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## Atlantic Richfield Company v. Montana Second Judicial District Court

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*Atlantic Richfield Company v. Montana Second Judicial District Court*, 2017 MT 324, 390 Mont. 76, 408 P.3d 515 (Mont. Dec. 29, 2017)

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Landowners in Opportunity, Montana sought restoration damages from ARCO, Anaconda Copper Mining Company's successor, to their property from over a century of processing ore at the Anaconda Smelter. ARCO argued that CERCLA preempted and barred any claim for restoration damages. The Montana Supreme Court held: landowners could bring their state common law claims seeking restoration damages; the state district court had subject matter jurisdiction; and landowners' proposed restoration fund did not challenge EPA's selected remedy under CERCLA.

## I. INTRODUCTION

The Montana Supreme Court accepted supervisory control over *Atlantic Richfield Company v. Montana Second Judicial District Court* to determine whether private property owners ("Property Owners") in the Anaconda Smelter Site ("Smelter Site") could bring a claim for restoration damages against Atlantic Richfield Company ("ARCO") after the Environmental Protection Agency ("EPA") directed ARCO's remediation under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").<sup>1</sup> The Montana Supreme Court found that the Property Owners' claims did not challenge EPA's selected remedy,<sup>2</sup> the Property Owners were not CERCLA "potentially responsible parties" ("PRPs");<sup>3</sup> and the Property Owners' claims did not conflict with CERCLA and thus were not preempted.<sup>4</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

In 1980, the Anaconda smelter, which had processed copper ore from Butte for nearly one hundred years, shut down.<sup>5</sup> Processing the copper ore produced wastes of arsenic, copper, cadmium, lead, and zinc, contaminating soil, groundwater, and surface water surrounding the smelter.<sup>6</sup> That same year, Congress passed CERCLA, also known as

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1. Atl. Richfield Co. v. Mont. Second Judicial Dist. Court, 2017 MT 324, ¶ 5, \_\_\_ P.3d \_\_\_, 2017 WL 66294510 (Mont. Dec. 29, 2017).

2. *Id.* ¶ 20.

3. *Id.* ¶ 24.

4. *Id.* ¶ 27.

5. *Id.* ¶ 2.

6. *Anaconda Co. Smelter Superfund Site, Background*, ENVTL. PROT. AGENCY, <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?>

“Superfund”, which fosters the cleanup of sites with hazardous waste contamination.<sup>7</sup> The Smelter Site was declared a Superfund site in 1983.<sup>8</sup> In 1984, Both ARCO and EPA were responsible for the Smelter Site remediation.<sup>9</sup> EPA chose a remedy for the Smelter Site remediation in 1998 and directed ARCO’s cleanup responsibilities.<sup>10</sup>

EPA required ARCO to remediate residential yards within the Smelter Site with levels of arsenic in the soil greater than 250 parts per million and further required remediation of all drinking water wells with levels of more than ten parts per million of arsenic.<sup>11</sup> Desiring full restoration to pre-contamination levels, a group of ninety-eight landowners, the Property Owners, in the Smelter Site obtained the opinion of outside experts for restoration remedies.<sup>12</sup> The outside experts recommended removing the top two feet of soil and installing permeable wells to remove arsenic from the groundwater.<sup>13</sup> The outside experts’ recommended restoration remedies were in excess of EPA’s requirements of ARCO for the cleanup.<sup>14</sup>

Property Owners brought four common law claims of trespass and nuisance against ARCO in 2008.<sup>15</sup> The fifth claim brought by the Property owners was “expenses for and cost of investigation and restoration of real property.”<sup>16</sup> The restoration damages would be placed in a trust account used to conduct restoration work.<sup>17</sup>

In 2013, ARCO moved for summary judgment on the Property Owners’ claim for restoration damages, arguing that CERCLA preempted the claim.<sup>18</sup> Initially, the second judicial district court of Montana dismissed the Property Owners’ case, finding that the statute of limitations barred the claims.<sup>19</sup> The Montana Supreme Court disagreed and held that the statute of limitations did not bar the claims for nuisance and trespass because they were ongoing and reasonably abatable.<sup>20</sup>

On remand, the district court denied all of ARCO’s motions for summary judgment, including their motion for summary judgement on the claim for restoration damages.<sup>21</sup> ARCO petitioned the Court for a writ of

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fuseaction=second.Cleanup&id=0800403#bkground (last visited March 6, 2018).

