.

22 In the proposed plan, Dawn stated that its plans were "very preliminary and cannot
23 be finalized until the ore body has been fully delineated with further drilling." Ex. 5259;
24 Courtright ¶ 37. Dawn requested that BLM approve the company's proposed mine and
25 Reclamation Plan before Dawn completed the following actions: (1) necessary drilling to
26 delineate ore reserves; (2) negotiation of a royalty rate with the Tribe; (3) obtain other required

1 permits/licenses from EPA and the State of Washington for the mine and mill; (d) obtain or
2 renew business and haul road leases from the Tribe and BIA. Ex. 5259; Courtright ¶ 38. No
3 operations would have been able to commence until these actions had been completed.
4 Courtright ¶ 38.

5 BLM Order 5/19/1987: After seeking input from the Tribe, BLM responded
6 formally to Dawn's plan on May 19, 1987. Exhibit 5106; Courtright ¶ 40. BLM's May 19,
7 1987 order attached BLM's detailed comments on Dawn's plan. Ex. 5106; Courtright ¶ 40.
8 BLM criticized the plan because it was "largely conceptual, lacking sufficient background
9 information, supplemental calculations, and/or supporting data to explain, justify, or
10 substantiate actions as proposed." Ex. 5106; Courtright ¶ 40. Because Dawn did not appear
11 serious about its efforts, BLM established a deadline of September 1, 1987, for Dawn to
12 submit a new plan that addressed BLM's comments, and set forth a proposed schedule of
13 actions Dawn would need to take in order to restart mining. Ex. 5106; Courtright ¶ 40.

14 The order directed that Dawn's plan contain a schedule "illustrating how [Dawn]
15 intend[ed] to diligently pursue bringing the mine back into production." Ex. 5106; Courtright
16 ¶ 40. The order envisioned that BLM could provide partial approvals as Dawn progressed
17 through the steps necessary to resume mining. Ex. 5106; Courtright ¶ 40. The order
18 established a November 1, 1987 deadline for Dawn to begin implementing the approved
19 portions of its new plan. Ex. 5106; Courtright ¶ 40.

20 Dawn did not comply with this order and did not appeal it. Courtright ¶ 40.

21 In 1988, BLM determined that Dawn's leases were not producing in paying quantities
22 as required by its "lease terms and requirements of 25 CFR 211.10 and 211.12," and on
23 February 29, 1988, it recommended to the BIA that it consider whether Dawn's "inaction and
24 lack diligence are grounds for cancellation of the subject leases." Exs. 1641, 2256. On June
25 24, 1988, BIA informed Dawn that BIA intended to issue a notice of cancellation of Dawn's
26 leases unless Dawn provided evidence that in intended to reclaim the Mine. Ex. 2258. Dawn

1 responded to the BIA's letter on July 11, 1988, affirming its intent to reclaim the Mine and
2 detailing the steps that it had taken to work toward resuming operations and reclaiming the
3 mine. Ex. 2259.

4 BLM Order: 4/29/1989: BLM grew concerned about the hundreds of millions of
5 gallons of water that were accumulating in Pit 3 at an increasing rate of 50 to 75 million
6 gallons per year. Courtright ¶ 52. BLM did not want the water level to over top Pit 3 and
7 discharge into the disturbed rock located downslope of the pit. *Id.* To address these concerns,
8 BLM issued an order on April 29, 1989 to accelerate the time by which Dawn would
9 commence treating contaminated mine water. Ex. 5112; Courtright ¶ 52. BLM issued the
10 order to prevent “serious or irreparable damage to the environment.” BLM’s order required
11 Dawn to submit a detailed plan describing how it would address disposal of the waste product
12 that would be generated by treatment of the contaminated water. Ex. 5112; Courtright ¶ 52.
13 The issue of waste product disposal from the water treatment plant needed to be resolved
14 because the waste product had been classified as source material by the Washington State
15 Department of Health and the Nuclear Regulatory Commission, and had to be treated
16 specially. Courtright ¶ 53.

17 The BIA issued a notice of intent to terminate Dawn's right to mine under the leases on
18 July 11, 1989. Ex. 2265.

19 Faced with its continued failure to either resume mining or comply with the
20 requirements to post an adequate reclamation bond and submit mine/reclamation plans, Dawn
21 argued that it lacked the financial resources to comply. Smith ¶ 65. On April 30, 1990, after
22 an informal hearing, the BIA terminated Dawn's rights under the 1964 mining leases based,
23 in part, on findings and conclusions that Dawn had failed to comply with the terms of the
24 leases and failed to provide the United States with an adequate mining plan. Ex. 1658. The
25 BIA Area Director rejected Dawn’s argument regarding its financial condition, noting that
26 accepting Dawn’s argument would result in the absurd situation that a lessee could excuse

1 compliance with lease terms solely on the basis of its poor financial condition. Ex. 5025;
2 Smith ¶ 66.

3 Dawn appealed the Area Director's decision to the Interior Board of Appeals,
4 which affirmed the Area Director's decision. Ex. 2272 (also 1665, 5256); *Dawn Mining Co.*
5 *v. Portland Area Director*, BIA, 20 IBIA 50, 1991 I.D. LEXIS 90 (1991) Dawn did not seek
6 judicial review of that decision. Smith ¶ 67.

7 Though Dawn's right to mine had been terminated, the United States maintained that
8 Dawn was still obligated, under the lease terms, to make provisions for the conservation, repair
9 and protection of the property. Ex. 1665. Dawn was still required to submit a plan for the
10 "conservation, repair, and protection of the property" and to leave the Mine "in a condition that
11 will not be hazardous to life or limb" as required by Provision III(16) of the leases. Ex. 2271.

12 To comply with its obligation to submit a plan for the reclamation of the Mine, Dawn
13 submitted an extensive reclamation plan to BLM on July 12, 1991. Exs. 2272, 2273.
14 According to the BLM, Dawn's 1991 reclamation plan was "largely adequate to comply with"
15 applicable regulations. Ex. 2274. The BLM noted that "[t]he only significant shortcoming is
16 the lack of a noxious weed control plan." Ex. 2274.

17 BLM Order 12/9/1991: On December 9, 1991, BLM issued an order requiring Dawn
18 to commence operation of the water treatment plan no later than July 1, 1992. Courtright ¶
19 54. The commencement date was established based upon BLM's analysis of historic pit water
20 volume increases, climate data, and other data that BLM had been gathering and evaluating
21 with respect to how quickly Pit 3 would fill with water and how soon treatment of that water
22 needed to begin to avoid over topping Pit 3. *Id.*

23 Dawn appealed this order, and it was affirmed by the Interior Board of Land
24 Appeals with two minor modifications. Courtright ¶ 55.

25 BLM Order 6/16/1992: BLM reissued the order on June 16, 1992. Ex. 5114, 5238;
26 Courtright ¶ 55. BLM's order required treatment at the rate of 300 gallons per minute. Ex.

1 5114; Courtright ¶ 55. However, consistent with BLM's orders, the plant had been
2 constructed so that it was capable of immediately increasing the treatment rate to 500 gallons
3 per minute. Courtright ¶ 56.

4 Dawn constructed a water treatment plant at the Mine, which became operational in
5 1992. Nelson ¶¶ 34-35; Ex. 2276. Dawn operates the water treatment plant.

6 BLM Order: 7/23/1993: On July 23, 1993, BLM issued a mine order that required an
7 increase in the water treatment rate to 500 gallons per minute. Ex. 5239; Courtright ¶ 56. This
8 increase in treatment rate was based on BLM's forecasted water accumulation rates for the
9 Mine, and was deemed necessary in order for all of the water at the Mine to be treated in
10 approximately 8 to 10 years. Courtright ¶ 56.

11 In January 1996, as part of the reclamation process, BLM published a notice of its intent
12 to prepare an Environmental Impact Statement (EIS) to evaluate alternative plans for the final
13 reclamation of the Midnite Mine. 61 Fed. Reg. 2528 (Jan. 26, 1996). Dawn prepared a more
14 extensive reclamation plan for BLM in June 1996. Ex. 2298.

15 In August of 1996, BLM, BIA, EPA, and the Washington Department of Health signed
16 a "Memorandum of Understanding For NEPA Scoping Midnite Mine Reclamation." Ex.
17 2300. The purpose of the MOU was to "set forth obligations for the review of data, the
18 conduct of meetings to gather public input, and the development of the EIS data needs
19 regarding reclamation of the Midnite Uranium Mine." Ex. 2300.

20 At the time, EPA did not plan on listing the Mine on the National Priorities List (NPL).
21 Ex. 2304. BLM similarly opposed listing of the Mine on the NPL, and instead believed that
22 BLM should "continue with the ongoing NEPA process to address reclamation issues at the
23 Midnite Uranium Mine." Ex. 2308. BLM was concerned that "EPA may be rushing to the
24 conclusion that reclamation planning should proceed using a combined RI/FS-EIS approach,
25 which in my view could force the Department into a CERCLA action." Ex. 2310. Such action
26 was "of particular concern since we have been working on a document which would provide

1 for a thorough evaluation of several approaches, not just CERCLA, and this document is yet
2 to be reviewed by policy makers within the Department." Ex. 2310.

