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2
3 MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY
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5 SISTER MARY JO McDONALD, REVEREND
6 JOHN M. KADING, JOSEPHINE E. McDONALD,
7 HELEN WHERRY, ORABELLE EVANS, B. MADDEN,
8 DALE and SUE RAWLINGS, VIRGINIA WALKER,
9 PHILOMENA MICHALSKY, MAURICE H. ROTH,
10 JAMES McDONALD, JANET R. LINDH, GERALDINE
11 CHRISTIAENS, JAMES and SHARON WILLIAMS,
12 JOHN and J.C. McELHENNY, R.A. and IRENE
13 BOKSICH, JAMES SHEA, BETTY L. BORCHERT,
14 PRISCILLA BORCHERT, RONALD and RANAE
15 BORCHERT, FRANCES ALTMAN, BOB MOODY,
16 CHARLES E. REED, JUANITA and DAVID MONGER,
17 SHARON VINGOM, RICHARD ALCORN, DAN DOLAN,
18 LYNN RECKAS, RANDY and SHIRLEY WINSTEAD,
19 TOM TRACY, JOE VAN MEEL, and all others
similarly situated,

Cause No.: 90-C-90
Hon. Thomas A. Olson
Presiding Judge

D FILED -

DEC 27 1996

LORI MALONEY, CLERK
BY *Lori Maloney* DEPUTY CLERK

45.⁰⁰

51-284

15 DENNIS R. WASHINGTON; and THE BUTTE WATER
16 COMPANY, a New Jersey Corporation,

17 Defendants.
18

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING FINAL APPROVAL OF SETTLEMENT AGREEMENT

20 INTRODUCTION

21 This lawsuit has been brought by a class of individuals, as
22 described in the Final Pre-Trial Order dated September 9, 1996, and
23 as previously certified by the Court, as follows:

24 All persons or entities who have been billed for water
25 service in Silver Bow County, Montana, by the Butte Water
26 Company for at least three consecutive months at any time
27 between March 5, 1987 and December 31, 1991, and all
persons or entities who received Butte Water Company
services for at least three consecutive months between
March 5, 1987 and December 31, 1991.

1 The Class is suing Defendants Dennis Washington and the Butte
2 Water Company for failing to deliver adequate drinking and
3 household water to them. The case has been bifurcated and the
4 liability phase of the case was scheduled for a two-to-three week
5 judge trial commencing on October 7, 1996. On the eve of trial,
6 the Defendants, the spokesperson for the Plaintiff Class steering
7 committee, and non-party Butte-Silver Bow City-County (hereinafter
8 "Butte-Silver Bow") signed a Stipulation and Compromise Settlement
9 Agreement which was presented to the Court on October 7, 1996, for
10 its consideration.

FINDINGS OF FACT

A. The Settlement As Proposed On October 7, 1996.

14 1. The settlement agreement proposed by the parties on
15 October 7, 1996, had the following main components:

26 (b) Butte Water Company affirmatively represented to this
27 Court that it has liabilities and assets such that the \$1.5 million
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1 fund can be established, after payment of all liabilities of Butte
2 Water Company. Butte Water Company also agreed that its assets
3 would be dedicated first to fully fund the \$1.5 million account,
4 after payment due from it as a result of the settlement of a
5 federal lawsuit¹ in which it is a named defendant, and payment of
6 any associated interest or attorneys' fees ordered by that court,
7 before any Butte Water Company assets are used to pay Butte Water
8 Company payables or outstanding Butte Water Company attorneys' fees
9 and costs.

10 (c) Butte Water Company, with money supplied by Defendant
11 Washington, agreed to establish a second account, consisting of 2
12 million dollars. That account will be further supplemented, over
13 and above the \$2 million, by all remaining money in the account
14 described in paragraph 1(a) of these Findings, after payment of the
15 Plaintiff Class's attorneys' fees and costs, and by all remaining
16 assets of the Butte Water Company after payment of all other
17 outstanding liabilities of the Butte Water Company.

18 (d) The account described in paragraph 1(c) of these Findings
19 is for the benefit of the Plaintiff Class. The Plaintiff Class
20 steering committee recommended that the monies in that account be
21 used in its entirety within three years by the municipal water
22 department of Butte-Silver Bow for replacement of water mains in
23 the domestic water distribution system for Butte, subject to this
24 Court's approval of that recommendation.

25
26 ¹United States of America and State of Montana ex rel.
27 Department of Health and Environmental Sciences vs. Butte Water
Company, CV-91-100-BU-PGH, United States District Court for the
District of Montana (hereinafter "federal lawsuit").

1 (e) The funding of the initial \$2 million for the account
2 described in paragraph 1(c) of these Findings would be provided by
3 Defendant Dennis Washington. He agreed to arrange to deposit in
4 that account an amount of \$2 million over and above any remaining
5 Butte Water assets. This amount is to be deposited in said account
6 no later than five (5) days after this Court's final approval of
7 the settlement.

18 2. Within five (5) days of this Court's final approval of
19 this proposed settlement, Montana Resources, Inc. and Montana
20 Resources Partnership ("MRI" and "MR," respectively) would, via
21 quit claim deeds, transfer to the Butte-Silver Bow all of their
22 rights, title and interest in the Silver Lake water system and
23 Silver Lake water rights (collectively referred to as the "SLWS").
24 These quit claim deeds will be subject to the existing rights of
25 all downstream users and the rights of MR described in paragraph 8
26 of the Stipulation and Compromise Settlement Agreement.

27 3. The transfer of the Silver Lake Water System and Silver
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1 Lake water rights to Butte-Silver Bow will be subject to a
2 reservation of right and Butte-Silver Bow's contractual obligations
3 to deliver without interruption and in perpetuity an annual average
4 use of Silver Lake water delivered to the MR property a first right
5 of 1 million gallons per day. MR, its successors and assigns,
6 agree to pay to Butte-Silver Bow in perpetuity for said water the
7 sum of \$238,000 per year in quarterly installments. MR and its
8 successors and assigns will be entitled to use of up to 18 million
9 gallons per day on a first-right basis during "unplanned upset
10 conditions" and of not more than 7 million gallons per day, during
11 non-irrigation season if possible, during "planned upset
12 conditions." The payment of the \$238,000 per year will be
13 suspended for any period of suspension of the operation of the mine
14 of 120 consecutive days or more. Upon closure of the mine, MR, at
15 its discretion, may terminate its rights to the water and its
16 obligation to pay the fees.

