

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 16-0555

ATLANTIC RICHFIELD COMPANY

Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW
COUNTY, THE HONORABLE KATHERINE M. BIDEGARAY

Respondent,

UNITED STATES' AMICUS BRIEF

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STATEMENT OF THE CASE

In an October 5, 2016, order this Court invited the United States Environmental Protection Agency (EPA) to file this *amicus* brief, addressing whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) bars or otherwise prevents a claim for restoration damages under Montana law that a group of 98 landowners has filed against the Atlantic Richfield Company (ARCO).

STATEMENT OF ISSUES

Does CERCLA bar the landowners' claim for restoration damages?

STATEMENT OF FACTS

The United States relies on ARCO's November 17, 2016 brief to set out the primary factual and procedural background. In addition, however, we note that though EPA has been actively responding to hazardous-substance contamination at the Site for more than 30 years, significant work remains. This includes 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. Final Residential Soils Report, August 7, 2015, available at <https://semspub.epa.gov/src/document/08/1549208>; Fifth Five-Year Review (Sept. 25, 2015), Table 10-1 at 10-7 <https://semspub.epa.gov/src/document/08/1549381>.

EPA estimates that ARCO will complete this work by approximately 2025, though monitoring and maintenance work will continue indefinitely. Fifth Five-Year Review, Table 10-7 at 10-58.

Response actions at two of EPA's five Operable Units (OUs) directly impact the landowners' property: Community Soils (CSOU), which primarily addresses residential yards contaminated with arsenic and lead in Anaconda, Opportunity, and the surrounding area; and Anaconda Regional Water, Waste, and Soils (ARWWS OU), which addresses a variety of soil, surface water, and groundwater contamination issues throughout the Site. *See generally* Record of Decision, Community Soils Operable Unit, Sept. 1996, CSOU ROD; *see also* Record of Decision, ARWWS OU, Sept. 1998 (ARWWS OU ROD).¹ EPA considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners, along Willow Creek for collecting and treating groundwater south of Opportunity to protect surface water in Willow Creek to the south and east of Opportunity. ARWWS OU ROD Am. § 6.4.2.1; ARWWS OU ROD Am. Responsiveness Summary § 3.0. EPA concluded, however, that this approach would not necessarily achieve the human health standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving

¹ The ARWWS OU ROD is available at <http://goo.gl/DWz1pF>.

waters. *Id.* § 6.4.3.1 & Responsiveness Summary § 3.0. EPA also determined that it was technically impracticable to reduce arsenic concentrations below 10 ppb in shallow groundwater in the South Opportunity aquifer. *Id.* § 6.4.1. EPA therefore did not select below-ground structures to address groundwater arsenic concentrations.

STANDARD OF REVIEW

EPA adopts the Standard of Review set out in Petitioner's brief.

SUMMARY OF ARGUMENT

In CERCLA, Congress narrowly circumscribed when and how to challenge an EPA-selected remedy and provided EPA with authority to review and approve remedial actions undertaken by potentially responsible parties to ensure that contaminated sites are cleaned up efficiently and without delay. Specifically, CERCLA section 113(h) bars "any challenges" to a removal or remedial action selected under CERCLA section 104. *See* 42 U.S.C. §§ 9604, 9613. The landowners' restoration-damages claim challenges EPA's selected response actions at the Site because the landowners would require different cleanup standards and actions for soil cleanup, and require installation of underground groundwater barriers, which could undermine EPA's cleanup approaches. Section 113(h)

prohibits this claim because it would impose different response actions than those selected by EPA.

Additionally, the doctrine of conflict preemption independently bars ARCO's restoration-damages remedy. Congress delegated the President authority to set cleanup levels and select response actions. Implementing the landowners' restoration-damages remedy would undermine Congress's approach, and aspects of the landowners' proposed remedy conflict with EPA's response action. Because Congress intended to supersede these types of non-federal remedies, the doctrine of conflict preemption bars the landowners' proposed cleanup.

Even if these principles did not bar the landowners' claim, CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), requires EPA authorization of any remedial action at a CERCLA site by potentially responsible parties where, as here, EPA has already initiated a remedial investigation and feasibility study. The landowners own property at the Site, and the District Court did not properly assess whether the landowners are potentially responsible parties under CERCLA. It is likely that some, if not all, of the landowners are potentially responsible parties. No landowner has sought EPA approval to undertake any remedial action at the Site. EPA is unlikely to approve the landowners' approach, and no court should assume that the landowners' proposed remedy could be implemented. Thus, the

landowners' proposed remedy is not a reliable basis for an award of restoration damages.