3 BIA geologists continuously monitored the site. During one of the BIA geologist's
4 spring 1997 site visits, the geologist observed a major overflow event during which the water
5 management system at the Mine was overloaded, and a large volume of untreated water was
6 flowing away from the Mine and into downstream waters. Smith ¶ 77. The geologist
7 immediately reported the conditions to BLM (who agreed to contact Dawn), the Tribe and
8 EPA. *Id.* This overflow event created three specific areas of potential slope instability and
9 land erosion that BLM identified immediately. Courtright ¶ 57. A fourth area of potential
10 slope instability was identified later. *Id.* BLM determined by laser survey monitoring
11 methods that two of four areas were stable. Courtright ¶ 58.

12 BLM Order 4/23/1997: Because Dawn was not taking action on its own to address these
13 issues, BLM issued a mine order on April 23, 1997. Ex. 5240; Courtright ¶ 57. The BLM
14 order required Dawn to monitor slope stability in two areas of the mine, backfill slopes
15 damaged by erosion, stabilize a power pole that provided electricity to the water treatment
16 plant, and re-vegetate damaged slopes. Courtright ¶ 58. Based on BLM's quick attention, all
17 of the areas recovered and did not become more significant slope stability problems. *Id.*

18 In July of 1998, BLM and Dawn entered into an Interim Agreement "to more fully
19 characterize the Site and the nature and extent of hazardous substance releases (if any) and
20 impacts, by designing and conducting the studies specified in this Agreement and the
21 Appendices." Nelson ¶¶ 42-43; Exs. 2317, 2318. The goal of the Interim Agreement was to
22 collect data for the eventual reclamation of the Mine. Nelson ¶ 42.

23 Although the EPA was not a "formal signatory" to the Interim Agreement, it was
24 involved in its negotiation. AR 1225074 at 2-17. "[I]t has been directly involved in the
25 review of the Work Plan, along with BIA, the Spokane Tribe, the Department of Energy, and
26 the Washington State Department of Health." Ex. 2320; see also AR 10673371 AR 1967339.

1 In July of 1998, EPA sought the Tribe's support for listing the Mine on the NPL. The Tribe
2 expressed its support for listing the Mine on the NPL in a letter to EPA on August 12, 1988.
3 Ex. 2319. In September of 1998, BLM wrote to EPA, stating that BLM was "concerned that
4 further action to formally propose listing of the [Mine] site on the NPL may negatively impact
5 implementation of the Interim Agreement and resulting Work Plan."Ex.2320. Nevertheless,
6 EPA proposed the Mine for listing on the NPL on February 16, 1999. Ex. 2323.

7 Initially, BLM's cooperation with EPA involved coordinating the details of
8 BLM's mine orders concerning management of contaminated water with EPA's concerns in
9 enforcing the Clean Water Act through Dawn's Clean Water Act "NPDES" discharge permit.
10 Courtright ¶ 61. BLM also consulted with EPA during BLM's NEPA "scoping" process so
11 that the information BLM gained during that process would be useful if EPA listed the site on
12 the National Priorities List under CERCLA. Courtright ¶ 61. When EPA listed the site and
13 began the Remedial Investigation and Feasibility Study process, BLM provided technical
14 information and offered technical comments on written material. *Id.*

15 From 1998 through 2000, BLM also worked cooperatively with EPA on the
16 Midnite Mine Workplan, the purpose of which was to collect additional environmental
17 baseline information on the Midnite Mine. Courtright ¶ 66. BLM served as the federal
18 government's "Project Manager" for this \$2.5 million project (which was paid for by
19 Newmont). *Id.* BLM took responsibility for quality assurance and data collection,
20 management of the project even though those responsibilities normally would be the borne
21 solely by the mining company. *Id.*

22 **I. ADDITIONAL FACTS REGARDING THE UNITED STATES' INVOLVEMENT AT THE MINE**

23 *Strategic Benefits.* Dawn's uranium production provided the United States with a
24 significant, material benefit by supplying uranium for the nation's nuclear weapon and energy
25 needs during the Cold War. The AEC's total purchases of 1,143,142 tons of ore accounted for
26 more than 36 % of Dawn's total production through 1981. Exs. 1848; 1849; 1850. In addition,

1 Dawn's supply of nuclear material to the domestic power industry during the 1970's provided
2 the United States with a significant strategic benefit in the form of a reliable, local and
3 independent source of energy.

4 Without the encouragement and direct involvement of the United States, the Mine
5 would not and could not have been developed in the 1950s and 60s.

6 *Lease Administration.* The United States administered Dawn's mining leases. It
7 authored and specified the terms of the leases and its authority over these lands allowed it to
8 prevent the very contamination that underlies the claims in this case. Ex. 1472. The Tribe
9 relied upon the United States to manage the site. As the Tribe explained in 1997,
10 "[t]hroughout the history of the Midnite, the Tribe has relied entirely on direction and
11 expertise provided by the United States as trustee, as well as the United States' authority to
12 manage and regulate the site." Ex. 1803, A.R. Doc. No. 107646 at p. 2. The BIA also worked
13 closely with the Tribe to communicate the Tribe's
14 concerns regarding environmental conditions and proposed reclamation actions at the Mine.
15 Smith ¶ 78. BIA also provided technical support and funding for the Tribe to retain legal and
16 environmental consultants to represent and assist the Tribe on Mine-related issues. Smith ¶¶
17 60, 78.

18 Throughout the terms of the leases, the United States, through the Department of the
19 Interior ("DOI") and its various agencies — including the Bureau of Indian Affairs ("BIA"),
20 the United States Geologic Survey ("USGS"), the United States Bureau of Land Management
21 ("BLM"), and the United States Minerals Management Service ("MMS") — exercised
22 authority over operations at the Mine granted by the lease, and by statute and regulation. This
23 included coordinating agencies and directing, policing, and supervising pollution control,
24 bonding and reclamation activities.

25 The United States' active involvement at the Midnite Mine was very different from the
26 norm. Courtright ¶¶ 63-68. For example, as evidenced by the numerous meetings held, site

1 visits, correspondence, and number of mine orders issued, the BLM played a very active role
2 in coordinating and directing Dawn to take corrective action in regards to the critical water
3 pollution (especially the over topping risks) and discharge problems in the 1980s.

4 The BLM also played a much more active role than it usually would in connection with
5 classifying the solid waste that would be produced by operating the water treatment plant.
6 Courtright ¶ 65. The classification of this waste material determined how and where it could
7 be legally disposed of and in what type of a repository. *Id.* It was Dawn's and Newmont's
8 responsibility to work with EPA, the Nuclear Regulatory Commission and the Washington
9 Department of Health to have the material classified (as solid waste, hazardous waste, or
10 "Source Material"). *Id.* Nonetheless, this task fell to BLM because Dawn and Newmont were
11 not taking adequate initiative to obtain the classification. *Id.* Resolution of this issue allowed
12 Dawn to begin treating water at the Midnite Mine. *Id.*

13 Dawn and Newmont's own conduct and inaction, as well as critical site conditions,
14 demanded more extensive involvement of the United States. Courtright ¶ 62. The intensity
15 of the involvement both cost and benefitted the United States, and directly affected the release
16 of hazardous substances at the site.

17 *Reclamation Bond Requirements.* In accordance with the terms of Dawn's leases and
18 the applicable mineral leasing regulations, the United States set and adjusted Dawn's bonding
19 requirements.

20 The two 1964 mining leases, drawn by the United States, required a total of only
21 \$15,000 in performance surety bonds from the lessee. Smith ¶ 61. However, Provision III (9)
22 of the leases also stated that "the right is reserved to the Secretary of the Interior or his
23 authorized representative to increase the amount of bond above the sum named." Exs. 5023
24 (MBIAPT000134), 5024 (MBIAPT000181); Smith ¶ 61. Through the 1980s, the BIA sought
25 to compel Dawn to post a reclamation
26 bond sufficient to protect the Mine site. Smith ¶¶ 60-67.

1 In 1982, with reclamation plans in flux, the USGS determined that "it would not be
2 reasonable to set an amount of bond at this time that would satisfy the total reclamation
3 requirements," but nevertheless specified dollar amounts to cover specific proposed
4 reclamation actions. Ex. 1508 at NEW0028464. In the fall of 1982, the BIA issued a final
5 bond order requiring Dawn to post a reclamation bond in the amount of \$10 million. Ex. 7,
6 Smith ¶ 62. Dawn appealed the BIA's bond order, which was invalidated on the basis that
7 Dawn had not been afforded sufficient opportunity to participate in the process. *Id.*

8 In 1986, the BLM and BIA jointly issued a new bond recommendation which would
9 require Dawn to post a \$9.7 million bond. *Id.* Thereafter, on June 18, 1987, the Department
10 of the Interior's Assistant Secretary for Indian Affairs ordered Dawn to post a single bond
11 covering both leases in the amount of \$9,730,000. Exs. 1635, 5132; Smith ¶ 63. Dawn refused
12 to post the bond, stating it did not have sufficient funds, but it did not challenge the bond
13 order. *Id.*

14 *Royalties.* Dawn paid its rents and royalties directly to the United States BIA. After
15 the BIA received the payments, it would deposit them into a special deposit account, determine
16 the appropriate allocation of the amount, and then transfer the deposits into the appropriate
17 accounts of the Tribe or individual owners.

