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Precap: Atlantic Richfield Company v. Montana Second Judicial Court, Silver Bow County

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PRECAP; Atlantic Richfield Company v. Montana Second Judicial Court, Silver Bow County

Dillon Haskell

OP 16-0555

Montana Supreme Court Oral Argument: Friday, April 7, 2017, at 9:30 a.m. in the George Dennison Theater, University of Montana, Missoula, Montana.

I. QUESTION PRESENTED

Does the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") bar a state law claim for restoration damages?

This question is of particular importance because CERCLA is not clear about whether it would bar a claim for restoration damages when the compensation for the damages would, by law, be spent on remedies that may supplement an existing remedy the EPA has chosen through CERCLA.

II. INTRODUCTION

CERCLA allows the EPA to identify responsible parties for uncontrolled or hazardous-waste sites, accidents, spills, and other emergency releases of pollutants into the environment.¹ After identifying responsible parties, the EPA may either compel them to fund cleanup efforts, or, if the responsible parties are unable to afford the cleanup or they can't be found, CERCLA provides a large federal fund, a "Superfund", to clean up and manage the sites.² The law allows the EPA to "(1) perform cleanup actions itself; (2) compel responsible parties through an administrative order to perform cleanup actions under EPA's supervision; or (3) enter into agreements with potentially responsible parties. . . to perform specified cleanup actions."³ Petitioner, Atlantic Richfield Company ("ARCO"), owned a smelter near Anaconda, Montana, that polluted the surrounding area with hazardous substances for

¹ Environmental Protection Agency, *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act*, EPA.GOV, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> (last updated Feb. 7, 2017).

² *Id.*

³ Petitioner's Opening Brief at 4, *Atlantic Richfield Co. v. Montana Second Judicial District Court*, <https://supremecourtdocket.mt.gov/view/OP%2016-0555%20Appellant's%20Opening%20-%20Brief?id={E0F18C58-0000-C715-A2F6-E641D6ACE121}> (Nov. 17, 2016) (Case No. OP 16-0555) (*citing* 42 U.S.C. §§ 9604, 9606).

nearly a century.⁴ The smelter and the surrounding area were added to a list of Superfund cleanup sites through CERCLA in 1983.⁵ Local property owners, Plaintiffs in the case, seek restoration damages from ARCO to be used for cleanup remedies in addition to those already contemplated by the EPA.⁶

III. PROCEDURAL AND FACTUAL BACKGROUND

The EPA enforces CERCLA's requirements through a series of federal regulations known as the National Contingency Plan.⁷ The National Contingency Plan allows for the establishment of a National Priorities List for the cleanup of hazardous "Superfund sites".⁸ When a site is added to the National Priorities List, the EPA conducts a Remedial Investigation and Feasibility Study.⁹ Through the Remedial Investigation and Feasibility Study, the EPA selects a remedy to clean up a site on the National Priorities List and "eliminate, reduce, or control risks to human health and the environment."¹⁰ After selecting a remedy, the EPA guides its remedy through a rigorous public comment period after which a final remedy is selected and memorialized in a Record of Decision ("ROD").¹¹ Recognizing that for many Superfund sites, hazardous substances will remain after a remedy is completed, the EPA is required to review remedies for these sites every five years and amend their respective RODs as necessary.¹²

ARCO managed a milling and smelting operation in Montana near the towns of Anaconda, Opportunity, and Crackerfield from 1884 to 1980.¹³ Over nearly a century of operation, ARCO's smelter emitted thousands of tons of arsenic and other heavy metals into the air.¹⁴ The arsenic and other heavy metals settled downwind on surrounding property, including property owned by 98 residents who are plaintiffs and counter-petitioners.¹⁵

⁴ Petitioner's Opening Brief at 1, 11, *supra* note 3.

⁵ *Id.* at 8.

⁶ Plaintiffs/Counter-Petitioners' Answer Brief at 3, *Atlantic Richfield Co. v. Montana Second Judicial District Court*, <https://supremecourtdocket.mt.gov/view/OP%2016-0555%20Appellee's%20Response%20-%20Brief?id={50101959-0000-CB1F-9F1C-329C6D668A8A}> (Dec. 12, 2016) (Case No. OP 16-0555).