7. *Atl. Richfield Co.*, ¶ 2 (citing 42 U.S.C. § 9601–9675 (2012)).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* ¶ 4.

16. *Id.* ¶ 6.

17. *Id.*

18. *Id.*

19. *Id.* ¶ 5.

20. *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 77, 380 Mont, 495, 358 P.3d 131.

21. *Atl. Richfield Co.*, ¶ 5.

supervisory control, and the Court issued an order granting it.<sup>22</sup> The writ was specifically for the limited purpose of considering the district court's order denying summary judgment to ARCO regarding the restoration damages claim, as well as the order granting the Property Owners' motion for summary judgment on ARCO's CERCLA preemption affirmative defenses.<sup>23</sup>

### III. ANALYSIS

The Court noted that due to the limited purpose of the writ, it did not need to decide the merits of the case, and ARCO was not precluded from challenging the merits of the Plaintiff's claims.<sup>24</sup> As a matter of law, ARCO argued that CERCLA precluded the Property Owners' state law restoration claims because they conflicted with EPA's remedy.<sup>25</sup> ARCO argued that CERCLA barred recovery where: (1) the claims were a direct challenge to EPA's remedy and thus invalid under CERCLA's timing of review provision; (2) the Property Owners were PRPs; and (3) the claims conflicted with CERCLA under the doctrine of conflict preemption.<sup>26</sup>

Preemption can occur expressly, or "impliedly through the doctrines of field preemption or conflict preemption."<sup>27</sup> The Court found there was no express or field preemption because CERCLA's savings clauses expressly allowed for state law claims.<sup>28</sup>

Property Owners relied on *Sunburst School District Number Two v. Texaco*, where the plaintiffs brought a similar restoration damages claim and Texaco argued that Montana's Comprehensive Environmental Cleanup and Responsibility Act ("CECRA"), which is similar to CERCLA, preempted their claims.<sup>29</sup> The *Sunburst* Court discussed preemption and held that since there was no necessary implication for conflict between the Department of Environmental Quality's supervisory role and the common law claim for restoration damages, there was no preemption under Montana's CECRA and the restoration damages were appropriate.

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22. *Id.*

23. *Id.*

24. For instance, to recover restoration damages under state common law, a party must show: "(1) the injury to the property is reasonably abatable, and (2) the plaintiff has 'reasons personal' for seeking restoration damages." *Id.* ¶ 8 (citing *Lampi v. Speed*, 2011 MT 231, ¶ 29, 362 Mont. 122, 261 P.3d 1000).

25. *Id.* ¶ 9.

26. *Id.* ¶ 10.

27. *Id.* (citing *Oneok, Inc. v. Learjet, Inc.*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1591, 1594-05, 191 L.Ed.2d 511 (2015)).

28. *Id.* (citing 42 U.S.C. §§ 9652(d), § 9614(a) (2012)).

29. *Sunburst School District No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079.

A. *The Property Owners' Claim Does Not Challenge EPA's Selected Remedy*

Section 113(h) of CERCLA (“timing of review provision”) describes the procedure for citizen challenges to EPA’s selected remedy in restoration cases.<sup>30</sup> The timing of review provision presents a jurisdictional question regarding the state court’s subject matter jurisdiction to hear state law claims involving CERCLA, as the statute only references federal courts. However, the Court declined to address that question because a dispositive and essential factor in the timing of review provision is that the claim for restoration damages must “challenge” the CERCLA cleanup.<sup>31</sup>

ARCO asserted the Property Owners’ claim challenged EPA’s remediation.<sup>32</sup> Recognizing it had not addressed what comprises a challenge to CERCLA remediation under the timing of review provision, the Court analyzed different circuits’ analyses of a “challenge” under CERCLA.<sup>33</sup> The Court concluded that a challenge “must actively interfere with EPA’s work, as when the relief sought would stop, delay, or change the work EPA is doing.”<sup>34</sup> The Court stressed that the Property Owners were not seeking to dictate EPA’s remediation, but instead were seeking common law damages to complete their *own* restoration, independent of EPA.<sup>35</sup> Since the Court did not find that the Property Owners’ remediation claims constituted a “challenge” under the timing of review provision, Montana state courts are not preempted from exercising their jurisdiction. Furthermore, the Court found that there was no ongoing EPA remedial action.<sup>36</sup>

B. *Property Owners are Not Potentially Responsible Parties*

Under CERCLA, a PRP is “prohibited from conducting any remedial action that is inconsistent with EPA’s selected remedy without EPA’s consent.”<sup>37</sup> ARCO argued that the Property Owners were PRPs and thus barred from remediation independent of EPA’s choice.<sup>38</sup> The Court found that while the Property Owners could potentially be treated as PRPs had EPA or judiciary determined them so, the statute of limitations for determining PRPs had long passed and “the PRP horse left the barn decades ago.”<sup>39</sup>

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30. 42 U.S.C. § 9613(h) (2012).