18 The United States Department of the Interior, either through the Office of Inspector
19 General's Audit Division or the Minerals Management Service, would conduct audits of the
20 payment and calculation of royalties. After approval of the new royalty rate in 1976, the
21 United States continued to oversee and audit Dawn's royalty payments and contributions to
22 its reclamation fund. *See e.g.*, Exs. 767, 1384, 1462, 1489, 1518, 1531, 1532, 1590. The
23 United States undertook these activities as part of its responsibilities as landlord of the Mine
24 site.

25 Over the course of Dawn's operations, the United States collected over \$9.6 million in
26 royalty payments. Ex. 1846.

1 **J. INTERIM AGREEMENT SAMPLING, EPA’S SITE INSPECTION AND REMEDIAL**
2 **INVESTIGATION**

3 As set forth above, in July of 1998 and prior to adding Midnite Mine to the NPL, the
4 BLM and Dawn entered into an “Interim Agreement” "to more fully characterize the Site and
5 the nature and extent of hazardous substance releases (if any) and impacts, by designing and
6 conducting the studies specified in this Agreement and the Appendices." Nelson ¶¶ 42-43;
7 Exs. 2317, 2318. The goal of the Interim Agreement was to collect data for the eventual
8 reclamation of the Mine. Nelson Direct ¶ 42. EPA was not a signatory to the Interim
9 Agreement, though provided input during the negotiation.

10 Pursuant to the Interim Agreement, Dawn's consultant Shepherd Miller, Inc. collected
11 extensive data at and around the Midnite Mine. Rosasco Test. ¶ 15. The agreement required
12 Shepherd Miller to provide copies of all data reports to the EPA, which it did on an ongoing
13 basis from September 1998 to August 2001. AR 1067357; Rosasco Table 1. That same year,
14 EPA also retained the consulting firm Ecology & Environment (E&E) to perform an Expanded
15 Site Inspection (“ESI”). The ESI included sampling (34 surface water samples, 45 sediment
16 samples, 13 soil samples and 6 groundwater samples) to support the evaluation of the site for
17 listing on the NPL. Rosasco ¶ 15; Hale ¶ 11.

18 In February 1999, after recommending the Mine be added to the NPL for remediation
19 under CERCLA, the EPA retained the consulting firm URS Corporation to perform a
20 Remedial Investigation and Feasibility Study (RI/FS) at the Midnite Mine. The purpose of the
21 RI/FS is to determine the nature and extent of contamination, assess the site risks to human
22 health and the environment, and develop and evaluate remedial alternatives. Hale ¶ 13. EPA’s
23 contractor followed a process of identifying and documenting the data quality objectives
24 (DQOs) to determine the type, quantity and quality of data needed to support EPA’s site
25 decisions. The EPA began this decisionmaking process in February 1999 and completed its
26 preliminary sampling plan in June 1999 (*see* SF 1169111 at 2), while Shepherd Miller was
simultaneously in the process of conducting its sampling pursuant to the Interim Agreement.

1 The EPA's DQO decisions were documented in Quality Assurance Project Plan
2 documents or "QAPPs". EPA published various versions of the Phase 1A QAPP beginning
3 in July 1999 (AR 1133100) and various versions of the Phase 2A/1B QAPP beginning in
4 August 2000 (AR SF [EPA Site File] 1169521 at 1; AR 1133103, AR 1137851(Addendum)).

5 By July 1999, EPA had received many (approximately 60), though not all, technical
6 reports related to the data collection efforts pursuant to the Interim Agreement. *See*
7 Administrative Record citations in Rosasco Table 1 (list of submitted reports). By August
8 2000, it had nearly 40 more. In June 2000, EPA's contractor prepared a technical
9 memorandum summarizing the "significant studies that had been performed at the Midnite
10 Mine prior to implementation of the Phase 1A RI/FS", including those performed by Shepherd
11 Miller pursuant to the Interim Agreement. AR 1156082. In July 2000, URS completed a
12 historical chemical and radiological data assessment of existing data collected by E&E and
13 Shepherd Miller. AR 1219056.

14 EPA conducted its field work in two phases: Phase 1A and Phase 2A/1B. During these
15 two phases EPA collected 569 more samples at the Mine and the potentially impacted areas
16 nearby, including soil, surface water, sediment and ground water samples. Phase 1A sampling
17 took place in September-October 1999 and March-April 2000, and Phase 2A/1B took place
18 in September-October 2000, and summer 2001. AR 1225186 Appendix A at 1. The summer
19 2001 sampling concluded the EPA's site characterization. The Phase I QAPP text and tables
20 describe and provide the EPA's justification for the sampling of surface water, sediment and
21 groundwater. AR 1133100. Phase II QAPP text and tables describe and provide the EPA's
22 justification for scoping of soil characterization, mined area groundwater, radon, radon flux,
23 radiation levels, and site geotechnical and hydraulic information. AR 1133103 at A-14,
24 Section A.5.3. The final analysis of the EPA's data collection was published in the Remedial
25 Investigation Report in September 2005. AR 125074.

1 At issue at trial was the EPA's decision to collect 187 of the 569 samples collected
2 during Phase 1A and Phase 2A/1B. The Administrative Record evidences the EPA and its
3 contractor's awareness the ESI sampling data of E&E and Interim Agreement data provided
4 (and expected to be provided) to the EPA, as well as the EPA's intent to integrate, where
5 possible, such data into the RI/FS process. Hale Attachment 1 (listing administrative record
6 documents). The Phase I QAPP and Phase II QAPP describe gaps in the Interim Agreement
7 data. AR 1133100 and AR 1133103.

8 The lengthy briefs and written testimony submitted to the court are very detailed and
9 have directed the court to hundreds of references to the Administrative Record. The court will
10 not make separate factual findings as to each of the 187 individual samples. The record
11 contains adequate support that the EPA's decision to collect 124 of the disputed samples was
12 primarily to address inadequate spatial coverage of existing data; the EPA's decision to collect
13 19 of the disputed samples was primarily to address incomplete data for potential constituents
14 of concern; the EPA's decision to collect 44 of the disputed samples was primarily to address
15 insufficient number of representative and comparable samples for statistical comparison.

16 For example, regarding inadequate spacial coverage the QAPPs explain:

17 Substantial amounts of historic analytic chemistry data exist to estimate PCOC
18 concentrations for groundwater, surface water, and sediments in the PIA [potentially
19 impacted area] AOIs [Areas of Interest] south of the MA [mined area]...Little or no
20 information exists for other PIA AOIs.

21 AR 1133100 at A-39.

22 The major data gaps identified for the Phase 2A/1B DQO process are: 1...2. Incomplete
23 external radiation data. Historic gamma radiation exist for some areas but are absent
24 or inadequate for other key areas...3. Incomplete or no airborne radon data for various
25 areas...4. Incomplete groundwater hydraulic and chemical data for MA and Blue
26 Creek...5. Incomplete or no background conditions information for various external
radiation, surface water, sediment and groundwater.

AR 1133103 at A-17.

Regarding potential constituents of concern, for example, the record states:

1 In the case of more recent investigations conducted by the EPA and SMI (i.e. data
2 collected since 1998), the investigations appear to have used protocols required by EPA
3 (1991a), and, after review of the quality of the data, the data from those studies may be
4 useable quantitatively for baseline risk assessment purposes when combined with data
5 collected during the RI...However, these data are not sufficient for conducting a
6 baseline risk assessment for a variety of reasons. First in all cases, the constituent
7 analyzed in previous studies comprise only a subset of the PCOCs that must be
8 evaluated for the baseline risk assessments. For example, a number of metals and
9 radionuclide isotopes needed for the risk assessments were not analyzed for in the
10 previous studies. Examples include cobalt, vanadium, and antimony, as well as decay
11 series isotopes for radionuclides. Therefore, it is necessary to collect additional PCOC
12 concentration data for the missing PCOCs.

13 AR 1133100 at A-39.

14 “Historic data for surface materials within the MA do not include all metals or full
15 radioactive decay series.” AR 1133103, Table A.7-4.

16 Historical data exist for surface material in the MA but do not include all PCOCs. In
17 particular, existing data do not include PCOC activities for all radioactive constituents
18 or isotopes of concern. Because the surface materials may not be in radioactive
19 equilibrium activities of decay products cannot be reliably estimated from activities of
20 parent constituents. Therefore, measurements of individual constituents and isotopes
21 are necessary for estimating risk.”

22 AR 1133103 at A-20.

23 Regarding the insufficient number of representative and comparable samples
24 justification, for example, the QAPP provides:

25 Based on 10 constituents per medium to be compared to background and the number
26 of site groundwater and site-related surface water sample locations, the power analysis
indicates a minimum of 16 sample locations is needed to perform the non-parametric
analysis of the data.

AR 1133100, A-53.

However, current conditions must be representative of maximum PCOC concentrations,
therefore, seasonal data are required....A preliminary evaluation of existing water
quality data appears to indicate that PCOC concentrations vary with season, particularly
for surface water and seeps/springs...Therefore it is proposed that water samples be
collected at two times during the spring....An additional sample is proposed for the low
flow season....Therefore, a total of there sampling events are proposed for groundwater
and surface water.

AR 1133100 at A-41-42.

1 The QAPP also provides that, “For historic data to be used in the risk assessment, and
2 to be statistically compared to background, requires that samples be collected in the same
3 manner as historic data.” AR 113100 at A-51. “Thus to conduct a statistically appropriate
4 comparison, a minimum of 16 background sediment samples for each sample type (discrete
5 and composite) is needed for comparison to the downstream samples.” AR 1133100 at A-53.