⁷ Petitioner's Opening Brief at 4, *supra* note 3; 40 C.F.R. § 300.1.

⁸ Petitioner's Opening Brief at 4–5, *supra* note 3; 40 C.F.R. § 300.425(b).

⁹ Petitioner's Opening Brief at 5, *supra* note 3.

¹⁰ 40 C.F.R. § 300.430(a)(1)-(2); Petitioner's Opening Brief at 5, *supra* note 3.

¹¹ Petitioner's Opening Brief at 5–6, *supra* note 3.

¹² *Id.* at 6.

¹³ *Id.* at 1, 11.

¹⁴ Plaintiffs/Counter-Petitioners' Answer Brief at 3, *supra* note 6.

¹⁵ Order by the Montana Supreme Court Accepting Jurisdiction at 1, *Atlantic Richfield Co. v. Montana Second Judicial District Court*, <https://supremecourtdocket.mt.gov/view/OP%2016->

ARCO's smelter closed in 1980, and the EPA added the smelter and surrounding area to the National Priorities List of Superfund sites in 1983.¹⁶ The EPA required ARCO to perform a site-wide Remedial Investigation and Feasibility Study that was completed in 1987.¹⁷ The EPA divided the Anaconda Superfund site into five operable units, each of which was given its own ROD.¹⁸ Of the five operable units, only the Community Soils Operable Unit and the Anaconda Regional Water, Waste and Soils Operable Unit ("Anaconda Regional Operable Unit") relate to Plaintiffs' properties.¹⁹ In 1988, the EPA required ARCO to conduct separate Remedial Investigation and Feasibility Studies for the two operable units.²⁰ The resulting RODs, completed in 1996, address Plaintiffs' residential yards, domestic wells and pasture properties.²¹

The Community Soils Operable Unit ROD calls for testing of residential yards throughout the Superfund site and requires cleanup of any yards exceeding the EPA's action levels of 250 parts per million ("ppm") arsenic or 400 ppm lead.²² If a property exceeds the action levels, ARCO is required to remove the tainted soil, replacing it with clean soil and sod.²³ The Anaconda Regional Operable Unit ROD requires testing for domestic wells every five years.²⁴ If a domestic well tests over 10 parts per billion arsenic, it must be replaced with a water treatment system.²⁵ Today, although cleanup is ongoing and the EPA has been actively involved with the site for more than three decades, the "cleanup of an additional 1,150 residential yards, revegetation of 7,000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds" remains.²⁶ In fact, the EPA estimates that ARCO's cleanup efforts will continue until 2025, with monitoring and maintenance work continuing indefinitely.²⁷

In 2008, Plaintiffs initiated the present case, seeking restoration damages from ARCO for common law trespass, nuisance, and strict liability claims.²⁸ In December 2013, the district court granted ARCO's

0555%20Grant%20--%20Order?id={A0EE9557-0000-CA28-9C76-316D975F3915} (Oct. 5, 2016) (Case No. OP 16-0555); Plaintiffs/Counter-Petitioners' Answer Brief at 12, *supra* note 3.

¹⁶ Petitioner's Opening Brief at 8, *supra* note 3.

¹⁷ *Id.*

¹⁸ *Id.* at 8–9.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ United States' Amicus Brief at 1–2, *Atlantic Richfield Co. v. Montana Second Judicial District Court*, <https://supremecourtdocket.mt.gov/view/OP%2016-0555%20Amicus%20--%20Brief?id={A00EFA58-0000-C11A-9522-55E4B071B521}> (Dec. 9, 2016) (Case No. OP 16-0555).