17 4. Butte-Silver Bow agreed to use the \$238,000 per year it
18 receives from MR or its successors and assigns first for any and
19 all necessary water main replacement and domestic water
20 distribution system and then, only if no such water main
21 replacement is necessary, to repair, upgrade, and maintain the
22 domestic water distribution system in Butte. Beginning on
23 January 1, 2010, Butte-Silver Bow would begin deducting the direct
24 pumping costs to pump the water to MR's mine from the \$238,000 per
25 year it receives from MR or its successors and assigns. This
26 amount deducted shall be dedicated by Butte-Silver Bow to operation
27 and maintenance of the SLWS. All of the \$238,000 per year

1 remaining after that deduction would continue to be dedicated to
2 replacement of the domestic water distribution system and repair,
3 upgrade, and maintenance of the water distribution system in Butte.

4 5. Butte-Silver Bow guaranteed that it will maintain the
5 SLWS in a reasonable fashion to ensure delivery of MR's water.

6 6. With respect to the \$2 million which defendant Washington
7 agreed to contribute to the fund described in paragraph 1(c) of
8 these Findings, Butte-Silver Bow agreed that said amount will be
9 repaid, together with interest which will accrue at the rate of 7%
10 or a 90-day treasury bill, whichever is greater. Butte-Silver Bow
11 guaranteed that the interest accrued on the principal amount will
12 be paid each year until the principal is paid in full.

13 7. Butte-Silver Bow agreed that the repayment described in
14 paragraph 6 of these Findings will not be funded by increased rates
15 to the customers of Butte-Silver Bow Municipal Water Utility, nor
16 will it be funded by increased taxes from the general public of
17 Butte-Silver Bow. Rather, the repayment would be funded through
18 mechanisms paid for by the industrial users of Silver Lake water or
19 other industrial users.

20

21 B. Fairness Hearings And Public Comment.

22 8. On October 7, 1996, this Court held a hearing on the
23 parties' "Motion for Preliminary Fairness Evaluation and Proposed
24 Settlement and for Setting of Formal Fairness Hearing and Direction
25 of Notice Thereof." The following persons testified in favor of
26 the proposed settlement at that hearing:

27 a. Sister Mary Jo McDonald, spokesperson for the steering
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1 committee of the Plaintiff class;
2 b. Charles Phillips, Ph.D., utility expert;
3 c. Jack Lynch, executive of the Butte-Silver Bow; and
4 d. Dave Schultz, Manager, Butte-Silver Bow Municipal Water
5 Utility.

6 Attorneys for the Plaintiff Class, Defendant Butte Water
7 Company, and Defendant Dennis Washington also spoke in support of
8 the proposed settlement at the hearing.

9 9. All of the testimony presented at the October 7, 1996
10 preliminary fairness hearing was supportive of the proposed
11 settlement, as set forth in the parties' Stipulation and Compromise
12 Settlement Agreement. That stipulation was signed October 7, 1996
13 by the defendants, as well as by Jack Lynch, executive of the
14 Butte-Silver Bow, and Sister Mary Jo McDonald, spokesperson for the
15 Plaintiff Class Steering Committee. A copy of the stipulation was
16 filed with this Court. After hearing testimony, this Court issued
17 an order on October 9, 1996 which set forth the following:

18 (a) That the proposed settlement appeared to be fair to the
19 parties. This finding was merely preliminary and subject to a
20 further hearing after notice pursuant to Rule 23(e),
21 M.R.Civ.P.;

22 (b) That a hearing would be held, pursuant to Rule 23(e),
23 M.R.Civ.P., at the Butte-Silver Bow County Courthouse on
24 November 8, 1996, at 9:30 a.m. Class members would be free to
25 appear and provide comments or objections to the proposed
26 settlement at that time;

27 (c) That notice to the members of the class was to be
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1 published in the Montana Standard by Friday, October 11, 1996, and
2 again on Friday, November 1, 1996. The order set forth as
3 Attachment A thereto the form of the public notice for such
4 hearing;

5 (d) That the trial be postponed pending the further
6 proceedings outlined in the order.

7 10. The published notice ordered by the October 7, 1996
8 hearing was accomplished. See Dolan Affidavit dated November 7,
9 1996 (attached as Exhibit B to Plaintiffs' Memorandum Regarding
10 Approval Of Proposed Settlement Agreement dated November 7, 1996).
11 In addition to that notice, the parties mailed the notice to all
12 current water customers of the Butte-Silver Bow Municipal Water
13 Department on November 4, 1996. See Affidavit of Dave Schultz,
14 dated November 6, 1996 (attached as Exhibit C to Plaintiffs'
15 Memorandum Regarding Approval Of Proposed Settlement Agreement
16 dated November 7, 1996). This Court adopted that additional method
17 of notice at the November 8, 1996 hearing.

18 11. At the November 8, 1996 hearing, testimony was taken with
19 regard to the proposed settlement.

20 (a) Eight persons testified in support of the proposed
21 settlement including, among others, the following: (1) The
22 spokesperson for the Plaintiff Class steering committee, Sister
23 Mary Jo McDonald; (2) Plaintiff steering committee member Jim Shea
24 (albeit with reservations, particularly about the ARCO side
25 agreement); (3) Manager of Butte-Silver Bow's water department,
26 Dave Schultz; (4) Butte-Silver Bow Chief Executive, Jack Lynch;
27 and (5) Dennis Wright, a Butte physician and member of the Butte-
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1 Silver Bow Chamber of Commerce. Those speaking in favor of the
2 settlement emphasized that the settlement will help the citizens of
3 Butte resolve some of their remaining problems with their domestic
4 water distribution system, as well as help alleviate the severe
5 industrial water supply shortage which the Butte area experiences,
6 which will benefit the Class because of the economic benefits that
7 such water will have to the community.