6 **III. ANALYSIS and CONCLUSIONS OF LAW**

7 **A. JURISDICTION AND VENUE**

8 The court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1345.

9 Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and © and 42 U.S.C. §
10 9613 because the claims arise, and the releases of hazardous substances occurred at the Site
11 located in the Eastern District of Washington.

12 **B. CLAIMS GENERALLY**

13 The United States makes its claims under sections 107 and 113 of CERCLA, 42 U.S.C.
14 §§ 9607 , 9613.

15 Dawn and Newmont counterclaim against the United States under § 113(f) of CERCLA,
16 42 U.S.C. § 9613(f)(1), because the United States is liable under CERCLA sections 107(a)(1)
17 & (a)(2) as a current owner of the facility and as an owner of the facility at the time hazardous
18 substances were released. On August 21, 2007, this court granted NUSA's and Dawn's motion
19 for summary judgment on the issue of the United States' liability as an "owner" under
20 CERCLA. *United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050 (E.D. Wa. 2007) (Ct.
21 Rec. 290).

22 The parties have not disputed that the Mine is a "facility," 42 U.S.C. § 9601(9), or that
23 there has been a "release" of hazardous substances from the facility that have caused the
24 incurrence of response costs. *Id.* § 9607.

1 Dawn does not dispute that it is liable for the release of hazardous substances from the
2 Mine as an operator the facility at the time hazardous substances were disposed. *Id.* §
3 9607(1)(2).

4 **C. NEWMONT IS LIABLE AS AN OPERATOR OF THE MIDNITE MINE UNDER *BESTFOODS***

5 To recover its costs for engaging in response actions under § 107 of CERCLA, the EPA
6 must demonstrate (among other elements which have already been established pre-trial) that
7 Newmont falls into the category of a responsible party, in this case being a person who
8 operated the Site at the time of disposal. 42 U.S.C. § 9607(a)(2) (“any person who at the time
9 of disposal of any hazardous substance owned or operated any facility at which such
10 hazardous substances were disposed of” shall be liable for responses costs). Those falling
11 within this category are liable for “all costs of removal or remedial action incurred by the
12 United States ... not inconsistent with the national contingency plan.” 42 U.S.C. § 9607(a).

13 In *United States v. Bestfoods*, the Supreme Court held that a corporate parent may be
14 held liable as an operator under two theories. 524 U.S. 51, 118 S. Ct. 1876, 1881, 141 L. Ed.
15 2d 43 (1998). First, a corporate parent is derivatively liable for the conduct of the subsidiary
16 if the corporate veil may be pierced. 524 U.S. at 66-67. Second, a corporate parent is directly
17 liable based on its own conduct at a facility if it manages, directs, or conducts "operations
18 having to do with the leakage or disposal of hazardous waste, or decisions about compliance
19 with environmental regulations." *Id.* The United States only asserts Newmont is an operator
20 based upon a theory of direct liability. Under *Bestfoods*, the analysis of direct operator
21 liability should not focus on "whether the parent operates the subsidiary, but whether it
22 operates the facility, and that operation is evidenced by participation in the activities of the
23 facility, not the subsidiary." *Id.* at 68 (quotation omitted).

24 CERCLA, however, only generally defines an operator as "any person . . . operating [a
25 covered] facility." 42 U.S.C. § 9601(20)(A)(ii). The Supreme Court in *Bestfoods* refined the
26 rather circular statutory definition of "operator" by stating that:

1 An operator is simply one who directs the workings of, manages, or conducts the affairs
2 of a facility. To sharpen the definition for purposes of CERCLA's concern with
3 environmental contamination, an operator must manage, direct, or conduct operations
4 specifically related to pollution, that is, operations having to do with the leakage or
5 disposal of hazardous waste, or decisions about compliance with environmental
6 regulations.

7 *Id.* at 67. The Court observed that "the statute obviously meant something more than mere
8 mechanical activation of pumps and valves, and must be read to contemplate 'operation' as
9 including the exercise of direction over the facility's activities." *Id.* at 71.

10 With regard to the parent's operation of the facility, the Court identified three possible
11 situations in which a parent may be held directly liable as an operator: (1) when the parent
12 operates the facility rather than its subsidiary or alongside the subsidiary in some sort of joint
13 venture; (2) when a dual officer or director departs so far from the norms of parental influence
14 exercised through dual office holding as to serve the parent, even when acting ostensibly on
15 behalf of the subsidiary in operating the facility; and (3) when an agent of the parent "with no
16 hat to wear but the parent's hat" might manage or direct activities at the facility. *Id.*

17 As to the second scenario, the Court acknowledged the possibility that directors and
18 officers might hold positions with both a parent and a subsidiary, and recited the corporate law
19 principle that it is entirely appropriate for them to do so. *Id.* at 69, 118 S.Ct. 1876. Such dual
20 officers can and do "change hats" to represent the two corporations separately. *Id.* (quotation
21 omitted). Again citing basic principles of corporate law, the Court noted the presumption that
22 directors wear their "subsidiary hats" rather than their "parent hats" when they act for the
23 subsidiary, and concluded that:

24 it cannot be enough to establish liability here that dual officers and directors made
25 policy decisions and supervised activities at the facility. The Government would have
26 to show that, despite the general presumption to the contrary, the officers and directors
were acting in their capacities as [parent] officers and directors, and not as [subsidiary]
officers and directors when they committed those acts.

Id. at 69-70.

1 As to *Bestfoods*' third scenario regarding an agent with no subsidiary hat to wear, the
2 Court stated that activities that "involve the facility but which are consistent with the parent's
3 investor status ... should not give rise to direct liability." *Id.* at 72. Thus, the Court directed
4 lower courts considering these issues to determine "whether ... actions directed to the facility
5 by an agent of the parent alone are *eccentric under accepted norms of parental oversight of*
6 *a subsidiary's facility*. [citation omitted]. The critical question is whether, in degree and detail,
7 actions directed to the facility by an agent of the parent alone are eccentric under accepted
8 norms of parental oversight of a subsidiary's facility." *Id.* (emphasis added).

9 With the principles of *Bestfoods* guiding this decision, the court concludes Newmont
10 is liable as an operator under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). In reaching
11 this decision, the court relies upon Newmont's direct connection to the operations of the Mine,
12 and does not rely merely or solely upon the closeness of the relationship between Newmont
13 and Dawn, Newmont's representation on the Dawn Board of Directors, the interlocking
14 directors and officers between the companies, Newmont's general financial oversight over
15 Dawn, or Newmont's monitoring of Dawn's performance. Nevertheless, these facts are
16 relevant in this case because in degree and detail, Newmont's inextricably interwoven
17 involvement in the management of Dawn departed from the accepted norms of corporate
18 oversight.

19 Newmont is liable as an operator under Section 107(a) of CERCLA, 42 U.S.C. §
20 9607(a), for its actions in managing, directing and conducting operations at the Midnite Mine
21 in 1955 and 1956 prior to the 1956 Management Agreement. The evidence shows that MMI
22 lacked the knowledge or resources to meet the AEC contract to deliver 2400 tons of ore.
23 Newmont, on the other hand, had both. In April 1955, Newmont sent employees to investigate
24 the site and then later to conduct the exploration and development activities at the mine while
25 Dawn was being established. Newmont's agreement with MMI required it to provide the
26 financing, equipment, supplies and personnel for the development program, which it did.

1 Activities conducted at the Site at this time included mapping, drilling, stripping overburden,
2 bulldozer trenching, excavating, forming adits, stockpiling ores creating waste dump areas and
3 shipping ore to the AEC. Although Dawn was incorporated and Mr. Hundhausen and Mr.
4 Hinsdale were acting at the time on Dawn's behalf, there is no evidence these men were
5 directing or making decisions regarding the operations being performed by NEL: Mr.
6 Hundhausen did not have operating experience and did not have the authority to supervise the
7 NEL employees activities. Mr. Hinsdale, a banker, did not possess the knowledge to direct
8 the mining operations. Newmont's undisputable lead role taken in the supervising, directing
9 and actually *conducting* the work at the Mine during this early period provide the basis for
10 operator liability.

11 Newmont is liable as an operator under Section 107(a) of CERCLA, 42 U.S.C. §
12 9607(a), for its actions in managing, directing or conducting operations at the Midnite Mine
13 pursuant to the 1956 Management Agreement.

14 Just prior to entering into the 1956 Management Agreement, Newmont represented that
15 it was planning to transition to full scale operations of the Midnite Mine and that it would "be
16 running the show." The exploration and development efforts of Newmont employees lead to
17 the 1956 Management Agreement which continued in effect throughout the operation of the
18 Mine. Moreover, the Agreement's terms are entirely consistent with Newmont's intention to
19 operate the Mine in that it expressly provides that Newmont "shall act as Manager of all the
20 operations and corporate affairs of Dawn." Ex. 4. The record contains a large number of
21 affirmations by Newmont, MMI, and Dawn that Newmont was "managing" the operations,
22 finances and corporate affairs of Dawn.