ARGUMENT

Over the course of more than three decades, EPA has invested millions of dollars in agency resources and thousands of hours of employee time, and has required ARCO to spend hundreds of millions more characterizing the Site, developing RODs, and cleaning the Site. The remedy-selection process continues to respond to public concerns and new data. For example, EPA significantly amended the RODs in 2011 and 2013 based on new information. The remedy-selection and implementation processes account for a wide range of technical, scientific, and community concerns.

EPA's responsibility is to protect human health and the environment based on sound science. It is vital that cleanups proceed expeditiously once EPA selects a remedy. Congress was concerned that consideration of the same broad interests that make for a robust remedy-selection process should not work to prevent EPA's selected remedy from moving forward.

Congress included statutory provisions such as CERCLA's section 113(h), 42 U.S.C. § 9613(h), and section 122(e), 42 U.S.C. § 9622(e), to ensure that an EPA-selected cleanup moves forward without obstruction, delay, and the diversion of

resources accompanying judicial challenge and litigation-based additional cleanup requirements and expenses. No matter how well intentioned, any attempt to impose conflicting cleanup standards and response actions is prohibited by CERCLA.

I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages.

Under Montana law, restoration damages redress an injury to property, and may exceed the diminution in market value of property caused by the particular injury. *See Lampi v. Speed*, 261 P.3d 1000, 1004 ¶ 21 (Mont. 2011); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 ¶¶ 28-31, 38 (Mont. 2007). To prevent a windfall, Montana requires a plaintiff asserting a claim for restoration damages to show that any award of such damages will actually be used to abate the injury. *Sunburst*, ¶ 40-43; *Lampi*, ¶ 31. The landowners' claim for restoration damages poses a prohibited challenge because it would (1) impose more stringent cleanup levels, (2) impose additional requirements, and (3) require approaches to groundwater remediation and soil disposal that directly conflict with EPA's ROD.

A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site.

The section 113(h) bar applies to any claims that in their effect "challenge[] any removal or remedial action selected under section 9604 of this title" or seek

“to review any order under section 9606(a) of this title.” 42 U.S.C. § 9613(h). The Ninth Circuit has found this language to be “clear and unequivocal,” and “amount[ing] to a blunt withdrawal of ... jurisdiction” for “any challenges” to an ongoing CERCLA response action, including any attempt to interfere with, strengthen, or control the cleanup or remedy. *McClellan Ecological Seepage Situation*, 47 F.3d 325, 328 (9th Cir. 1995) (internal citations omitted). Congress chose to prioritize expeditious cleanup of hazardous substances and to ensure that litigation would not interfere with such cleanup actions.

The District Court here held that the restoration-damages claim could proceed to trial because a claim challenges EPA’s cleanup “*only* if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup.” August 30 Slip Op. at 9 (emphasis added) (citing *ARCO Env’tl. Remediation, L.L.C. v. Dep’t of Health & Env’tl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)). This holding is erroneous, mischaracterizes Ninth Circuit law, and reflects an overly narrow view of section 113(h). In the case cited by the District Court, *ARCO Environmental Remediation*, the Ninth Circuit held only that a claim regarding the right to access public information about a cleanup was not a “challenge” because that claim was not, in any way, related to the goals of the challenged cleanup. *Id.* The Ninth Circuit did not hold that termination or delay was *necessary* to trigger section

113(h). Rather, it recognized, in dicta, that termination or delay of an EPA-mandated cleanup was *sufficient* to trigger the section 113(h) bar.² See 213 F.3d at 1115.