8 b. The testimony from Butte-Silver Bow officials and
9 attorneys indicated that, in order for Butte-Silver Bow to accept
10 the ownership and operation of the SLWS, it needed to have in hand
11 water service and water rights agreements with several entities.
12 Two entities, the Atlantic Richfield Company ("ARCO") and Advanced
13 Silicon Materials, Inc. ("ASiMI") offered to provide financing
14 which Butte-Silver Bow needs to upgrade and maintain the SLWS,
15 while still delivering MR's water to the mine and using the
16 \$238,000 per year from MR to replace water mains in the domestic
17 water distribution system. In return, ARCO and ASiMI will receive
18 water from the SLWS. Also, Butte-Silver Bow and these entities
19 needed to enter into an agreement with several downstream
20 irrigators who have certain water rights claims on the SLWS, in
21 order to ensure that adequate water can be delivered to all
22 entities. These "ancillary" agreements were not in place as of the
23 November 8, 1996 hearing.

24 c. Three persons testified in opposition to the proposed
25 settlement, including the following: (1) a member of the Rocker
26 water and sewer district; (2) Mary Kay Craig, a representative
27 from the non-profit group CTEC, with has been monitoring the
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1 superfund cleanup in the Butte area; and (3) Thomas Brobrick, a
2 local citizen and class member. The member of the Rocker water and
3 sewer district raised several concerns, including that the Rocker
4 water and sewer district was loaned money from Butte-Silver Bow
5 which he felt should not have to be repaid, that wastewater (rather
6 than SLWS water) could be used for industrial uses, and that there
7 could be a restrictive use order in the future on water in the
8 area. Ms. Craig testified that she did not think this settlement
9 should affect the State's natural resource damage suit against
10 ARCO. Mr. Brobrick testified that he thought class members were
11 entitled to at least \$3,500 per person for their past problems with
12 Butte Water Company water.

13 d. Melvyn Rowling, a former engineer for the Anaconda
14 Company, did not testify in favor or against the proposed
15 settlement, but urged an addendum to the agreement which would list
16 and critique all water rights and property records associated with
17 the Silver Lake Water System.

18 e. Also introduced as Exhibit 1 at the November 8
19 hearing was a letter from Dale Rawlings, a member of the Plaintiff
20 Class steering committee, in opposition to the proposed settlement.
21 Mr. Rawlings' letter expresses concern that Butte-Silver Bow
22 officials used the proposed settlement to aid them in the recent
23 local elections, and that local industrial water users and the
24 Butte-Silver Bow officials used this case as a vehicle to gain
25 benefits for them.

26 f. Ed Beaudette, county attorney for Anaconda-Deer Lodge
27 County ("ADLC"), raised objections on behalf of ADLC, including

1 arguments that ADLC would lose tax revenue derived currently from
2 the portions of the SLWS in ADLC, that ADLC has a water rights
3 claim on Silver Lake Water, that ADLC has local permitting
4 processes that must be complied with in regard to maintenance,
5 upgrade, or operation of the SLWS in ADLC, and that the settlement
6 may affect ADLC's concerns with the ongoing superfund cleanup in
7 the area. ADLC is not a member of the Plaintiff Class, nor is it
8 a party to the lawsuit. ADLC spoke against the proposed settlement
9 and moved this Court to be joined in the lawsuit as an
10 indispensable party or a party needed for just adjudication or,
11 alternatively, moved to intervene. This Court denied those motions
12 at the hearing. This Court has no jurisdiction over the ADLC water
13 rights claims, potential change of use issues regarding the Silver
14 Lake water, the ongoing superfund lawsuits or cleanup, loss of tax
15 revenue concerns, or the local regulatory process to which ADLC
16 referred. This case has been litigated for 6 and 1/2 years, has
17 reached a critical point, and public comment has been received.
18 Allowing ADLC to enter as a party merely would draw out the process
19 unnecessarily.

20 g. Class counsel James H. Goetz spoke in favor of the
21 proposed settlement, contingent upon the execution of the ancillary
22 agreements between Butte-Silver Bow and non-parties to this lawsuit
23 which will facilitate the transfer of the SLWS and associated water
24 rights to Butte-Silver Bow, in a form which protects the Class's
25 interests.

26 h. Counsel for the Defendants, Ron MacDonald, also spoke
27 in favor of the agreement.

12. As a result of the testimony at the November 8, 1996 hearing, this Court ordered:

a. That the documents and ancillary agreements necessary to implement the proposed settlement be filed with the Clerk of Court by Friday, November 22, 1996.

6 b. That the written public comment period on the
7 proposed settlement be extended from November 8, 1996, to December
8 2, 1996.

9 c. That additional notice of the proposed settlement and
10 the new deadlines for documents and written public comment be
11 published in the Montana Standard.

12 d. That this Court would make a decision after December
13 2, 1996, regarding the fairness, adequacy, and reasonableness of
14 the proposed settlement. If the proposed settlement were approved,
15 the Court would hold a hearing on December 6, 1996, in Butte,
16 Montana, to determine Plaintiff Class's attorneys' fees and costs.

17 13. The notice described in paragraph 12(c) of these Findings
18 was published in the Montana Standard on November 13, 1996. See
19 Dolan Affidavit, dated December 2, 1996. In addition, the notice
20 was mailed out to all current water customers of the Butte-Silver
21 Bow Municipal Water Department on November 15, 1996. See Affidavit
22 of Dave Schultz, dated November 25, 1996. This Court hereby adopts
23 that additional method of notice.