23 Regardless of whether the agreement is characterized as a "management" agreement or
24 a "fee for service" agreement as disputed by the parties' experts, the critical matter is that
25 Newmont in fact undertook the obligation under the Management Agreement and carried out
26 *its* business as a direct participant in the management of all operations of Dawn, including its

1 polluting operations at the Midnite Mine, by providing directors, officers, managers, and
2 technical staff to Dawn who directed the operations of the Mine and the corporate affairs of
3 Dawn. This included providing the most critically involved players in the decisionmaking at
4 the Mine – the resident manager, the off-site general managers, and Pete Loncar as Dawn’s
5 first mine superintendent. In order to ensure the management of the operation was well-run,
6 Newmont also furnished senior officials as officers and directors (so-called “dual hat”
7 individuals) and technical specialists Dawn needed to make decisions on mining and
8 environmental affairs.

9 As the *Bestfoods* court observed and consistent with long accepted principles of agency
10 law, the “fact that a corporate subsidiary happens to own a polluting facility operated by its
11 parent does nothing, then, to displace the rule that the parent ‘corporation is [itself] responsible
12 for the wrongs committed by its agents in the course of its business.’” 524 U.S. at 65. The
13 Court concluded, “If any such act of operating a corporate subsidiary's facility is done on
14 behalf of the parent corporation, the existence of the parent-subsidary relationship is simply
15 irrelevant to direct liability.” Because a corporation cannot physically act except through its
16 employees and authorized agents, principles of agency law come front and center, even in
17 cases of the assertion of direct liability. One such principle is that “[a] person may be the
18 servant of two masters, not joint employers, at one time as to one act, if the service to one does
19 not involve abandonment of the service to the other.” *Dazo v. Globe Airport Security, Servs.*,
20 295 F.3d 934 (9th Cir. 2002).

21 The so-called “dual hat” Newmont personnel it provided to Dawn were discharging both
22 Newmont’s duties as “manager” of Dawn’s operations and at the same time were acting on
23 behalf of Dawn under the authority of their Dawn titles. There is also evidence of these dual
24 hat individuals acting arguably contrary to the interests of Dawn when sending the message
25 that Newmont would operate Dawn as it wanted. For example, in what the court has coined
26 the “that’s-the-way-it-is letter”, Newmont denied a request from the Midnite Mines

1 minority member of Dawn’s executive committee to participate more actively in managing
2 Dawn’s operations. Newmont flatly stated that practice at all its operating subsidiaries was
3 to give the resident manager substantial autonomy without executive committee input, and that
4 is how things would be done at Dawn as well. Ex. 114.

5 Yet another example, is Newmont’s vice-president of operations M.D. Banghart (and
6 also Dawn’s vice-president) refusal of MMI’s request to have its geologist inspect the Dawn
7 property, explaining in a memo to the file: “that it was not Newmont practice to allow brokers
8 to send geologists and engineers to examine mining properties under its management.” Ex.
9 922e. In the same memo, Mr. Banghart states that he explained to the MMI nominee that
10 when giving out information to the public MMI needed to “stay in line with...customary
11 Newmont policy.” *Id.* While the court concludes the evidence supports the conclusion that
12 Newmont operated the facility pursuant to the terms 1956 Management Agreement, at a
13 minimum, the evidence also supports that Newmont was operating the facility alongside Dawn
14 jointly. Newmont is liable as an operator under Section 107(a) of CERCLA, 42 U.S.C. §
15 9607(a), for its actions in managing, directing or conducting operations at the Midnite Mine,
16 because its actions exceeded the norms of corporate parental oversight of subsidiaries based
17 on its role as an investor.

18 Both in terms of degree and detail, Newmont’s involvement in reviewing and managing
19 Dawn’s operations exceeded the actions typically associated with investor status such as,
20 oversight of finance and budgetary choices, monitoring performance and expression of general
21 policies. *Bestfoods*, 524 U.S. at 72. The facts show a level of participation and control by
22 Newmont that exceeds the bounds of a merely interested investor and instead became an active
23 operator.

24 The court’s factual findings surrounding Newmont’s evolution from a holding company
25 to a company that “actually...manages properties” support the foregoing conclusion. In 1969,
26 President and Chairman, Plato Malozemoff, gave a series of speeches describing

1 how Newmont managed the operations of some of Newmont’s subsidiaries, and how its
2 primary method of doing so was to appoint “highly capable men” as the resident management
3 and give them “a high degree of autonomy.”

4 In the case of Dawn, Dawn’s management structure was always set by Newmont, not
5 Dawn, based on Newmont’s determination as to how to best manage the operation. For
6 example, it was Newmont’s idea to create the position of the off-site general manager for its
7 three operations in the Western United States – Carlin, Idarado, and Dawn. Quivik Test. ¶¶
8 223-236; Robert Thompson Test. ¶ 36. Moreover, it was always Newmont, not Dawn, who
9 determined who the Dawn resident manager - the main decisionmaker at the Mine-would be.
10 Robert Fulton, Dawn’s first resident manager, was picked by Newmont months before the
11 1956 Management Agreement was in place.

12 Moreover, as *Bestfoods* advises, investor status wanes when agents of the parent with
13 no subsidiary hat to wear make decisions involving the facility which exceed the norms of
14 general oversight. As part of Newmont’s management practices, Newmont developed
15 corporate expertise in various disciplines needed for mining operations and used these
16 expertise (and created NSL) to facilitate the management of its subsidiary operations. This
17 meant, in the case of Dawn, that at times Newmont officials with no Dawn titles performed
18 critical functions: for example, they negotiated the first mining contract with the AEC; they
19 designed the first Dawn mill; they negotiated sales contracts, which in turn affected the pace
20 of mining operations required for each year; they played a significant role in rehabilitating the
21 Dawn mill for the second operating period; and they determined transfers of Newmont
22 personnel between other Newmont operating subsidiaries and Dawn, particularly during the
23 periods of significant operational change.

24 **D. DISPUTED COSTS ARE NOT INCONSISTENT WITH THE NATIONAL CONTINGENCY PLAN**

1 CERCLA § 107 provides for the recovery of “*all costs* of removal or remedial action
2 incurred by the United States Government...not inconsistent with the national contingency
3 plan.” 42 U.S.C. § 9607(a)(4)(A) (emphasis added).

4 The EPA is generally entitled to all costs, even if unreasonable or unnecessary unless
5 the defendant proves that such costs are inconsistent with the NCP. *See In re Bell Petroleum*
6 *Serv. Inc.*, 3 F.3d 889, 906 (5th Cir.1993).

7 Judicial review of the EPA's response action is governed by statute:

8 (j) Judicial review

9 (1) Limitation

10 In any judicial action under this chapter, judicial review of any issues concerning
11 the adequacy of any response action taken or ordered by the President shall be
12 limited to the administrative record. Otherwise applicable principles of
13 administrative law shall govern whether any supplemental materials may be
14 considered by the court.

15 (2) Standard

16 In considering objections raised in any judicial action under this chapter, the
17 court shall uphold the President's decision in selecting the response action unless
18 the objecting party can demonstrate, on the administrative record, that the
19 decision was arbitrary and capricious or otherwise not in accordance with law.

20 (3) Remedy

21 If the court finds that the selection of the response action was arbitrary and
22 capricious or otherwise not in accordance with law, the court shall award (A)
23 only the response costs or damages that are not inconsistent with the national
24 contingency plan, and (B) such other relief as is consistent with the National
25 Contingency Plan.

26 (4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages
only if the errors were so serious and related to matters of such central relevance
to the action that the action would have been significantly changed had such
errors not been made.

42 U.S.C. § 9613(j).

The court has already found (it was undisputed) at the summary judgment stage that the
EPA has provided sufficient information to the court to establish a prima facie case that the

1 government is entitled to its costs. *See U.S. v. Chapman*, 146 F.3d 1166, 1169 (9th Cir.1998);
2 42 U.S.C. § 9607(a)(4)(A) (defendants may be held liable for “all costs of removal or remedial
3 action incurred by the United States Government or a State or an Indian tribe not inconsistent
4 with the national contingency plan”). The costs are presumed to be recoverable, unless Dawn
5 is able to demonstrate on the Administrative Record that the government's choice of response
6 action is inconsistent with the NCP. *Chapman*, 146 F.3d at 1169. “The NCP is designed to
7 make the party seeking response costs choose a cost-effective course of action to protect
8 public health and the environment. If that party follows the detailed process set forth in the
9 NCP, then its costs are not inconsistent with the NCP.” *Id.* It is therefore not the court’s role
10 to decide the cost-effectiveness of individual expenditures, but rather it must evaluate the
11 government’s action for consistency with the NCP. The court looks to the NCP that was in
12 effect at the time that the EPA incurred the response costs.

13 To show that the government's response action is inconsistent with the NCP, Dawn must
14 demonstrate that the EPA acted arbitrarily and capriciously in choosing a particular response
15 action to respond to a hazardous waste site. *See Washington State Dept. of Transp. v.*
16 *Washington Natural Gas Co.*, 59 F.3d 793, 802 (9th Cir.1995). The narrow arbitrary and
17 capricious standard of review is applied “because determining the appropriate removal and
18 remedial action involves specialized knowledge and expertise, [and therefore] the choice of
19 a particular cleanup method is a matter within the discretion of the EPA.” *United States v.*
20 *Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*, 810 F.2d 726 (8th Cir.1986),
21 cert. denied, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987). An agency's decision is
22 arbitrary and capricious if the agency “relied on factors which Congress has not intended it to
23 consider, entirely failed to consider an important aspect of the problem, offered an explanation
24 for its decision that runs counter to the evidence before the agency, or is so
25 implausible that it could not be ascribed to a difference in view or the product of agency
26 expertise.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43

1 (1983). “[T]he agency must examine the relevant data and articulate a satisfactory explanation
2 for its action including a rational connection between the facts found and the choice made....In
3 reviewing that explanation, [the Court] must consider whether the decision was based on a
4 consideration of the relevant factors and whether there has been a clear error of judgment. *In*
5 *re Bell Petroleum Serv. Inc.*, 3 F.3d 889, 905 (5th Cir.1993).