²⁷ *Id.*

²⁸ Plaintiffs/Counter-Petitioners' Answer Brief at 3, *supra* note 6.

motion for summary judgment based on the theory that Plaintiffs' claims were time-barred by the relevant statutes of limitations.²⁹ The Montana Supreme Court reversed the decision in September 2015, holding that there were genuine issue of material fact about whether the alleged contamination was reasonably abatable, which would have precluded summary judgment on a continuing tort theory.³⁰ After reassuming jurisdiction, the district court denied a separate motion for summary judgment from ARCO, holding Plaintiffs' claims for restoration damages did not challenge the ongoing Superfund cleanup and were therefore not barred by CERCLA.³¹ ARCO then sought a writ of supervisory control relating to the ruling.³² The Montana Supreme Court granted the writ because of the impact this decision will have on trial.³³ In its order granting the writ, the Court explained:

If the District Court's ruling on this issue is determined to be incorrect, then all of the Plaintiffs' claims for restoration damages would be dismissed with prejudice. A ruling on this issue clearly will drive the trial and the legal theory upon which the Plaintiffs' claims for damages may proceed, and could moot many of the other issues Atlantic Richfield raises.³⁴

The writ stayed further proceedings, including a five-week trial scheduled in November 2016.³⁵ Further, the Court granted the EPA leave to file an amicus brief simultaneously with ARCO.³⁶ The issue—whether Plaintiffs' claims for restoration damages are barred by CERCLA—will be resolved by the Court now.³⁷

²⁹ Petition for Writ of Supervisory Control at 1, *Atlantic Richfield Co. v. Montana Second Judicial District Court*, <https://supremecourtdocket.mt.gov/view/OP%2016-0555%20Writ%20-%20Supervisory%20Control%20--%20Petition?id={20F14E57-0000-CB1E-B451-31FD794EBA53}> (Sep. 21, 2016) (Case No. OP 16-0555).

³⁰ *Id.*

³¹ Order by the Montana Supreme Court Accepting Jurisdiction at 1–2, *supra* note 15.

³² *Id.*

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ *Id.*

IV. SUMMARY OF ARGUMENTS

A. *Petitioner Atlantic Richfield Company*

1. *CERCLA § 113 Bars Plaintiffs' Claim Because It Challenges the CERCLA Cleanup.*

ARCO argues that CERCLA bars Plaintiffs' restoration damages claim.³⁸ First, ARCO argues that the district court lacks jurisdiction over the claims because they are a challenge to the EPA's remedy, requiring Plaintiffs to wait until cleanup has completed and bring the claims in federal court.³⁹ With few exceptions, federal courts have exclusive jurisdiction over challenges to EPA remedies made through CERCLA.⁴⁰ As Plaintiffs did not allege any exception to the rule, the primary issue "turns on whether Plaintiffs' claim for restoration damages challenges the CERCLA cleanup."⁴¹ CERCLA § 113 bars any challenge to an EPA Superfund cleanup, so if Plaintiffs' claim challenges the cleanup remedy, it will be barred.⁴² Employing a broad standard for whether a remedy would "challenge" an existing EPA remedy, ARCO contends that Plaintiffs' proposed remedy "easily satisfies [the] criteria for a challenge to a CERCLA cleanup."⁴³

In particular, ARCO is very critical of two remedies Plaintiffs have proposed: first, that the action level for soil cleanup should be lower than the 250-ppm arsenic standard used by the EPA; and second, that several subterranean Permeable Reactive Barriers should be constructed upgradient of Plaintiffs' community to protect from further groundwater contamination.⁴⁴ The EPA considered both remedies but ultimately chose alternative means to accomplish the cleanup.⁴⁵ Therefore, ARCO argues that requiring it to finance either remedy would challenge the EPA's existing RODs, something Plaintiffs could only do in federal court.⁴⁶

2. *CERCLA § 122(e)(6) Bars Plaintiffs's Claim Because Plaintiffs are Potentially Responsible Parties and Their Remedy is Not Authorized by the EPA.*

³⁸ Petitioner's Opening Brief at 17, *supra* note 3.

³⁹ *Id.* at 17–18.

⁴⁰ *Id.* at 18–19.

⁴¹ *Id.* at 20 (internal quotations omitted).

⁴² *Id.* at 18.

⁴³ *Id.* at 20–21 (internal quotations omitted).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 23–25.