24 14. Since the proposed settlement was first announced on
25 October 7, 1996, through December 2, 1996, Class counsel was
26 contacted by eighteen persons whom were presumed to be members of
27 the Class. Dolan Affidavit dated December 2, 1996. Of those, one

1 anonymous person wrote to oppose the settlement because he or she
2 felt that the Silver Lake water should be used for drinking water,
3 not industrial use. Id. Two persons contacted Class counsel and
4 stated that they did not like the fact that the monetary part of
5 the settlement was proposed for replacing water mains rather than
6 going directly to the Class members. Id. The remaining fifteen
7 persons who contacted Class counsel were merely seeking information
8 about the proposed settlement and did not indicate to Class counsel
9 whether they opposed or supported the settlement. Id. All of the
10 individuals were informed of their right to submit either oral
11 comments at the November 8, 1996 hearing or written comments
12 directly to this Court. Id.

13 15. Since the proposed settlement was first announced on
14 October 7, 1996, through December 2, 1996, the Court received
15 written comments from approximately fifteen (15) individuals
16 regarding the proposal. Two of those written comments supported
17 the proposed settlement, except that one of those commenters felt
18 that the proposed attorneys' fees award is too high. Three of the
19 written comments (including Mr. Brobrick who testified at the
20 November 8 hearing) expressed a belief that the cash portion of the
21 settlement should be paid to class members as damages. One of
22 those three also expressed disagreement with repayment of the \$2
23 million loan from Defendant Washington.

24 One commenter submitted two written documents. The first
25 opined against two million dollar loan from Washington to Butte-
26 Silver Bow, and charged that Butte-Silver Bow's Chief Executive is
27 too "friendly" with Defendant Washington to be unprejudiced in his

1 support of this settlement. The second written comment from that
2 person merely expresses a belief, evidently based upon a newspaper
3 article, that ASIMI was promised water from the SLWS before this
4 settlement was made public, and asks the Court to protect the Class
5 from such "underhanded government control."

6 One commenter was apparently confused in thinking that the
7 cash portion of the settlement was not going to be used for water
8 main replacement until after the year 2010, and urged that the
9 money be used immediately for that purpose, which is exactly what
10 the proposed settlement does.

11 Janet Lindh, a member of the Plaintiff Class steering
12 committee, expresses an opinion that Class counsel should be
13 awarded the majority of the \$1.5 million for fees and costs. Ms.
14 Lindh expressed concern about the difficulties and complications
15 that the proposed settlement has run into since October 7, 1996,
16 and still supports the settlement if the necessary implementing
17 agreements are in place.

18 The Clerk/Business Manager of the Ramsay school district
19 submitted a written request that the district be "included" in the
20 settlement because it fears a loss of tax revenue to the Ramsay
21 school district when the SLWS is transferred from private to public
22 hands.

23 One written comment merely states that he or she "had to get
24 water during that period."

25 Another commenter expressed several concerns with the proposed
26 settlement. First, he does not believe that resource damage action
27 by the State against ARCO should be mentioned in the settlement.

1 Second, he believes that the industrial water users should be
2 charged a rate that will compensate for lost tax revenue due to the
3 transfer of the system from private to public hands. Third, he
4 believes that the industrial water users of SLWS should pay the
5 total cost of maintenance and repair of the SLWS. Fourth, he
6 believes the \$238,000 paid by MR to Butte-Silver Bow each year
7 should have an inflation factor added to it. Fifth, he does not
8 believe that the \$2 million given by Defendant Washington should be
9 a loan.

10 Melvin Rowling testified at the November 8, 1996 hearing and
11 also submitted a written statement. Mr. Rowling does not oppose
12 the settlement, but feels that a more detailed review of the
13 documents, water rights, easements, etc. associated with the SLWS
14 should be appended to the settlement to ensure that future
15 conflicts regarding the system are minimized.

16 A former President and General Manager of the Butte Water
17 Company filed a written comment in opposition to the settlement.
18 It is his contention that there are questions regarding the SLWS
19 water rights and the SLWS water production and pipeline capacity,
20 that MR's payment of \$238,000 per year is too little, that ARCO's
21 needs for water could significantly affect the SLWS, and that the
22 replacement of water mains in Butte will not alleviate the water
23 quality problems of the water supplied by Basin Creek Reservoir.

24 A letter from the George Grant Chapter of Trout Unlimited
25 expressed concern that they have not had adequate time to study the
26 ancillary agreements to the proposed settlement. Trout Unlimited's
27 concern is that the net effect the proposed settlement will be less

1 water in the Clark Fork River. The Court finds that, first, Trout
2 Unlimited is not a member of the Class. Second, this Court does
3 not have jurisdiction over its concerns about water in the Clark
4 Fork River.

5 With respect to the ancillary agreements, the Court
6 acknowledges that the documents are complicated, as is to be
7 expected when a major water system and attendant water rights are
8 transferred. However, the terms of the proposed settlement, which
9 spell out the benefits to be received by the Class and the
10 obligations of the various parties regarding those benefits, are
11 not overly complicated and have been before the public since
12 October 7, 1996. The ancillary agreements carry out the terms of
13 the proposed settlement.

14 Finally, Mary Kay Craig, president of the Citizens' Technical
15 and Environmental Committee ("CTEC") and who testified at the
16 November 8 hearing, wrote a letter as a Class member and on behalf
17 of CTEC. The Court notes that CTEC is not a Class member. She
18 also objects to the short time frame in which to review the
19 ancillary documents. As discussed above, the Court notes that the
20 proposed settlement, not the ancillary documents, is before the
21 Court for approval. The Court is satisfied that the ancillary
22 documents carry out the terms of the proposed settlement. Ms.
23 Craig's letter is largely a reiteration of the testimony she gave
24 at the November 8, 1996 hearing at which she expressed concern
25 about the effect that this settlement has on the superfund issues
26 and the State of Montana's natural resources case in the federal
27 courts. The Court finds that, while there may be some effect on
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1 those issues by the settlement, it has no jurisdiction over those
2 issues, and that any such speculative effect does not render this
3 settlement unfair or unreasonable.