The District Court should have dismissed the restoration-damages claim. Most courts have correctly concluded that any suit that will “impact the implementation” of the government’s selected CERCLA response action constitutes a “challenge” within the meaning of section 113(h). See *Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990). While Congress did not intend to bar all state-law claims related to hazardous substances, see *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243-44 (10th Cir. 2006) (citing cases), many courts have correctly found that Congress did intend to bar attempts to apply *any* law that even indirectly works to control, alter, or interfere with an EPA-selected remedy, or that

² Section 113(h) states that “[n]o Federal court shall have jurisdiction ... under State law ... to review any challenges to removal or remedial action” 42 U.S.C. § 9613(h) (emphasis added). The landowners did not argue in district court that section 113(h) is inapplicable to state courts, but state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners’ restoration damages claim. CERCLA section 113(b) gives “the United States district courts” “exclusive original jurisdiction over all controversies arising under [CERCLA]” *Id.* § 9613(b). The Ninth Circuit has explained that section 113(h) speaks in terms of actions brought in federal courts because Congress required CERCLA controversies be litigated in federal courts. See *Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999); see also *O’Neal v. Dep’t of the Army*, 742 A.2d 1095, 1100-01 (Pa. Super. Ct. 1999).

otherwise affects the goal of the remedy. *See McClellan*, 47 F.3d at 330. Even claims that purport to strengthen EPA's selected remedy are barred. *Id.*; *see also United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996) (zoning requirements barred); *Town of Acton v. W.R. Grace Co.*, No. 13-12376-DPW, 2014 WL 7721850 (D. Mass. Sep. 22, 2014) (municipal groundwater cleanup standards barred).

A "challenge" includes actions that are "related to the goals of the cleanup." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Courts have even barred claims seeking to enforce other federal laws and state laws that attempt to supplement EPA's CERCLA remedy. *See, e.g., Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014). The Ninth Circuit has made clear that the prohibition of section 113(h) applies equally to both federal and state actions because "Congress did not intend to preclude dilatory litigation in federal courts but allow such litigation in state courts." *Fort Ord*, 189 F.3d at 832; *see also ARCO Env'tl. Remediation, LLC*, 213 F.3d at 1115; *McClellan*, 47 F.3d at 328; 42 U.S.C. § 9613(b).

In *McClellan*, the Ninth Circuit ruled that a suit seeking to impose additional reporting requirements would "second-guess" EPA's determination and interfere with the remedial action selected, and was accordingly barred by section 113(h).

47 F.3d at 329-30. Similarly, in *Razore*, the court held that section 113(h) barred the plaintiffs' claims regarding EPA's cleanup of a former landfill, which amounted to an "attempt to dictate specific remedial actions and to alter the method and order for cleanup." 66 F.3d at 239-40; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220-23 (9th Cir. 2013); *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995); *ARCO Env'tl. Remediation, LLC*, 213 F.3d at 1115; *Villegas v. United States*, 926 F. Supp. 2d 1185, 1196 (E.D. Wash. 2013) ("CERCLA's broad jurisdictional bar applies to any suit that challenges any aspect of a CERCLA removal or remediation action, regardless of whether the suit purports to be based on CERCLA."). Other circuits have reached similar holdings. The Tenth Circuit held that a state public-nuisance and negligence suit seeking an unrestricted award of money damages was barred by section 113(h). *New Mexico*, 467 F.3d at 1249-50; *see also Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002); *Cannon v. Gates*, 538 F.3d 1328, 1335-36 (10th Cir. 2008).

The District Court incorrectly distinguished the Tenth Circuit's decision by drawing a distinction between common-law and statutory claims. Aug. 30 Slip Op. at 10. But CERCLA section 113(h) does not focus on the nature of the underlying

cause of action. Rather, it requires courts to assess the impact of the non-federal remedy (here, the restoration-damages claim) to determine if that remedy poses a prohibited “challenge.” See 42 U.S.C. § 9613(h). *New Mexico*, along with *McClellan*, *Razore*, and the other cases cited above, shows how courts have assessed what constitutes a prohibited challenge. While many common-law claims survive, the express statutory language of CERCLA makes clear that no claim survives if it seeks to challenge or has the effect of challenging EPA’s ROD.

These readings of the scope of section 113(h) are dictated by the broad language used by Congress. Congress emphatically barred “*any* challenges to removal or remedial action ... in *any* action,” 42 U.S.C. § 9613(h) (emphasis added); and the United States Supreme Court recognizes the comprehensive scope of the term “any.” See *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”); see also *United States v. James*, 478 U.S. 597, 605 (1986) (“Congress’ choice of the language ‘any damage’ and ‘liability of any kind’ further undercuts a narrow construction” (emphasis in original)). The sweeping nature of Congress’s word choice supports a broad reading of the language of section 113(h).