Second, ARCO alleges that Plaintiffs' proposed restoration remedy is unauthorized by the EPA and therefore barred by CERCLA § 122(e)(6).⁴⁷ ARCO's second argument hinges on the theory that Plaintiffs are Potentially Responsible Parties. In order to determine who will pay for cleanup costs, CERCLA imposes strict liability for cleanup costs at Superfund sites on four broad classes of Potentially Responsible Parties unless they can establish that another party caused the environmental hazard.⁴⁸ According to ARCO, one of these classes includes "all current owners of property at a CERCLA facility."⁴⁹ The statutory status of Potentially Responsible Party does not immediately confer fault, but ARCO argues it applies "regardless of what restoration activities Plaintiffs plan to conduct, or whether they have introduced contaminants onto their properties."⁵⁰

§ 122(e)(6) requires any Potentially Responsible Party to obtain EPA authorization before taking remedial action at a Superfund site.⁵¹ As, under Montana law, restoration damages must be spent restoring damaged property, any damages would necessarily fund remedial action.⁵² Therefore, if Plaintiffs are, in fact, Potentially Responsible Parties, they would need EPA authorization for their proposed remedy before they may be legally entitled to restoration damages. The EPA has not authorized Plaintiffs' remedies, and it is unlikely to do so.⁵³ The EPA previously considered and rejected remedies like Plaintiffs' proposed subterranean Permeable Reactive Barriers to prevent groundwater contamination, so ARCO argues Plaintiffs' remedies have been "expressly rejected" by the EPA.⁵⁴ ARCO therefore contends that, by virtue of their status as landowners, Plaintiffs are Potentially Responsible Parties, and any award of restoration damages is barred because it would fund an unauthorized Superfund site remedy.⁵⁵

3. *Plaintiffs' Claim is Preempted by CERCLA Because Congress Intended to Vest the EPA with Exclusive Authority to Determine Remedies at Superfund Sites.*

Finally, ARCO argues that Plaintiffs' restoration claim is preempted by CERCLA because it conflicts with "Congress's clear and

⁴⁷ *Id.* at 31–32 (citing 42 U.S.C. § 9622(e)(6)).

⁴⁸ § 9607(a)–(b).

⁴⁹ Petitioner's Opening Brief at 35, *supra* note 3.

⁵⁰ *Id.* at 35–36.

⁵¹ § 9622(e)(6).

⁵² MONT. CODE ANN. § 75-11-604 (2016).

⁵³ United States' Amicus Brief at 22, *supra* note 26.

⁵⁴ Petitioner's Opening Brief at 18, *supra* note 3.

⁵⁵ *Id.* at 31–32.

overarching intent to vest EPA with exclusive authority to determine the remedy at Superfund sites, to prevent conflicting remedies, and to protect EPA's remedy from interference while it is being implemented.”⁵⁶ Under the theory of conflict preemption, ARCO asserts that compliance with federal and state laws is impossible because Plaintiffs’ claim for restoration damages not only lacks EPA approval but challenges the existing remedy.⁵⁷ Additionally, ARCO lists out three reasons for why Plaintiffs’ claim “thwarts Congress's purposes and objectives as expressed in CERCLA”: 1) CERCLA grants the EPA sole authority to select cleanup remedies for Superfund sites;⁵⁸ 2) part of CERCLA’s objective is to prevent conflicting remedies at Superfund sites that may exacerbate problems;⁵⁹ and 3) private citizens’ role in the remedy-selection process is limited to public comment and citizen suits after the remedy’s completion in order to prevent interference with the chosen remedy as it is implemented.⁶⁰ In summary, Plaintiffs will no longer be eligible to recover restoration damages should the Court find in ARCO’s favor for any of the three preceding arguments.

B. Plaintiffs Gregory A. Christian, et al.

1. CERCLA Only Prevents Double Recovery of Cleanup Costs and Preserves the Right to Pursue Restoration Damages.

Plaintiffs argue that CERCLA does not bar claims for restoration damages under Montana common law.⁶¹ They argue that CERCLA only prevents double recovery of cleanup costs ordered by the EPA, and that CERCLA preserves the right to pursue restoration damages under state common law.⁶² Plaintiffs’ approach views CERCLA and state environmental laws as working more in tandem. Instead of preempting state-law claims, Plaintiffs argue CERCLA preserves necessary claims for additional liability.⁶³ Plaintiffs point to extensive case law to illustrate the congressional intent behind CERCLA, and they conclude that Congress only intended to prevent double recovery for removal costs under CERCLA and state or other federal laws.⁶⁴ Plaintiffs argue that if CERCLA’s purpose were to preempt state-law remedies for recovering

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 40.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Plaintiffs/Counter-Petitioners’ Answer Brief at 9, *supra* note 6.