4

5 C. December 19th Enhancements To The Settlement As Proposed On
6 October 7, 1996.

7 16. On December 10, 1996, this Court entered an order stating
8 that it had considered the settlement as proposed on October 7,
9 1996, the ancillary agreements filed subsequent to the November 8,
10 1996 hearing, the written comments submitted to the court after the
11 November 8, 1996 hearing, and the testimony presented at that
12 hearing. The court noted that it was impressed by the monumental
13 effort and time expended by the people involved in the case to
14 bring about a mutually satisfactory remedy to the serious water
15 problem Butte and its citizens have faced for many years. This
16 Court, however, expressed reservations about whether the settlement
17 as proposed on October 7 adequately addressed the concerns of the
18 domestic users of water in Butte. Pursuant to a telephonic hearing
19 with the parties' attorneys on December 10, 1996, at which time
20 this Court expressed these concerns with counsel, counsel requested
21 and were granted until December 27, 1996, to speak to their clients
22 and each other regarding the court's reservations. The December 6
23 attorney fee hearing was canceled due to the illness of the
24 undersigned judge, to be reset if necessary. See Order dated
25 December 10, 1996.

26 17. At the request of Defendants' counsel, the Court then set
27 a hearing for December 19, 1996, at which time it heard further

1 argument from counsel and testimony from Butte-Silver Bow
2 government officials regarding the proposed settlement. At that
3 hearing, the following additional elements to the settlement as
4 proposed on October 7, 1996, were proposed by Defendants and Butte-
5 Silver Bow:

6 a. In addition to those funds previously committed for
7 domestic water distribution system repair, discussed above in
8 paragraph 1(c), Butte-Silver Bow, through the TIFID, agreed to
9 provide an additional \$2.5 million for that purpose. Originally on
10 December 19, Butte-Silver Bow offered to augment the funds for
11 water distribution system repair by \$2 million. After Defendant
12 Washington agreed to forgo repayment of \$500,000 of the loan he
13 previously agreed to make available to Butte-Silver Bow (see
14 discussion below), Butte-Silver Bow agreed to commit that \$500,000
15 which it will no longer have to repay to Washington to the fund,
16 making a total of \$2.5 million in TIFID proceeds available for the
17 water system repair fund. These monies will be put into that fund
18 from the proceeds of the next sale of bonds for the TIFID for
19 Silver Lake Water System acquisition.

20 b. Defendant Washington agreed to forgive repayment of
21 \$500,000 of the \$2 million dollar loan to Butte-Silver Bow.

22 c. Butte-Silver Bow will establish an advisory committee
23 regarding use of the monies for repairs on the Butte domestic water
24 distribution system. The Plaintiff Class Steering Committee shall
25 be allowed to designate three of its members to serve on that
26 committee.

27 d. Butte-Silver Bow will earmark all funds received in this
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1 settlement for domestic water distribution system repairs, and will
2 account for them and see to it that they are applied solely for
3 that purpose. Butte-Silver Bow will provide to the public an
4 annual report accounting for the monies it has received and
5 disbursed from this settlement for water distribution system
6 repairs, and how those monies have been spent. The report shall be
7 written in plain language, and must show how Butte-Silver Bow has
8 complied with the agreements contained in the compromise
9 settlement. A summary of this annual plain language report shall
10 be mailed to all water customers of Butte-Silver Bow.

11 18. After these enhancements to the settlement were proposed,
12 Class counsel James H. Goetz represented that he contacted the
13 Plaintiff Class steering committee and that the committee endorsed
14 the settlement with its enhancements. Mr. Goetz indicated that, as
15 with the steering committee's endorsement of the original
16 settlement proposal, the committee's decision was not unanimous.

17

18 D. Fairness, Reasonableness, and Adequacy of The Proposed
Settlement, as Modified By The Enhancements Proposed By The
Defendants and Butte-Silver Bow on December 19, 1996.

19 19. The Court has been familiar with this complex case since
20 it was filed in 1990. The proposed settlement was announced on the
21 eve of trial. As part of the trial preparation, the Plaintiff
22 Class and the Defendants filed proposed findings of fact and
23 conclusions of law and trial briefs. The Plaintiff Class's
24 proposed findings and conclusions, over 100 pages long, very
25 thoroughly set forth their case. Likewise, their trial brief was
26 over 100 pages long and provided the Court with a thorough legal
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1 background of the issues to be decided at trial. Similarly, the
2 Defendants' proposed findings and conclusions and briefs apprised
3 this Court of the Defendants' factual and legal position in the
4 case. The Court has reviewed these documents and used them in
5 weighing the possible outcome of the case if it were to go to
6 trial.

7 20. It is the opinion of Plaintiffs' counsel that the case
8 against the Defendants is very strong. See Affidavit of James H.
9 Goetz, dated December 2, 1996.

10 21. Defendants' counsel likewise have vigorously asserted
11 throughout the case that their clients are not liable in any
12 amount.

13 22. This is a complex and unique case that has been and would
14 continue to be vigorously defended. If successful at the liability
15 phase, the Class then faces the task of completing the damage phase
16 of the trial. Appeals are likely. Thus, significant hurdles,
17 including considerable time and expense, lay between the Class and
18 recovery if the case were tried.

19 23. The Court finds that the Plaintiff Class appears to have
20 a strong case, but that the Defendants also have potentially viable
21 defenses. Because of the complexity of the case, its bifurcation,
22 and the possibility of appeal, any recovery through trying the case
23 would be years away.

24 24. There is no evidence or suggestion that this proposed
25 settlement has been reached by any collusive means. In fact, this
26 case has been vigorously contested up to the eve of trial and the
27 settlement negotiations have been quite public. The written public

1 comments and testimony which implies that this agreement is the
2 result of political deals or undue corporate influence are not
3 persuasive. The proposed settlement has undergone considerable
4 public scrutiny, and the Class has been vigorously represented by
5 Class counsel and a very involved steering committee.