Legislative history also supports a broad reading of section 113(h). The Chairman of the Senate Judiciary Committee explained:

The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the actions that are performed by EPA. The section covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of “all lawsuits” under “any authority,” and to cover “all issues,” supports the conclusion that section 113(h) bars the landowners’ challenge to EPA’s ROD.

Finally, actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA. *See* 42 U.S.C. § 9622; *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013). The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party’s cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations.

Importantly, Congress also provided mechanisms to challenge EPA’s ROD. Those mechanisms are listed in section 113(h). For example, if the landowners believe that EPA’s remedy is not sufficiently protective, they may bring a citizen suit under 42 U.S.C. § 9659. *See id.* § 9613(h)(4). By barring litigation that

challenges a cleanup plan, section 113(h) ensures that EPA, state agencies, and potentially responsible parties participating in a cleanup can develop and implement an adequate and fully realized cleanup plan.

B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy.

In the prior section, we address law surrounding the nature of a “challenge” under section 113(h). Here, we focus on how the landowners’ claim impacts EPA’s remedy at the Site. Under Montana law, the landowners must use any restoration-damages award to restore the affected properties. It follows that obtaining restoration damages under state law necessarily means implementing a cleanup action different from the one selected by EPA. The landowners’ experts take issue with the cleanup standards selected by EPA, seeking to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA. The landowners’ experts also proposed actions that differ from those EPA has required, including: (1) excavating to two feet rather than EPA’s chosen depth of 18 inches within residential areas; (2) transporting the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (3) constructing a series of underground trenches and barriers for capturing and treating shallow groundwater. The landowners’ experts’ reports are not detailed, but do indicate that aspects of those plans are a dramatic departure from EPA’s ROD

requirements. Given the ongoing cleanup at the Site, the landowners bear the burden of showing consistency with section 113(h)—any missing details weigh in favor of dismissing the landowners' claim.

The District Court, disregarding the 1150 properties that remain to be cleaned, appeared to rely heavily on ARCO's representation that the cleanup of the landowners' residential yards will be finished by November 1, 2016, to support its conclusion that the landowners' supplemental restoration requirements will not interfere with ongoing ROD requirements. Aug. 30 Slip Op. at 8. The District Court's conclusion ignores the full impact of permitting the restoration claim to go forward. Allowing individual property owners to divert cleanup resources from the implementation of EPA's ROD is a direct conflict with EPA's cleanup process. Goals of the CSOU ROD, for example, include minimization of dust transfer, bioavailability of lead, and soil ingestion. CSOU ROD Am. at II-11. Once the EPA remedy at the landowners' properties is complete, the completed yards are either capped or backfilled with clean soil. *See, e.g.*, CSOU ROD Am. II-18 – II-19 (setting residential-soils requirements including a “soil swap” and ensuring “replacement with clean soil and a vegetative ... or other protective barrier”). Tearing up that protective cap or layer of soil directly impacts EPA's chosen remedy and could expose the neighborhood to an increased risk of dust transfer or

contaminant ingestion. Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public. Even if the landowners attempt to coordinate their efforts with EPA, their involvement would slow the implementation and timeline of EPA's ROD and increase the agency's costs. The District Court's analysis wrongly assumed that the restoration on the Site proposed by the landowners' experts could proceed without risk or consequence. *See* Aug. 30 Slip Op. at 8. Additionally, even if EPA could coordinate with the landowners, recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres.

The landowners' proposal to install underground reactive barriers is plainly inconsistent with EPA's cleanup, and may pose even greater risks. First, it is important to understand that water from domestic wells in the town of Opportunity is generally clean and drinkable, due to natural conditions in the deep underground aquifer accessed by the wells, and to hydraulic controls (a drain-tile system) that intercept arsenic contamination in shallow groundwater beneath the town of Opportunity. ARWWS ROD Am. at 6.4.1. If conditions change, EPA can take additional actions that it deems appropriate to protect human health and the environment based on what it learns through monitoring. ARWWS ROD Am. at 6.4.5.