31. *Atl. Richfield Co.*, ¶¶ 12, 14.

32. *Id.* ¶ 14.

33. *Id.* ¶¶ 14-15.

34. *Id.* ¶ 15.

35. *Id.* ¶¶ 15-17 (emphasis added).

36. *Id.* ¶ 18.

37. *Id.* ¶ 22 (citing 42 U.S.C. § 9622(e)(6) (2012)).

38. *Id.* ¶ 24.

39. *Id.*

*C. Property Owners' Claim Does Not Conflict with CERCLA and is Not Preempted*

ARCO lastly argued that the claim for restoration damages was otherwise in conflict with CERCLA in three ways.<sup>40</sup> ARCO first argued that EPA has exclusive discretion to choose remedies at CERCLA sites and alternative remedies are preempted. The Court disagreed, reaffirming CERCLA's savings clauses that expressly "contemplate the applicability of state law remedies."<sup>41</sup> Second, ARCO maintained that there was "unambiguous congressional intent" to preempt state law remedies in superfund remediation.<sup>42</sup> The Court was not persuaded, again because it found that the Property Owners' claimed damages and planned remediation did not challenge EPA's remediation at the site, and did not prevent EPA from accomplishing its goals at the Smelter Site.<sup>43</sup> Finally, ARCO asserted that any private remediation claims could not proceed until EPA's remediation was complete.<sup>44</sup> The Court already found there was no ongoing remediation and was not persuaded.<sup>45</sup>

Having established there was no ongoing remediation, that CERCLA's savings clauses expressly allowed for state law claims, and the Property Owners' claim did not challenge EPA's remedy, the Court held: "CERCLA does not expressly or impliedly preempt the Property Owners' claim for restoration damages. . . ."<sup>46</sup>

#### IV. CONCURRENCE

Justice Baker specially concurred, noting the decision was a "narrow one. . . ."<sup>47</sup> The Concurrence discussed how CERCLA sets a floor for remediation, not a ceiling.<sup>48</sup> Furthermore, the Concurrence noted: "[t]he dynamic between individual restoration and CERCLA's coordinated large-scale response does not give rise to preemption as a matter of law."<sup>49</sup> The Concurrence discussed future issues for trial, separately adding if ARCO maintains that the proposed remedy conflicts with measures already taken to remediate the site, ARCO may address those conflicts while rebutting the essential elements in a state restoration damages claim.<sup>50</sup> However, ARCO cannot "cloak itself" in the federal government's authority, meaning ARCO cannot assert that because it

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40. *Id.* ¶ 27.

41. *Id.* (citing 42 U.S.C. §§ 9614(a), 9652(d) (2012)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* ¶ 18.

46. *Id.* ¶ 27.

47. *Id.* ¶ 31 (Baker, J., concurring).

48. *Id.* ¶ 33 (citing *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1246 (10th Cir. 2006)).

49. *Id.* ¶ 33.

50. *Id.* ¶ 36.

complied with EPA remediation, the company does not need to do any additional remediation.<sup>51</sup>

#### IV. DISSENT

The dissent characterized the majority's conclusion as "not only inconsistent with CERCLA and federal precedent, but as having no authority in Montana law."<sup>52</sup> Fundamentally, the dissent disagreed with the majority's holding that the Property Owners' claim was not a "challenge" to EPA's remedy<sup>53</sup> and that the remediation was not ongoing.<sup>54</sup>

#### V. CONCLUSION

The Montana Supreme Court affirmed the rights of private property owners in superfund areas to bring restoration claims against the PRP. The Court drew a line between acceptable monetary restoration damages versus compelling EPA to conduct said restoration. Finding no challenge to EPA restoration plans, the timing of preview provision did not apply, there was no CERCLA preemption for restoration claims, and state common law restoration claims could be sought from ARCO.

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51. *Id.*

52. *Id.* ¶ 37 (McKinnon, J., dissenting).

53. *Id.* ¶ 37.

54. *Id.* ¶ 51.