6 25. There are approximately 28,000 Class members. Only a
7 relative handful of members expressed, either at the November 8,
8 1996 hearing or through the written comment procedure, any
9 disgruntlement with the settlement. Likewise, there were a number
10 of persons who submitted comments or testimony in support of the
11 proposal. It is significant that the majority of the Plaintiff
12 Class steering committee supports the agreement. According to the
13 comments of Class counsel and the testimony of the steering
14 committee spokesperson, Sister Mary Jo McDonald, the steering
15 committee has been active throughout this long litigation and has
16 exercised independent judgment in matters concerning the case.

17 Most of the disgruntlement that has been expressed has to do
18 with the fact that some non-parties (ARCO, Asimi, Butte-Silver Bow)
19 are receiving some benefits from this settlement. The Court finds
20 that, while that may be the case, those entities were necessary to
21 make the settlement possible, because a cornerstone of the
22 settlement, the transfer of the Silver Lake Water System and rights
23 to Butte-Silver Bow, was not possible without those entities'
24 active involvement. Moreover, the fact that part of the money
25 being supplied by Defendants is in the form of a loan does not make
26 this settlement unfair or unreasonable. A significant amount of
27 money, apart from the loan, is being paid outright by the
28

1 Defendants, and, on December 19, 1996, Defendant Washington agreed
2 to forego repayment of \$500,000 of the loan. Further, the SLWS,
3 with a conservative estimated value far of \$7-13 million, is being
4 conveyed outright by entities controlled by Defendant Washington.
5 The Class benefits greatly from the transfer of that system,
6 because the area's economy will now have water available for its
7 expansion, and because the transfer results in a stream of payments
8 to Butte-Silver Bow which will be used to replace the Class
9 members' antiquated water distribution system. That antiquated
10 distribution system is one of the remaining causes of the water
11 quality problems which were the genesis of this lawsuit.

12 26. Some class members objected to the fact that an agreement
13 between ARCO and Butte-Silver Bow, incidental to this underlying
14 settlement agreement, provides that Butte-Silver Bow will recommend
15 at the appropriate time that ARCO receive, in the natural resource
16 damage lawsuit which the State of Montana has brought against ARCO,
17 commensurate credit for its role in facilitating the public
18 benefits which the transfer of the Silver Lake Water System
19 entails. The Court has no jurisdiction over that promise by Butte-
20 Silver Bow, but agrees with Class counsel that it does not diminish
21 the fairness, adequacy, or reasonableness of this settlement. In
22 any event, that agreement is not part of this settlement agreement
23 or binding on the Class members. The Class members remain free to
24 take whatever private or public position they desire on the issues
25 in Montana's natural resource case against ARCO.

26 27. Although a few class members raised concerns that
27 Plaintiff steering committee recommended that the cash portion of
28

1 the settlement be used to pay attorneys' fees and costs and to
2 replace the antiquated municipal water distribution system in
3 Butte, there appears to be widespread agreement among the Class of
4 that use as the highest and best use of that money for the Class.
5 This Court agrees that such use makes the most sense in this
6 situation, given the amount of money available, the fact that a
7 portion of the money will be paid in installments over a thirteen
8 year period or more, the administrative costs that a direct class
9 monetary distribution would entail, and the fact that the Class
10 size would result in a direct distribution of a relatively small
11 amount per class member. The Court finds that dedication of the
12 cash parts of this settlement for Plaintiff Class's attorneys fees
13 and costs and replacement and repair of the Butte municipal water
14 distribution system is fair, adequate, and reasonable. The
15 benefits to the Class of such use of the cash portion of the
16 settlement are substantial, albeit indirect. Replacement of the
17 water distribution system will help alleviate one of the remaining
18 obstacles to providing class members with high quality drinking
19 water. Financing that water main replacement with this settlement
20 ensures that future rate increases to the Class to accomplish that
21 goal are minimized.

22 28. The Court finds that the concerns expressed about the
23 loss of tax revenue when the SLWS is conveyed from private to
24 public hands are not sufficient to render this settlement unfair or
25 unreasonable. There is no "right" to continued tax revenues from
26 private sources. If a holder of private property wants to donate
27 his property to a non-taxable entity, he is entitled to do so. If

1 an industry closes down, tax revenues are lost.

2 29. The view expressed that the industrial water users of
3 SLWS should pay the total cost of maintenance and repair of the
4 SLWS is satisfied by the terms of the agreement. Also, it is the
5 opinion of the Butte-Silver Bow officials that the \$238,000 per
6 year paid by MR for its water is more than a fair price for that
7 water, and, in any event, ARCO and ASIMI have agreed to pick up the
8 operation and maintenance costs of the system so that the entire
9 \$238,000 can be used for water main replacement for at least 13
10 years.

11 30. The Court also finds that the concerns over the capacity
12 of the SLWS to meet the needs of the prospective users, and the
13 concerns that there may be some disputes regarding water rights,
14 easements, or other matters associates with the SLWS is not a
15 reason to disapprove this settlement. Such disputes are to be
16 expected, if they occur, when one is dealing with a major water
17 system and associated water rights. Butte-Silver Bow officials
18 have testified that they have diligently investigated the SLWS and
19 are confident that they will be able to operate the system for the
20 benefit of the Class and the citizens of Butte.

21 31. Plaintiff Class Counsel, James H. Goetz, has submitted an
22 affidavit in support of the proposed settlement. The Court finds
23 Mr. Goetz's opinion persuasive. Mr. Goetz is a experienced trial
24 lawyer and probably knows the strengths and weaknesses of this case
25 better than anyone. He also brings substantial experience to bear
26 on the always difficult decision of weighing the potential value of
27 trying a case against the value of settling a case. Mr. Goetz

1 estimated that the value of this settlement, as proposed on October
2 7, 1996, was between \$12.3 million and \$18 million. This variation
3 occurs because the value of the SLWS is difficult to determine, but
4 several things are clear. That estimate must be adjusted upward by
5 because of the enhancements which the Defendants and Butte-Silver
6 Bow agreed to on December 19, 1996. There is now a monetary
7 recovery to benefit the Class of \$2 million from Defendant
8 Washington, approximately \$1.8 million from Butte Water Company
9 assets, \$2.5 million from the TIFID bonds to be sold in 1997, and
10 a stream of cash payments to Butte-Silver Bow with a net present
11 value of an additional \$2 million, as long as MR's mine stays in
12 operation. Thus, apart from any value placed on the SLWS, the
13 monetary portion of the settlement has a net present value of
14 approximately \$8.3 million. Additionally, the SLWS has substantial
15 value over and above that monetary recovery.