6 More specifically, in determining the scope of the RI/FS, 40 CFR 300.430(b), requires
7 the EPA to tailor its study to site circumstances so that the scope and detail of the analysis is
8 “appropriate to the complexity of site problems being addressed.” During scoping, the EPA
9 must:

- 10 (1) Assemble and evaluate existing data on the site, including the results of any
11 removal actions, remedial preliminary assessment and site inspections, and the
12 NPL listing process.
- (2) Develop a conceptual understanding of the site based on the evaluation of
existing data described in paragraph (b)(1) of this section.
- 13 (8) Develop sampling and analysis plans that shall provide a process for obtaining
14 data of sufficient quality and quantity to satisfy data needs.

14 40 CFR 300.430(b).

15 The EPA is required to act upon the informed scientific opinion of its employees. Thus,
16 even when specialists express conflicting views, the agency must be accorded the discretion
17 to rely on the reasonable opinions of its own qualified experts at the time, even if, as an
18 original matter, a court might find the contrary views expressed in litigation more persuasive.

19 *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377
20 (1989). When, as in this case, examining scientific determinations, a reviewing court must be
21 generally at its most deferential. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*,
22 462 U.S. 87, 103, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). The court has reviewed the

23 Administrative Record. The court has also relied upon the affidavits of government expert
24 Ellen Hale and Dawn’s expert Paul Rosasco solely to evaluate whether there is anything in the
25 record to support the agency's decision and to assist the court in understanding the voluminous
26

1 and detailed scientific content of the record evidence. From this review the court concludes
2 the EPA's decision to conduct the sampling disputed by Dawn was not arbitrary and
3 capricious and was consistent with the National Contingency Plan. Thus the associated
4 approximately \$1.8 million in CERCLA response costs incurred by the United States at the
5 Midnite Mine are recoverable under CERCLA.

6 Dawn's contention at trial was that given the time-frame in which EPA made its
7 decisions regarding what sampling to conduct at the site, it did not give adequate attention to
8 the data already collected and submitted to the EPA pursuant to the Interim Agreement. While
9 Dawn can not deny the Administrative Record includes statements that the agency considered
10 the Interim Agreement data, citing to the chronology of events, Dawn claims the record lacks
11 evidence of a *sufficiently detailed analysis* of the data (and data reports) prior to the
12 development of the EPA's sampling plan. Moreover, the record shows the EPA conducted a
13 more thorough evaluation of the data after EPA had finalized its sampling plan. Thus, Dawn
14 argues, the agency's decision violated the NCP because the record necessarily lacks a
15 satisfactory explanation of the basis for its decision to collect the samples at issue. It is
16 Dawn's contention the EPA largely ignored the data and thus went to unnecessary expense
17 duplicating sampling efforts.

18 The record evidences that the agency both assembled and examined the existing data,
19 including site specific data, and articulated a satisfactory explanation for its decision to
20 conduct the sampling Dawn disputes, including a "rational connection between the facts found
21 and the choice made." *See Bell Petroleum, 3 F.3d at 900; Burlington Truck Lines v. United*
22 *States, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246, 9 L.Ed.2d 207 (1962).* The court does not
23 find that the lack of a more detailed analysis or discussion of the existing data prior to the
24 decision to conduct the sampling, evinces a clear error in judgment.

25 Dawn's expert supported assertions that the sampling was duplicative and/or
26 unnecessary and that the RI work was "wasteful, ill conceived and poorly conducted" (Ct. Rec.

1 444) does not overcome the deference accorded to the EPA's expertise. Dawn's position is
2 ascribed to a difference in view with the decisionmaker, based in part upon a retrospective
3 view of information made available and events occurring subsequent to or simultaneous with
4 the EPA's decision-making process.

5 The fact that a particular response action was perhaps not the best or most cost-effective
6 choice in hindsight does not make the response action arbitrary and capricious.

7 **E. JUDGMENTS ON THE UNITED STATES' CLAIMS AGAINST THE DEFENDANTS**

8 *Joint and Several Liability or Divisibility.* Section 107's basic liability provision
9 provides that "subject only to the defenses set forth in subsection (b) of this section [PRPs
10 shall be liable for]-(A) all costs of removal or remedial action incurred by the United States
11 Government or a State or an Indian tribe not inconsistent with the national contingency plan
12" § 9607(a). The scope of liability in a § 9607(a) cost recovery action is said to be strict,
13 joint, and several, unless the harm is divisible. *See U.S. v. Burlington Northern & Santa Fe*
14 *Ry. Co.*, 520 F.3d 918, 934 (9th Cir. 2008)(citing *Fireman's Fund Ins. Co. v. City of Lodi*, 302
15 F.3d 928, 945 (9th Cir. 2002) and *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863,
16 871 (9th Cir. 2001)); *see also, California v. Montrose Chemical Corp. of California*, 104 F.3d
17 1507, 1518 n. 9 (9th Cir. 1997).

18 In order to avoid joint and several liability on a § 107(a) cost recovery claim and
19 succeed on a divisibility defense, the direct defendant must show the harm at issue is capable
20 of apportionment and to provide sufficient evidence for the court to apportion liability. *See*
21 *Burlington Northern & Santa Fe Ry. Co.*, 520 F.3d at 942 (9th Cir. 2008). Newmont's
22 divisibility argument at trial was based upon its contention that its liability, if any, should be
23 limited to its discrete involvement during the "early exploration period." Newmont contended
24 at trial that the evidence demonstrated the "footprint" of the activities during the early period
25 was subsumed by more invasive excavation, and therefore, any harm from these early efforts
26 "was so negligible as to be de minimis, especially compared to the harm

1 associated with Phase I and Phase II of mining.” See Ct. Rec. 459 [Prop. Findings of Fact]
2 at 21. The evidence requires the court to reject these contentions. Newmont has not met its
3 burden of demonstrating the divisibility defense to liability. Newmont acknowledged this to
4 be the case post-trial in light of the court’s oral ruling at trial. Ct. Rec. 487.

5 *Prejudgment Interest.* The award of prejudgment interest is provided for in § 107(a) of
6 CERCLA, 42 U.S.C. § 9607(a), and is mandatory. *United States v. Consolidation Coal Co.*,
7 345 F.3d 409, 415 (6th Cir. 2003). Under § 107(a), prejudgment interest accrues “from the
8 later of (I) the date payment of a specified amount is demanded in writing, or (ii) the date of
9 the expenditure concerned.” 42 U.S.C. § 9607(a).

10 *Judgment as to Past Response Costs.* Pursuant 42 U.S.C. § 9607(a) and the court’s
11 conclusions herein and at the summary judgment stage, the court concludes the United States
12 is entitled to a judgment in its favor on its cost recovery claims under § 9607(a) that Newmont
13 and Dawn are jointly and severally liable for recoverable response costs incurred as of
14 December 31, 2004 in responding to the release of hazardous substances at the Midnite Mine
15 Site, plus pre-judgment interest.

16 *Total Amount of Costs Recoverable under CERCLA.* The court previously directed the
17 United States to submit its calculation of the amount of costs incurred, including any pre-
18 judgment interest. The United States filed its submission (Ct. Rec. 486, Att. A [Declaration
19 of Ruth Broome]) and neither Dawn nor Newmont have objected to the United States’
20 calculation. The United States’ submission reflects the total costs incurred by the United
21 States as of December 31, 2004 was \$12,346,336.99 and the amount of pre-judgment interest
22 as calculated from September 1, 1999 through July 31, 2008 is \$3,476,310.86.

23 Accordingly, the total liability amount upon which to base a judgment for the past
24 response costs incurred until December 31, 2004 is \$ **15,822,647.85**.

25 *Declaratory Judgment.* In an action for recovery of response costs, “the court shall
26 enter a declaratory judgment on liability for response costs or damages that will be binding on

1 any subsequent action or actions to recover further response costs or damages.” 42 U.S.C. §
2 9613(g)(2) (emphasis added).

3 The United States is entitled to a declaratory judgment that Dawn and Newmont are
4 jointly and severally liable for all response costs consistent with the National Contingency
5 Plan incurred after December 31, 2004 by the United States in responding to the release of
6 hazardous substances at the Midnite Mine Site, pursuant to Section 113(g)(2) of CERCLA,
7 42 U.S.C. § 9613(g)(2).

8 **F. CONTRIBUTION CLAIMS OF NEWMONT AND DAWN: ALLOCATION**

9 CERCLA’s § 113(f), 42 U.S.C. § 9613(f), is intended to provide a liable party under
10 CERCLA with a cause of action to mitigate what could be harsh effects of joint and several
11 liability imposed under § 107(a). *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d
12 1574, 1582 (5th Cir. 1997). Section 113(f)(1) states: “Any person may seek contribution from
13 any other person who is liable or potentially liable under section 9607(a) of this title, during
14 or following any civil action under section 9606 of this title or under section 9607(a) of this
15 title.” 42 U.S.C. § 9613(f). This court held on summary judgment that the United States was
16 liable in contribution as an “owner” under CERCLA based upon the United States’ ownership
17 and title to the Spokane Indian Reservation land on which the Midnite Mine is located and its
18 actions as the owner.