By contrast, the landowners would build several underground permeable reactive barriers. Kane Rep., Opinion 4(b), at 10. These barriers, intended to treat shallow groundwater moving toward Opportunity, would be 8,000 feet long, 15 feet deep, three feet wide, and situated upgradient of the town. *Id.* Shorter barriers would be placed upgradient of individual landowners' properties. *Id.* These barriers could change the groundwater flow in unpredictable ways, which could impact current hydraulic controls. The barriers proposed by the landowners' experts contain elements and enzymes that supposedly strip arsenic in water but could unintentionally contaminate groundwater and surface water. *Id.* In other words, the landowners' remedy could upset a balance that currently protects human health and the environment. Additionally, if EPA sampling detects elevated contamination following landowners' installation of underwater barriers, EPA will not be able to determine whether the contamination was impacted by the landowners' project, complicating potential remedial options. If other property owners later filed similar claims and demanded construction of additional structures not envisioned by the ROD the situation becomes even more complex. Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids *ad hoc* addition of potentially competing cleanup measures. The District Court took far too narrow a view of the

impact of the scope of a prohibited challenge—looking primarily to whether the landowners “seek to alter the ROD” or “change any of the requirements that the EPA has imposed upon ARCO.” August 30 Slip Op. at 9.

CERCLA cleanups are often iterative in that EPA uses data obtained during the remedial investigation and early monitoring to inform subsequent adjustments to its cleanup plan. *E.g.*, CSOU ROD Am. Part II § 3.0 (describing how data obtained through sampling implemented under the original CSOU ROD led EPA to add lead remediation to its soil cleanup). Lawsuits that seek to impose different or additional remedial actions while a cleanup is in progress not only would result in diversion of limited government resources and delay of EPA’s cleanup efforts contrary to Congress’s intent, *McClellan*, 47 F.3d at 329, but also would force the parties to litigate the details of a cleanup plan that may not be final.

Not only would the landowners set a new remedial goal for soils (8 ppm for arsenic, compared to the 250 ppm ROD standard), they would achieve their goals through different methods. As in *McClellan*, the landowners’ experts advocate remediation levels that are “directly related to the goals” and methods of the cleanup of the Site prescribed by EPA. Section 113(h), however, does not allow the landowners to use their state-court lawsuit to supplement EPA’s selected response-action cleanup levels.

C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses.

The District Court relied on CERCLA's savings clauses in holding that section 113(h) did not bar the landowners' restoration-damages claim. Aug. 30 Slip Op. at 5-8. No savings clause, however, shields the landowners' restoration-damages claim. Section 302(d) of CERCLA, which provides in part that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law," 42 U.S.C. § 9652(d), is not in conflict with section 113(h). As the Ninth Circuit stated in *Razore*, "[t]he temporary bar to citizen enforcement does not change [a potentially responsible party's] 'obligations or liabilities'" under other statutes. 66 F.3d at 240. Moreover, reading section 302(d) to govern the interpretation of section 113(h) "would effectively write [section 113(h)] out of the Act," a result that would be contrary to the court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (alteration in original) (citations omitted). As the Seventh Circuit has pointed out, while "federal environmental laws [were] not intended to wipe out the common law of nuisance," section 302(d) "must not be used to gut provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998).

Two other provisions of CERCLA, sections 114(a) and 310(h), also contain savings provisions, but neither provision trumps the limitations Congress set out in section 113(h). 42 U.S.C. §§ 9614(k), 9659(h). Section 310(h) provides that the statute “does not affect or otherwise impair the rights of any person under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title.*” 42 U.S.C. § 9659(h) (emphasis added). The express language of this savings clause demonstrates the primacy of section 113(h). *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012). Section 114(a) likewise contains no language that would overcome the limitations Congress set out in section 113(h). This case presents a perfect example of how these provisions interrelate. CERCLA does not bar all of the landowners’ state-law claims – only the landowners’ claim for restoration damages.

II. Principles of Conflict Preemption Independently Bar the Landowners’ Restoration-Damages Remedy.

If there is a conflict between federal and state cleanup standards, federal law prevails where it is “a physical impossibility” to comply with both the federal and state mandates, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*,

312 U.S. 52, 67 (1941). Where state action conflicts with a CERCLA cleanup, state cleanup standards are preempted. *See City & County of Denver*, 100 F.3d at 1512-14. Even if section 113(h) did not bar the landowners' restoration damages claim, the doctrine of conflict preemption, grounded in the Supremacy Clause, U.S. Const. art. VI, cl. 2, independently bars the landowners' restoration-damages remedy here. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015).