16 32. Defense counsel, Ron MacDonald, also has expressed
17 support for the settlement throughout these settlement proceedings.
18 Mr. MacDonald is also an experienced trial lawyer, and because of
19 his long involvement with representation of Dennis Washington and
20 Washington-related entities, he has an thorough knowledge of the
21 complexities and value of the SLWS. Mr. MacDonald also agrees that
22 the value of the SLWS, and this settlement, is substantial.

23 33. The Court finds that no additional notice of the
24 enhancements to the settlement proposed on December 19, 1996, by
25 the Defendants and Butte-Silver Bow is required. Those
26 enhancements do not change the basic nature of the proposed
27 settlement of which the Class has had ample notice and opportunity

1 to be heard. Those proposals merely provide more benefits to the
2 Class, in the form of additional monies to be contributed to the
3 fund for repairs of the water distribution system, and waiver by
4 Defendant Washington of repayment of a portion of the loan he was
5 making to Butte-Silver Bow.

6 34. The Court has thoroughly reviewed the merits of the
7 Plaintiff Class's case, the defenses thereto, the likely recovery
8 of the Plaintiff Class if the case were tried, the length of time
9 and expense that a trial and possible appeals would likely entail,
10 the value of the proposed settlement, the reaction and comments of
11 the members of the Class, and the opinion of Class counsel and
12 Defendants' counsel. Based on its review of all of these factors
13 and the entire record in this case, the Court concludes that there
14 is no evidence of collusion with respect to this proposed
15 settlement. The Court concludes that the proposed settlement, as
16 enhanced by the proposals which Defendants and Butte-Silver Bow
17 agreed to before the Court on December 19, 1996, and including the
18 Plaintiff Class steering committee's recommendation that the
19 monetary portion of the settlement left after payment of attorneys'
20 fees and costs be used for repair of Butte's water distribution
21 system, is fair, adequate and reasonable.

22 35. Any finding of fact in the following conclusions of law
23 is incorporated herein.

24

25 CONCLUSIONS OF LAW

26 1. Any conclusion of law included in the above findings of
27 fact is incorporated herein.

1 2. Rule 23(e), M.R.Civ.P. provides that notice of the
2 proposed compromise and dismissal shall be given to all members of
3 the Class in such manner as this Court directs. The Court
4 concludes that public notice of the proposed settlement to class
5 members has been accomplished in a reasonable, fair manner and has
6 fairly apprised the prospective members of the class of the terms
7 of the proposed settlement and of the options that are open to them
8 in connection with these proceedings. The notice was neutral and
9 it emphasized that this Court was expressing no opinion on the
10 merits of the case or the amount of the settlement. The notice
11 gave the class members a reasonable time in which to respond and
12 apprised interested parties of the proposed settlement sufficient
13 to satisfy due process. See, e.g., Grunin v. Int'l House of
14 Pancakes, 513 F.2d 114, 122 (8th Cir.), cert. denied, 423 U.S. 864
15 (1983); Weinberger v. Kendrick, 698 F.2d 61, 71 (2nd Cir. 1982),
16 cert. denied, 104 S.Ct. 77 (1983).

17 3. The matter of settlement of class actions is left to the
18 sound discretion of this Court. Girsh v. Japson, 521 F.2d 153, 156
19 (3rd Cir. 1975). A district court has considerable discretion in
20 determining whether a settlement is fair and reasonable. Bryan v.
21 Pittsburgh Plate Glass Co., 404 F.2d 799, 801 (3rd Cir.), cert.
22 denied 419 U.S. 900 (1974). The court must act as the guardian of
23 the rights of absentee class members in approving a settlement.
24 Weinberger, supra, 698 F.2d at 69, n.10.

25 4. The burden is upon the proponents of the settlement to
26 persuade the court that it is fair, adequate and reasonable.
27 Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir.
28

1 1983). Among the most important factors to be considered when
2 determining whether a settlement is fair, adequate and reasonable
3 are:

- 4 (1) The strength of the plaintiff's case on the merits
5 balanced against the amount offered in settlement;
- 6 (2) Presence of collusion in reaching a settlement;
- 7 (3) The reaction of members of the class to the settlement;
- 8 (4) The opinion of competent counsel;
- 9 (5) The stage of the proceedings and the amount of discovery
completed.

10 3B Moore's Federal Practice, ¶ 23.80[4], p. 23-488 through 23-490.

11 Merely because the proposed settlement may amount only to a
12 fraction of the potential recovery will not per se render the
13 settlement inadequate or unfair. TBK Partners, Ltd. v. Western
14 Union Corp., 675 F.2d 456, 463-64 (2nd Cir. 1982). The court must
15 look to the risks of establishing liability and damages and of
16 maintaining the class action through the trial. Id. at 463. A
17 probable result at trial must be balanced against the probable
18 costs, in both time and money, of continued litigation.

19 Lowenschuss v. Bluhdorn, 613 F.2d 18, 19-20 (2nd Cir.), cert.
20 denied, 449 U.S. 840 (1980).

21 5. The Court has thoroughly reviewed the merits of the
22 Plaintiff Class's case, the defense thereto, the likely recovery of
23 the Plaintiff Class if the case were tried, the length of time and
24 expense that a trial and possible appeals would likely entail, the
25 value of the proposed settlement, the reaction and comments of the
26 members of the Class, and the opinion of Class counsel and
27 Defendants' counsel. Based on its review of all of these factors

1 and the entire record in this case, the Court concludes that there
2 is no evidence of collusion with respect to this proposed
3 settlement and that the proposed settlement is fair, adequate and
4 reasonable.

