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FILED

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OFFICE OF
 WORKERS' COMPENSATION JUDGE
 HELENA, MONTANA

Attorneys for ASARCO, Inc., Benefis,
 Continental Casualty Company,
 Golden Sunlight Mines, Northwest Healthcare,
 Corp., Northwestern Energy, LLC, Plum Creek Timber Co.,
 F.H. Stoltze Land & Lumber Co., and Safeway

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER,
 Individually and on Behalf of Others
 Similarly Situated,

Petitioners,

v.

MONTANA STATE FUND

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE
 CORPORATION,

Intervenor.

WCC NO. 2000-0222

RESPONSE TO SUMMONS

COMES NOW Respondents, ASARCO, Inc., Benefis, Continental Casualty
 Company, Golden Sunlight Mines, Northwest Healthcare, Corp., Northwestern Energy,
 LLC, Plum Creek Timber Co., F.H. Stoltze Land & Lumber Co., and Safeway by and

DOCKET ITEM NO. 310

through counsel of record, and pursuant to this Court's Summons of May 4, 2005, hereby dispute the entitled of claimants they insured to additional benefites under the *Flynn* decision as follows:

1. A common fund does not exist in this case because the purported non-participating beneficiaries of the decisions in the *Flynn* case are not ascertainable, particularly going back to July 1, 1974. See *Murer v. State Compensation Mut. Ins. Fund*, 283 Mont. 210, 942 P.2d 69, (1997) (holding that there must be an ascertainable class of non-participating beneficiaries for there to be a common fund). These answering insurers do not have sufficient information as to the claimants whose benefits have been reduced because of the social security offset and, in fact, do not have files of all workers compensation claimants dating back to 1974.
2. A common fund does not exist in this case because the process of identifying unascertainable beneficiaries places an impermissible and undue burden on insurance companies who wrote worker's compensation policies in Montana. Even if these answering insurers had a claims files dating back to 1974, it would not be possible to know which claimants received social security benefits as a result of representation by an attorney during the social security proceedings or which claimants incurred attorney fees in obtaining social security benefits.
3. A common fund does not exist in this case because the participating litigants, Robert Flynn and Carl Miller, did not create, preserve or increase an identifiable monetary fund or benefit in which all non-participating beneficiaries maintain an interest.

DATED this 5th day of July, 2005.

HAMMER, HEWITT, SANDLER & JACOBS, PLLC



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Attorneys for ASARCO, Inc., Benefis, Continental
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LLC, Plum Creek Timber Co., F.H. Stoltze Land &
Lumber Co., and Safeway

CERTIFICATE OF SERVICE

This is to certify that I, David M. Sandler sent on this 5th day of July, 2005, the forgoing attached RESPONSE TO SUMMONS Fees was duly serviced upon the following attorneys of record, by depositing a true copy thereof in the United States mail, postage paid, addressed as:

Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802



David M. Sandler