⁶² *Id.* at 11.

⁶³ *Id.*

⁶⁴ *Id.*

costs of hazardous waste cleanups, then the section of the law aimed at preventing double recovery would be superfluous.⁶⁵

Plaintiffs further object to ARCO's contention that CERCLA requires their restoration claim to be brought in federal court.⁶⁶ Plaintiffs argue that the prohibition of challenges to the EPA-selected remedy was meant to prevent dilatory lawsuits intended to slow down or prevent cleanup efforts.⁶⁷ Therefore, Plaintiffs' claim does not challenge the EPA-selected remedy because it is not a claim that "seeks to alter, delay or stop an EPA-mandated cleanup"; their claim is only for restoration damages.⁶⁸

2. *Plaintiffs are Not Potentially Responsible Parties, so CERCLA § 122(e)(6) is Irrelevant.*

Additionally, Plaintiffs dispute the idea that they are Potentially Responsible Parties.⁶⁹ Using case law from various federal district and circuit courts, Plaintiffs argue that:

a person or entity is only a [Potentially Responsible Party]: (1) if the person/entity has entered into a voluntary settlement with the EPA; (2) upon a judicial determination that the person/entity is a responsible party; or (3) if the person/entity is currently a defendant in a CERCLA lawsuit and has been found not to be entitled to statutory defenses.⁷⁰

Plaintiffs refute the idea that they are Potentially Responsible Parties because they do not fit any of the three categories.⁷¹

Nonetheless, Plaintiffs contend that even if they are considered Potentially Responsible Parties, they are entitled to both the innocent landowner and contiguous landowner defenses.⁷² Plaintiffs state that the elements of an innocent landowner defense are 1) another party was the sole cause of the hazardous substances and the resulting damages, 2) the responsible party did not release the hazardous substances due to any kind of agency relationship with the party raising the defense, and 3) the party raising the defense "exercised due care and guarded against the foreseeable acts or omissions of the responsible party."⁷³ Likewise,

⁶⁵ *Id.* at 12 (citing *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 126 (3d Cir. 1991)).

⁶⁶ *Id.* at 13–14.

⁶⁷ *Id.* at 14.

⁶⁸ *Id.*

⁶⁹ *Id.* at 34.

⁷⁰ *Id.* (citing *Taylor Farm Ltd. Liab. Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 966–71 (S.D. Ind. 2002); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 n. 2 (3d Cir. 1997)).

⁷¹ *Id.*

⁷² *Id.* at 36–38.

⁷³ *Id.* at 37 (citing *Westfarm Associates Ltd. Partn. v. Washington Suburban Sanitary Commn.*, 66 F.3d 669, 682 (4th Cir. 1995)).

Plaintiffs add that a person who owns property contiguous or similarly situated to real property that contaminates their property with hazardous substances is entitled to a contiguous landowner defense.⁷⁴ Plaintiffs allege either defense may be used to show a party is not a Potentially Responsible Party if they would otherwise fit the definition of one.⁷⁵

ARCO alleges Plaintiffs must establish the absence of causation necessary for an innocent landowner defense.⁷⁶ Plaintiffs argue that because ARCO is the party alleging plaintiffs are Potentially Responsible Parties, ARCO also has the burden of proving it—and they dispute ARCO’s ability to do so.⁷⁷ Experts from both Plaintiffs and the EPA have opined that the elevated levels of arsenic and other heavy metals in the region are directly attributable to the smelter operated by ARCO and its predecessors.⁷⁸ Plaintiffs argue that “[m]ost of the contamination occurred before many of the Plaintiffs moved to Opportunity or were even born.”⁷⁹ For these reasons, Plaintiffs believe ARCO is unable to cite any admissible evidence that could defeat the defense.⁸⁰