19 Congress included the contribution provision in the CERCLA statute to “compensate
20 for the potentially unfair burden that section 107 joint and strict liability might impose on
21 named PRP's, when other PRP's have not been named in an action brought by the government
22 under that section.” *U.S. v. Kramer*, 757 F.Supp. 397, 412 (D.N.J.1991). The contribution
23 liability of a responsible person under § 113 corresponds to that party's equitable share of the
24 total liability. *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 945 (9th Cir.
25 2002) (internal citations omitted). While a defendant in a § 107 cost-recovery action may be
26 jointly and severally liable for the total response cost incurred by the Government,

1 “[t]hird-party defendants ... are, by judicial precedent, only severally liable for contribution
2 under § 113(f)(1).” *State of N.J., Dept. of Environmental Protection v. Gloucester*
3 *Environmental Management Services*, 821 F.Supp. 999, 1004 (D.N.J.1993) (citing *U.S. v.*
4 *Kramer*, 757 F.Supp. 397, 414 (D.N.J.1991)).

5 In apportioning response costs among responsible parties, CERCLA requires only that
6 the Court use “such equitable factors as the court determines are appropriate.” 42 U.S.C.
7 9613(f)(1). In enacting the contribution section of CERCLA, Congress was concerned “that
8 the relative culpability of each responsible party be considered in determining the
9 proportionate share of costs each must bear.” *United States v. Monsanto Co.*, 858 F.2d 160,
10 173 n.29 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *Environmental Transp. Sys., Inc.*,
11 969 F.2d at 508 (“[T]he language and legislative history of [section 113(f)] indicates, at the
12 very least, Congress’[] intent that courts should equitably allocate costs of cleanup according
13 to the relative culpability of the parties rather than [according to] an automatic equal shares
14 rule.”). To determine culpability, many courts, including the Ninth Circuit, have endorsed the
15 consideration of the “Gore factors” that were enumerated in a bill sponsored by then-
16 Congressman Albert Gore, but never enacted. *See U.S. v. Burlington Northern & Santa Fe*
17 *Ry. Co.*, 520 F.3d 918, 940 n. 26 (9th Cir. 2008). The Gore factors include:

- 18 (i) the ability of the parties to demonstrate that their contribution to a discharge,
19 release or disposal of a hazardous waste can be distinguished;
- 20 (ii) the amount of the hazardous waste involved;
- 21 (iii) the degree of toxicity of the hazardous waste involved;
- 22 (iv) the degree of involvement by the parties in the generation, transportation,
23 treatment, storage, or disposal of the hazardous waste;
- 24 (v) the degree of care exercised by the parties with respect to the hazardous waste
25 concerned, taking into account the characteristics of such hazardous waste; and
- 26 (vi) the degree of cooperation by the parties with Federal, State or local officials to
prevent any harm to the public health or the environment.

1 *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508-09 (7th Cir. 1992).

2 This list is not exhaustive. One court distilled the following four “critical factors”:

- 3 (I) The extent to which cleanup costs are attributable to wastes for which a party is
4 responsible;
- 5 (ii) The party's level of culpability;
- 6 (iii) The degree to which the party benefitted from disposal of the waste.
- 7 (iv) The party's ability to pay its share of the cost.

8 *United States v. Davis*, 31 F.Supp.2d 45, 63 (D.R.I.1998), aff'd, 261 F.3d 1 (1st Cir. 2001);

9 Robert P. Dahlquist, Making Sense of Superfund Allocation Decisions: The Rough Justice of
10 Negotiated and Litigated Allocations, 31 *Envtl. L. Rep.* 11098, 11099 (2001)(“The Gore
11 factors are most relevant in academic and theoretical analysis of the way Superfund liabilities
12 should be allocated. But in the real world Judge Torre's list of four critical factors often
13 provides the basis upon which Superfund allocations are made.”). Indeed, “the court may
14 consider the state of mind of the parties, their economic status, any contracts between them
15 bearing on the subject, any traditional equitable defenses as mitigating factors and any other
16 factors deemed appropriate to balance the equities in the totality of the circumstances.” *United*
17 *States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572-73 (6th Cir. 1991); accord *Envtl. Transp. Sys.,*
18 *Inc.*, 969 F.2d at 509 (7th Cir. 1992) (“[A] court may consider any factors appropriate to
19 balance the equities in the totality of the circumstances.”); *Weyerhaeuser Co. v. Koppers Co.*,
20 771 F. Supp. 1420, 1426 (D. Md. 1991) (“[T]he Court is not limited to any specific equitable
21 factors but may consider the factors relevant to the circumstances of the case.”).

22 In considering the degree to which a party has benefitted, courts have considered both
23 financial profits as well as non-monetary benefits, such as the furthering of war or national
24 defense efforts. See, e.g., *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d
25 1019, 1026 (9th Cir. 2002) (affirming the district court's allocation of 100% of the response
26 costs for cleanup of a former World War II rubber production facility); *United States v. Shell*

1 *Oil Co.*, 294 F.3d 1045, 1060 (9th Cir. 2001) (affirming the district court's allocation of 100%
2 of the response costs to the United States in part because the activity that caused the
3 contamination, the production of aviation gasoline, was "properly seen as part of the war effort
4 for which the American public as a whole should pay"); *see also FMC Corp. v. U.S. Dep't of*
5 *Commerce*, 29 F.3d 833, 846 (3d Cir. 1994) (en banc) ("Furthermore, we point out that at
6 bottom our result simply places a cost of the war on the United States, and thus on society as
7 a whole, a result which is neither untoward nor inconsistent with the policy underlying
8 CERCLA."). Additionally, "[t]he knowledge and/or acquiescence of the parties in the
9 contaminating activities", as well as any support provided for those activities, is a relevant
10 equitable factor for a court to consider when allocating response costs among liable parties.
11 *Weyerhaeuser*, 771 F. Supp. 1420, 1426 (D. Md. 1991).

12 Having considered all of the credible evidence presented at trial and considering all of
13 the circumstances of this case as outlined in the court's factual findings, the court finds the
14 following factors most critical to the court's allocation in this case:

15 *The benefits each of the liable parties received from the activities which caused releases*
16 *of hazardous substances;*

17 *Each of the liable parties' knowledge of, or acquiescence in, the activities that caused*
18 *the release of hazardous substances at the site;*

19 *The degree of involvement by all the parties in the generation, transportation,*
20 *treatment, storage, or disposal of the hazardous waste;*

21 *The degree of control and care exercised by all the parties with respect to the hazardous*
22 *waste concerned, taking into account the characteristics of such hazardous waste. This*
23 *includes the authority granted the United States over its leases and pursuant to those leases,*
24 *the Mine operations;*

25 *The degree of cooperation by the parties with Federal, State, or local officials to*
26 *prevent any harm to the public health or the environment;*

1 *The degree to which all the parties directly oversaw, managed, or conducted activities*
2 *related to pollution at the site.*

3 Unraveling the over fifty-year history of the parties' involvement at the Midnite Mine
4 in view of these equitable factors, the court concludes that the United States' equitable share
5 of responsibility under CERCLA is one-third.

6 The court recognizes that Dawn and Newmont have not advocated for the court to
7 allocate shares of responsibility between each of them (other than to argue Dawn represents
8 an orphan share, which the court discusses below), perhaps because the contribution claims
9 are made only against the United States and thus the only necessary determination is that of
10 the United States' share. However, the court has discretion to account for the role of and
11 equitably allocate responsibility to *all* liable parties. Applying the foregoing equitable factors
12 to all the parties in this case, the court finds that a fair and equitable allocation of Dawn's share
13 of the response costs is one-third and Newmont's share is one-third under the facts of this case.

14 As set forth in the court's Findings of Fact, each of the factors identified by the court
15 apply to each of the liable parties in this case. Each of the parties benefitted from the Mine's
16 polluting operations; each of them, from the onset of mining operations, were extensively
17 involved at the Mine and with the Mining operations; and each of them had knowledge of and
18 acquiesced to the site specific and inherent environmental issues associated with open pit
19 mining. In the court's view, each of the parties in their own way allowed the contamination
20 problems at the Mine to persist and worsen over time, and each of the parties had their own
21 equal authority and opportunity to assure better stewardship of this land.

22 The United States, as an owner of the Mine, both knew that Dawn would mine uranium
23 at the Mine, specifically contracted for Dawn to mine uranium at the Mine, and knew of the
24 inherent environmental problems associated with open pit uranium mining. The Midnite
25 Mine's uranium production provided the United States with a vital national security benefit
26 by supplying uranium for the nation's nuclear weapon and energy needs during the Cold War.

1 During Phase I, the United States was the sole purchaser of uranium from the Mine. The
2 AEC's contracts directly controlled the amount production at the Mine and the AEC's total
3 purchases of 1,143,142 tons of ore during the first 12 years of the Mine's operation account
4 for more than 36 % of the uranium produced by the Mine. Exs. 1848; 1849; 1850. Without
5 the direct involvement and encouragement of the United States, the Mine would not have been
6 developed at the time it did.