5 6. The Court has also considered the "fluid" nature of the
6 settlement in this case. The benefits to the Class from the
7 transfer of the Silver Lake Water System and attendant water rights
8 are indirect, but substantial. The Class consists of persons who
9 received water from the Butte Water Company during certain years in
10 the late 1980's and early 1990's. In large part, those persons
11 make up the population of the City of Butte, and the economic
12 benefits from the transfer of the SLWS will inure to the Butte
13 Community. The transfer of the SLWS is a cornerstone of the
14 settlement, and without it there would be no settlement. There is
15 no way to have the value of the SLWS distributed directly to the
16 Class, but the indirect benefit to them is substantial.

17 The Court has also carefully considered the recommendation of
18 the Plaintiff Class steering committee that the \$2 million from
19 Defendant Washington, the residual assets from the Butte Water
20 Company, the Silver Lake Water System acquisition fees of \$2.5
21 million from the TIFID, and the \$238,000 paid by Washington's
22 companies annually to Butte-Silver Bow, be dedicated to replacement
23 of water mains in the Butte municipal water system. While a very
24 few persons testified or wrote to the Court with the opinion that
25 individual class members should be directly compensated for their
26 past damages, the steering committee's recommendation appears to
27 have the widespread support among the class. The Court has

1 considered the relatively small amount of cash immediately
2 available via this settlement in relation to the relatively large
3 number of class members. Butte-Silver Bow has represented to the
4 court that the \$2.5 million from the TIFID would only be available
5 for water main replacement, not for cash disbursement to individual
6 plaintiffs. Given that situation, and the costs that would be
7 incurred to distribute a pro rata share of that money to the class
8 members, the Court concludes that the steering committee's
9 recommendation makes the most sense. The water mains which that
10 money will be used to replace will help alleviate the remaining
11 water quality problems of the Class, and will serve to hold down
12 rate increases in the future because that work will not have to be
13 financed with rate increases, at least to the extent of the monies
14 dedicated from this settlement.

15 The same holds true for the annual \$238,000 payments from MR
16 to Butte-Silver Bow. The same benefits to the Class will be
17 realized by these funds' dedication to water main replacement.
18 Moreover, these funds will only be realized over the course of at
19 least 13 years, making direct distribution of them to the class
20 impossible.

21 Newberg states in his treatise, Newberg on Class Actions (2nd
22 ed. 1977), discusses fluid class recoveries:

23 In a settlement context, when an aggregate class recovery
24 cannot economically be distributed to individual class
25 members, or when a balance of the recovery fund remains
26 after individual distribution, the parties, subject to
27 court approval, may agree that undistributed funds will
be distributed or disposed of for the indirect benefit of
the class. This distribution of funds that have not been
individually distributed, by distributing them for the
next best use which is for indirect class benefit, has

been approved under the equitable power of courts in various cases under the analogous cy pres doctrine. The cy pres, or next best use, doctrine originated in the charitable trust field when courts took steps to prevent the failure of trusts. In the class action context, cy pres applications have also been referred to as fluid class recovery distributions.

While the use of cy pres distribution remains controversial and unsettled in an adjudicated class action context, courts are not in disagreement that cy pres distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds. Thus, even in circuits that have ruled that cy pres or fluid class recovery distributions are not valid in contested adjudications, these distributions have received a stamp of approval as part of a class settlement.

Id. at § 11.20, pp. 414-415 (emphasis added). Newberg continues:

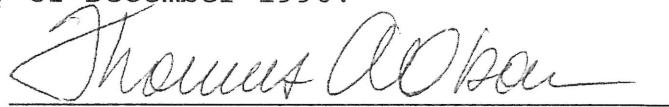
Examples of decisions that have upheld cy pres distribution in class action settlements for the aggregate indirect benefit of the class include a payment to state agencies for use in public health programs, [West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2nd Cir.), cert. denied, 404 U.S. 871 (1971)], payment to a newly formed foundation to study biological effects of radiation exposures from a nuclear plant accident [In re Three Mile Island Litig., 557 F.Supp. 96 (M.D. Pa. 1982)], payments to area law schools or medical schools for general use, [Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., No. 41774SC [E.D. Pa. February 27, 1978])], escheat to the state after the expiration of a time period for individual distributions (citation omitted) and others.

See also Bebchick v. Public Utilities Comm'n, 318 F.2d 187, 204 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963) (in a non-class action setting, approving establishment of a transit fund, or special account or reserve to be left to the discretion of the utility commission having regulatory authority with respect to the transit "provided such discretion is exercised consistently with the purpose of benefitting transit users in any rate proceeding pending or hereafter instituted. For example, the fund might be

1 used to cover costs which otherwise might lead to an increase in
2 fares, or might be used to aid in determining whether fares should
3 be reduced now or hereafter.").

4 The Court finds that the "fluid" recovery of the class in this
5 case, as recommended by the Plaintiff Class steering committee,
6 will garner the maximum benefit from the settlement to class
7 members, and that use of the cash portion of the settlement to
8 augment the replacement of water mains in the Butte municipal water
9 distribution system is fair and adequate to the class.

10
11 DATED this 24th day of December 1996.

12 
13 Judge Thomas A. Olson
14 District Judge

15 cc: James H. Goetz and Richard J. Dolan
16 Ronald B. MacDonald
17 Michael G. Black
Tracy Axelberg
Randy Cox



21
22 STATE OF MONTANA
23 COUNTY OF SILVER BOW
24 I, BETH PARKS, CLERK OF THE DISTRICT
COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE
COUNTY OF SILVER BOW, do hereby certify the
foregoing to be a full, true and correct copy of
the original on file in my office, and that I have
carefully compared the same with the original.

25 In Witness Whereof, I have hereunto set my
hand and affixed the seal of the District Court
this 6th day of November, 2023
26 Beth Parks, Clerk
27 By Beth Parks
Deputy