In conducting a preemption analysis, two bedrock principles guide the courts: (1) the purpose of Congress; and (2) "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress, in CERCLA, established how EPA should determine the degree of cleanup at a site, including how EPA should consider non-federal standards (such as state standards) in selecting the final cleanup level. *See* 42 U.S.C. § 9621(d). Congress was clear that the President or his delegates were responsible for remedy selection, after considering state-law cleanup standards and a host of other factors. *See id.* § 9621(a). Allowing the landowners' restoration-damages claim to proceed

cannot be reconciled with that congressionally mandated approach for consideration of state and local requirements.

Aspects of the landowners' restoration plan also conflict with EPA's RODs or could make those remedies difficult or impossible to achieve, as discussed more fully in argument section I-B. For example, the landowners' proposed construction of a series of underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater-monitoring efforts under EPA's selected cleanup plan. Additionally, the same excavated soil cannot be transported to EPA-approved onsite repositories, as provided for in the CSOU ROD, and also be transported to Missoula or Spokane, as required in the landowners' restoration plan.³ This is the type of uncoordinated response that CERCLA section 121(d), 42 U.S.C. § 9621(d), was designed to prevent.

III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6).

As Congress provided in section 122(e)(6) of CERCLA:

When either the President, or a potentially responsible party ... has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by [EPA].

³ Even if the landowners deposit excavated soil onsite, that approach would create additional costs for EPA's cleanup.

42 U.S.C. § 9622(e)(6). The President has initiated a remedial investigation and feasibility study (RI/FS) for the Anaconda Smelter Site under CERCLA, through EPA securing ARCO's agreement to perform the RI/FS for the various operable units within the Site. Consequently, no PRP may undertake any remedial action at the Site without EPA authorization. *See id.* § 9622(e)(6). EPA has not authorized the remedial action the landowners appear to seek in their restoration-damages claim, and therefore neither ARCO nor any landowner PRP may undertake it. Though the landowners seek money damages, those damages presuppose a subsequent remedy that is unauthorized. EPA is unlikely to approve the cleanup proposed by the landowners because that approach is inconsistent with EPA's RODs for the reasons discussed in sections I-A, I-B, and II of this brief. Such a tentative proposal is not a proper basis for a damages award.

CERCLA designates current owners of contaminated property as PRPs, *see* 42 U.S.C. § 9607(a)(1), unless they meet certain requirements, *see id.* § 9607(q). The District Court improperly concluded that the landowners need to be somehow "declared PRPs" to be considered a potentially responsible party. Aug. 30 Slip Op. at 15. That conclusion is incorrect, and is untethered to the statutory language. Parties that meet the requirements set out in 42 U.S.C. § 9607(a)(1) are, by definition, potentially responsible parties—regardless of whether they have

defenses that could absolve them of liability. Most relevant here are the so-called “third party” and “innocent landowner” defenses, by which a PRP may show that the release of hazardous substances was caused solely by “an act or omission of a third party,” *id.* § 9607(b)(3), or that “the disposal or placement of the hazardous substance” occurred before the PRP acquired the property, *id.* § 9601(35)(A). However, those defenses are defenses to a PRP’s liability for cleanup costs. Section 122(e)(6) prohibits PRPs from initiating a remedial action without EPA permission.

The District Court failed to undertake the proper statutory analysis by focusing on whether the landowners were “*potentially* responsible parties.” The District Court likewise failed to assess whether any of the 98 landowners qualified as a protected “third party” or “innocent landowner” under the statutory definitions. Thus, the District Court’s conclusion that all 98 landowners are not subject to the requirements of CERCLA section 122(e)(6) is fatally flawed.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over, and should dismiss, the landowners’ claim for restoration damages.

DECEMBER 8, 2016

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CERTIFICATE OF SERVICE

I certify that, on this 8th day of December 2016, a copy of the foregoing document was served by first-class mail to counsel of record for each of the parties, as set forth below.

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CERTIFICATE OF COMPLIANCE

The foregoing brief uses a monospaced Times New Roman 14 point typeface. According to the Microsoft Word text counting function, this brief contains 4,999 words. This brief complies with the 5,000 word limit for amicus briefs set by Rule 11(4) of the Montana Rules of Appellate Procedure.

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A handwritten signature in black ink, appearing to read 'M. R. Oakes', written over a horizontal line.

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