A similar rationale applies to Plaintiffs’ assertion of a contiguous landowner defense. Again, Plaintiffs claim that the burden rests with ARCO to establish the unavailability of the defense.⁸¹ Plaintiffs own property downwind of the smelter, so they challenge ARCO’s ability to satisfy its burden and defeat the defense.⁸²

3. *Congress Did Not Intend to Prevent State Law Claims for Damages Resulting from Hazardous Waste at Superfund Sites.*

Finally, Plaintiffs contend Congress expressly chose not to preempt common law claims seeking restoration damages with CERCLA.⁸³ Therefore, Plaintiffs also dispute ARCO’s contention that Congress preempted their claims by vesting the authority for Superfund site cleanups with the EPA.⁸⁴ Like their prior arguments, Plaintiffs view state-law environmental claims as promoting—rather than impeding—CERCLA’s objectives.⁸⁵ Plaintiffs maintain that their claims for restoration damages do not conflict with CERCLA because the proposed

⁷⁴ *Id.* at 38 (citing *Young v. U.S.*, 394 F.3d 858, 861 n.1 (10th Cir. 2005)).

⁷⁵ *Id.* at 36–38.

⁷⁶ *Id.* at 36.

⁷⁷ *Id.* at 36–37.

⁷⁸ *Id.* at 37.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 38.

⁸² Plaintiffs/Counter-Petitioners’ Answer Brief at 38, *supra* note 6.

⁸³ *Id.* at 40.

⁸⁴ *Id.*

⁸⁵ *Id.*

remedy does not actually conflict with the EPA-selected remedy.⁸⁶ They allege removing additional arsenic and heavy metals from the cleanup site does not interfere with Congress's objectives in passing CERCLA.⁸⁷ Plaintiffs assert that "CERCLA sets the floor, but not the ceiling for environmental cleanup."⁸⁸ Plaintiffs also challenge ARCO's speculation that private remedies ordered beyond those contemplated by the EPA may cause a defendant to "simply go bankrupt and leave" rather than fulfill its obligation to the EPA.⁸⁹ Plaintiffs seem to view ARCO's argument here as a veiled threat that may even highlight the importance of maintaining access to state-law environmental claims for plaintiffs.⁹⁰ When the Montana Supreme Court issues its opinion, Plaintiffs must succeed on each of these arguments to have any chance of recovering restoration damages for their properties.

V. ANALYSIS

The threshold issue of whether CERCLA bars Plaintiffs' claim for restoration damages has resulted in extensive arguments from both sides and their respective amici. The question, however, may be divided (somewhat) neatly into three primary sub-issues, each of which are potentially dispositive: first, whether Plaintiffs' proposed remedy impermissibly challenges the EPA's ROD; second, whether Plaintiffs are Potentially Responsible Parties and therefore barred from seeking this type of relief; and third, whether principles of federal law conflict preemption bar Plaintiffs' claim.

Plaintiffs' remedy essentially consists of two parts, so the first sub-issue—whether Plaintiffs' proposed remedy impermissibly challenges the EPA's ROD—requires a different analysis for each. First, while the EPA aims to return soil levels to 250 ppm arsenic, Plaintiffs plan to have the arsenic levels in their soil restored to pre-pollution levels, or 8 ppm arsenic.⁹¹ Therefore, Plaintiffs' experts have proposed excavating the top 24 inches of soil on actionable properties instead of the 18 inches proposed by the EPA.⁹² Second, Plaintiffs' experts have proposed constructing a series of underground trenches and Permeable Reactive Barriers to mitigate threats of additional groundwater contamination.⁹³

⁸⁶ *Id.* at 13, 34.

⁸⁷ *Id.* at 42.

⁸⁸ *Id.* at 41 (citing *New Mexico v. General Electric Co.*, 467 F.3d 1223, 1244 (10th Cir. 2006); *Fireman's Fund Ins. v. City of Lodi*, 302 F.3d 928, 941–43 (9th Cir. 2002); *Manor Care*, 950 F.2d at 125–26).