7 Additionally, one of the goals of the AEC's domestic uranium procurement program was
8 to establish a domestic uranium production industry to support a viable commercial nuclear
9 power industry, and the Mine was a result of these efforts. Thus, even during Phase II, the
10 Midnite Mine supplied nuclear material to the domestic power industry during the 1970's
11 which provided the United States with a significant strategic benefit in the form of a reliable,
12 local and independent source of energy.

13 The United States as owner and landlord, knew of and acquiesced in Dawn and
14 Newmont's activities at the Mine. Under its responsibilities as landlord and lease
15 administrator, from the onset of mining operations the United States had both the authority and
16 duty to inspect the mining operations, monitor water quality, control the rents and royalty
17 obligations, conduct oversight and audits, and set and monitor the amount of the reclamation
18 bond/fund. Both the action and inaction of the United States pursuant to its responsibilities
19 under the leases directly impacted the operation and extent of reclamation efforts at the Mine.

20 Newmont and Dawn, on the other hand, not the United States, conducted the mining
21 activities that have caused the environmental problems that are now being addressed by EPA.
22 Dawn and Newmont sought to profit financially and did profit from the operation. While steps
23 were taken to address pollution issues at the Mine, there was a demonstrated lack of care and
24 recalcitrance in reclaiming the mine site. The majority of actions taken by Dawn and
25 Newmont were performed not on their own initiative, but pursuant to government involvement
26 and orders to do so.

1 ***Orphan Share and provisional allocation.*** One additional factor some courts consider
2 when allocating responsibility is the inability of an entity to pay their full share of
3 responsibility. “A party otherwise qualifying as a responsible party under CERCLA may be
4 defunct, bankrupt, uninsured, or otherwise lack the resources to bear its ideal measure of
5 responsibility in monetary terms.” *U.S. v. Kramer*, 953 F.Supp. 592, 595 (D.N.J. 1997). This
6 inability to assign an ideal measure of monetary responsibility to an otherwise responsible
7 party, gives rise to a so-called “orphan share” under CERCLA. The existence of an orphan
8 share, may be cause for the court to consider the need to increase the ideal allocation of liable
9 parties. *Id.* The amount of an orphan share is usually measured by

10 the gap between a party's narrowly defined ideal share (based on perfect knowledge of
11 harm caused by that party only, expressed as a proportion of the total costs of
12 remediation at the site) and the party's actual share (if equitably apportioned among all
responsible parties considering such factors as, for example, the proportion of the
party's wastes-however measured-to the total wastes for which responsible parties have

13 been identified, and the ability of each party to pay for its responsible share when
14 financially disabled parties are excluded from consideration.

14 *Id.*

15 The orphan share concept was not advanced by the Defendants as an equitable factor
16 the court should consider until *after* trial. In their post-trial briefing to the court, Defendants
17 jointly argue “In making an allocation and entering a judgment in this case, a critical fact is
18 Dawn’s lack of assets and its acknowledge inability to pay its share of past or future response
19 costs.” Ct. Rec. 487 at 5. Defendants now urge the court to divide Dawn’s share or
20 responsibility equally between Newmont and the United States, leaving Dawn with a zero
21 allocation.

22 Despite Defendants’ apparent view that it was a “critical fact” for the court to consider
23 (and presumably find), the parties presented no evidence at trial and the court was never asked
24 to determine the existence or size of any orphan share. Perhaps this is somewhat explainable
25 considering Newmont’s position at trial that it was not liable for *any* of the contamination at
26

1 the Midnite Mine. Nevertheless, in light of Defendants' post-trial argument, the court
2 permitted the parties the opportunity to supplement the record on this issue.

3 On September 11, 2008, Dawn filed the Affidavit of Thomas P. Mahoney which
4 estimates Dawn's net worth is a negative -\$47,762,153. Ct. Rec. 495. Dawn's statement of
5 assets and liabilities lists "Land" (valued at \$309,523.00) as Dawn's only asset, and "Notes
6 payable to Newmont" and reclamation as its only liabilities (valued at a total \$48,071,676.00).
7 *Id.* The Affidavit also provides evidence that although Dawn ceased operations in 1981 and
8 since that time has had "no source of revenue", Dawn has continued to exist operating the
9 water treatment plant at the Midnite Mine and reclaiming the mill near Ford, Washington
10 using funds "loaned" from Newmont. No further information was supplied by the Defendants.

11 Based on this limited record, the court is unable to determine whether Dawn is "defunct,
12 bankrupt, uninsured, or otherwise lacks the resources to bear its ideal measure of
13 responsibility in monetary terms." *Kramer*, 953 F.Supp. at 595. Defendants have not
14 provided any testimony on Dawn's ability to pay its share of responsibility in this case. In
15 addition, as the United States identified in its response to Dawn's Affidavit (see Ct. Rec. 498
16 and Ct. Rec. 500), missing from the record on this issue is evidence regarding any potentially
17 applicable liability insurance policy insuring Dawn and evidence regarding whether Newmont
18 has provided any ongoing assurances to cover Dawn's future financial needs, including
19 judgments. Accordingly, the court's equitable allocation has not included any orphan share
20 in arriving at the appropriate share of responsibility of the liable parties.

21 **G. ALLOCATION JUDGMENT AND COSTS INCURRED AFTER DECEMBER 31, 2004**

22 The court's equitable allocation will not only apply to already incurred qualifying
23 response costs, but also to qualifying response costs incurred after December 31, 2004 and
24 future response costs that the parties are likely to incur. See 42 U.S.C. § 9613(g)(2); *Boeing*
25 *Co. v. Cascade Corp.*, 920 F.Supp. 1121, 1140 (D.Or. 1996)(explaining the logic in allowing
26 contribution plaintiff declaratory judgment allocating future costs, although the contribution

1 section of CERCLA does not expressly provide for declaratory relief). The court's final
2 equitable allocation will be reduced to a declaratory judgment to guide any future disputes
3 regarding allocation of future qualifying response costs.

4 Defendants have intimated that the court's declaratory judgment fixing the parties'
5 equitable share of future response costs should contain a contingency provision, generally
6 favored in CERCLA contribution actions, which authorizes the parties to re-litigate the
7 equitable allocation of *future costs* for good cause shown if *new events* or *new evidence* render
8 the current division inequitable. Ct. Rec. 487 at 10-11.

9 In imposing this allocation of future costs, the court has no reason to believe at this time
10 that it does not also accurately reflect the situation as it has likely existed since December 31,
11 2004 and is likely to exist throughout the remaining remediation. Pretrial, the court
12 specifically decided that fairness and judicial economy weighed against bifurcating the issues
13 of past and future costs and in favor of hearing at trial the entire issue of allocation, despite the
14 fact that the recoverability of future costs has been left for another day. Ct. Rec. 366 at 8.
15 Newmont had advised the court that it intended to proffer evidence at trial and to contend that
16 the equitable considerations informing the decision as to allocation of future costs would be
17 different since it would account for components of the remedy. *Id.* Despite being given the
18 opportunity to do so, very little evidence, if any, and no such argument was presented at trial.
19 Indeed, in their post-trial memorandum, Defendants advocated for the same allocation of
20 liability as to both past and future costs. Ct. Rec. 487 at 2. Accordingly, the court does not
21 foresee this allocation decision being subject to change in the future.

22 **IV. ORDER**

23 Pursuant to the foregoing Findings of Fact and Conclusions of Law and having fully
24 adjudicated the parties claims in this matter and a decision having been duly rendered, the
25 court having further determined there is no just reason for delay, hereby directs the Clerk of
26 the Court to enter Final Judgment on a separate document as follows:

1 1. Judgment for the United States on its claims against Newmont and against Dawn,
2 joint and severally, for the recovery of \$15,822,647.85 in costs incurred at the Midnite Mine
3 Superfund Site through December 31, 2004 (including prejudgment interest), pursuant to 42
4 U.S.C. § 9607(a).

5 2. Declaratory judgment in favor of the United States and against Dawn and against
6 Newmont, joint and severally, for response costs consistent with the National Contingency
7 Plan since December 31, 2004 and to be incurred by the United States in responding to the
8 release of hazardous substances at the Midnite Mine Superfund Site, pursuant to § 113(g)(2)
9 of CERCLA, 42 U.S.C. § 9613(g)(2). This part of the judgment bears interest, on each sum
10 of costs paid by the United States, from the later of (i) the date payment of a specified amount
11 is demanded in writing, or (ii) the date of the expenditure concerned, as provided in 42 U.S.C.
12 § 9607(a).

13 3. Judgment for Dawn and for Newmont on their claims against the United States for
14 contribution, pursuant to § 113(f) of CERCLA, 42 U.S.C. § 9613(f).

15 4. Declaratory judgment for Dawn and for Newmont on their claims for contribution
16 against the United States for response costs consistent with the National Contingency Plan
17 incurred after December 31, 2004 or to be incurred by the United States in responding to the
18 release of hazardous substances at the Midnite Mine Superfund Site, pursuant to 42 U.S.C. §
19 9613(g)(2).

20 5. The contribution judgment shall declare with respect to *all* past and future
21 recoverable costs of remediation, the United States' equitable share of the costs is one-third;
22 Newmont's equitable share of the costs is one-third; and Dawn's equitable share of the costs
23 is one-third. This part of the judgment bears postjudgment interest from the date the clerk
24 enters judgment on the docket. 28 U.S.C. § 1961.

25 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and judgment,
26 and furnish copies to counsel.