⁸⁹ *Id.* at 44 (quoting Petitioner's Opening Brief at 24, *supra* note 3).

⁹⁰ *Id.* at 44–45.

⁹¹ *Id.* at 7; United States' Amicus Brief at 13, *supra* note 35.

⁹² United States' Amicus Brief at 13, *supra* note 35.

⁹³ *Id.*

While both Plaintiffs and ARCO seem to lump these actions into one remedy,⁹⁴ the Court may find that some portions challenge the EPA's ROD while others do not. For example, the Court may find that the restoration damages for the Permeable Reactive Barriers are barred while the restoration damages for additional soil excavation are not. This could happen if the Court concluded the Permeable Reactive Barrier remedy violates the EPA's existing ROD while the soil excavation remedy merely supplements it. Both the EPA and ARCO rely on *McClellan Ecological Seepage Situation v. Perry*⁹⁵ to bolster their arguments that any additional remedies that *strengthen* the EPA's remedy also challenge the EPA's remedy.⁹⁶ Plaintiffs point out, however, that in *McClellan*, the plaintiff's remedy actually imposed additional reporting requirements that would have second-guessed the EPA's remedy and prolonged CERCLA-mandated cleanup efforts.⁹⁷ By contrast, Plaintiffs in the present case neither question the EPA's remedy nor advocate for additional reporting requirements. Instead, Plaintiffs seek state-law restoration damages to return their properties to preexisting conditions that directly align with the EPA's remedy.

On the other hand, the EPA argues that the additional remedial measures would not accomplish Plaintiffs' goals. The EPA researched and expressly rejected a proposal to construct underground trenches and Permeable Reactive Barriers to manage groundwater contamination.⁹⁸ The EPA concluded that "this approach would not necessarily achieve the human health standard[s] . . . and would not eliminate exceedances of arsenic in downstream receiving waters."⁹⁹ Plaintiffs argue that the Permeable Reactive Barriers will allow passage of water and won't result in a change in groundwater flow as the EPA fears.¹⁰⁰ Besides the fact that the EPA already *expressly* rejected the Plaintiff's PRB construction as ineffective, the Permeable Reactive Barrier remedy creates a level of unpredictability which supports the theory that constructing Permeable Reactive Barriers would actually challenge the EPA's existing ROD. Therefore, in the most likely scenario, the Court will find that Plaintiffs'

⁹⁴ See generally Petitioner's Opening Brief at 20–25, *supra* note 3; Plaintiffs/Counter-Petitioners' Answer Brief at 13–33, *supra* note 6 (where, in each, Plaintiffs' remedies are outlined but remain indistinguishable as far as the law is applied to them).

⁹⁵ 47 F.3d 325 (9th Cir. 1995).

⁹⁶ United States' Amicus Brief at 7, *supra* note 35; Petitioner's Opening Brief at 20–21, *supra* note 3.

⁹⁷ *McClellan*, 47 F.3d at 330.

⁹⁸ United States' Amicus Brief at 2–3, *supra* note 35.

⁹⁹ *Id.*

¹⁰⁰ Plaintiffs/Counter-Petitioners' Answer Brief at 43, *supra* note 6; see United States' Amicus Brief at 16, *supra* note 35.

Permeable Reactive Barrier remedy challenges the EPA's ROD but Plaintiffs' plan for additional soil excavation does not.

Next, plaintiffs are likely not Potentially Responsible Parties, so their remedy would not violate CERCLA § 122(e)(6). At first glance, ARCO and the EPA are correct that Plaintiffs meet the statutory definition of Potentially Responsible Parties. Plaintiffs are owners of property contained within a Superfund site, so they fit one of the four classes of Potentially Responsible Parties.¹⁰¹ This simplistic interpretation, however, does not fit the facts of the case.

First, no Potentially Responsible Parties exist here any longer because there is only one *responsible* party for the hazardous waste—ARCO. CERCLA § 107 imputes strict liability on whomever owns property that created the hazardous waste, operated a facility that generated the waste, contracted to transport or store the hazardous waste, or possessed the hazardous waste when it was released.¹⁰² The structure of the statute, however, indicates that identifying Potentially Responsible Parties is simply the first step towards cleaning up a hazardous site.¹⁰³ The statute exists to help the EPA determine who may initially be culpable,¹⁰⁴ but naming additional Potentially Responsible Parties after there is already an EPA ROD and there is no indication whatsoever that those additional parties actually contributed to the damage at the Superfund site violates the intent of the statute.

Second, Plaintiffs have given two defenses for whether they are Potentially Responsible Parties. In regards to the innocent landowner defense, ARCO is most likely correct that the innocent landowner defense would only come into play if a court tried placing liability on Plaintiffs.¹⁰⁵ Under the portion of the CERCLA statute creating the defense, the statute only removes liability for “a person *otherwise liable*” who can establish the defense.¹⁰⁶ Therefore, the statute seems to indicate that a party may be a Potentially Responsible Party even though they are able to prove the innocent landowner defense. By contrast, the contiguous landowner defense is phrased differently under the statute. Here the statute states that a person that owns real property that is contiguous to a Superfund site “shall not be considered to be [a Potentially Responsible Party].”¹⁰⁷ Because Plaintiffs own land contiguous to the Superfund site, this defense

¹⁰¹ See 42 U.S.C. § 9607(a)(1).

¹⁰² § 9607(a).

¹⁰³ See generally § 9607.

¹⁰⁴ See generally *id.*

¹⁰⁵ Petitioner's Opening Brief at 36, *supra* note 3

¹⁰⁶ § 9607(b) (emphasis added).

¹⁰⁷ § 9607(q)(1).

prevents them from being named as Potentially Responsible Parties in the first place.

Finally, part of whether Plaintiffs' claim is barred by CERCLA may hinge on whether CERCLA preempts the type of restitution Plaintiffs seek altogether. ARCO admits in the first page of its brief that CERCLA "does not prohibit all claims for property damages at a Superfund site, and it does not affect most of Plaintiffs' claims in this case."¹⁰⁸ However, ARCO argues that the restoration claim is barred under the theory that CERCLA conflicts and preempts these types of state-law claims.¹⁰⁹ The EPA makes a similar argument that the restoration claims are barred.¹¹⁰ The EPA contends that Congress delegated decisions about the degree and manner of cleanups at Superfund sites to the EPA alone, so allowing the claim to proceed would violate Congress's original intent.¹¹¹ In response, Plaintiffs argue once more that their claim advances CERCLA's goals and does not challenge the EPA's proposed remedy or the authority delegated to it.¹¹²

The Court's decision here may look similar to the first sub-issue. The precise type of remedy Plaintiffs have proposed may weigh on the Court's decision about whether CERCLA bars it. A decision that restoration damages are *always* preempted by CERCLA, however, seems unlikely. As indicated by Plaintiffs, Congress did leave room for additional state-law environmental claims to be made outside of CERCLA. The Court's decision may instead choose to reduce the applicability of restoration-damage claims when CERCLA is involved while leaving the door open for future cases where restoration damages aren't preempted by CERCLA and are still necessary to make plaintiffs whole.

Ultimately, in the most likely scenario the Court will find for Plaintiffs, but only in regards to their additional soil excavation remedy. The Court is unlikely to find Plaintiffs are Potentially Responsible Parties, which would bar their claim altogether. Instead, the Court will likely find Plaintiffs' call for additional soil excavation aligns with and supplements the EPA's existing remedy. The fact that the EPA already rejected building the underground Permeable Reactive Barriers and the unpredictability of the barriers' success, however, will likely cause the Court to find this portion of Plaintiffs' remedy does challenge the EPA's. Finally, in the unlikely event that the Court finds for ARCO without splitting Plaintiffs'

¹⁰⁸ *Id.* at 1.

¹⁰⁹ *Id.* at 39.

¹¹⁰ United States' Amicus Brief at 19–21, *supra* note 35.

¹¹¹ *Id.*

¹¹² Plaintiffs/Counter-Petitioners' Answer Brief at 39–43, *supra* note 6.

remedy on one of these primary issues, it is improbable the Court will choose to foreclose any possibility of future restoration claims made in conjunction with Superfund cleanups under CERCLA.