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EDITOR'S PICK

Updated: Montana Supreme Court rules in favor of Opportunity residents in suit against Atlantic Richfield

SUSAN DUNLAP susan.dunlap@mtstandard.com Dec 30, 2017



Opportunity resident Rick Hamilton, pictured with one of his horses outside his home last winter, worries about his horses rolling in the dirt. He owns a 10-acre spread in Opportunity where the question of what is a safe level of arsenic in the soil is the basis of a legal battle. The Montana Supreme Court ruled Friday that Hamilton and close to 100 other Opportunity residents will get their day in court to argue that state law can override federal law in cleanup decisions.

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Susan Dunlap, The Montana Standard

Setting a legal precedent that could affect all of Montana's Superfund cleanups, the Montana Supreme Court ruled in favor of Opportunity and Crackerville residents Friday, finding that Superfund law does not prohibit the residents from seeking claims under Montana state law.

In a six-to-one decision, the court decided Friday that Opportunity residents can go to a jury trial with Atlantic Richfield Company over the cleanup decisions made years ago by the Environmental Protection Agency. EPA created cleanup levels that the residents thought were not stringent enough after decades of heavy metal pollution created by the defunct Washoe Smelter in Anaconda.

The state's high court ruled that Superfund law does not prevent individuals from seeking damages for cleanup rules established by state law. This sets precedent, according to attorneys Mark Kovacich and Justin Stalpes, both of whom represent the Opportunity residents.



The residents, through their lawyers, hired experts who recommended the top 2 feet of soil in their yards be excavated and a permeable wall installed underground that would capture arsenic that might be traveling in groundwater before it reaches drinking wells.

A jury trial will make the decision as to whether Opportunity residents get what they want.

Should the Opportunity residents ultimately prevail, it is estimated that the additional cleanup would cost Atlantic Richfield about \$50 million more than the company has already spent in Opportunity and Anaconda.

The work would mean removing 650,000 tons of soil and digging an 8,000-foot trench for the groundwater wall.

Opportunity residents want Atlantic Richfield to take the soil back to what is called “background levels” of arsenic. The Washoe Smelter, which shut down in 1980, processed approximately 8,000 tons of Butte’s raw copper ore a day for nearly 80 years, spewing tons of heavy metals, including arsenic and lead, during those years. EPA estimates the footprint of contaminants covers at least 300 square miles.

According to EPA, "background levels" would mean returning the soil to roughly 25 parts per million of arsenic in the dirt.

But even that is potentially contentious and could be up to a jury to decide. The experts hired by the residents believe "background" levels of arsenic are lower than 25 parts per million.

Currently, EPA's cleanup standard for Opportunity, Anaconda, and Butte is 250 parts per million of arsenic in the soils and attics.

Opportunity is about 5 miles east of Anaconda and within sight of the former 565-foot smelter. A smaller neighborhood, Crackerville, is southeast of Anaconda and the old smelter.

The legal fight

The nearly 10-year-long legal battle between nearly 100 Opportunity residents and Atlantic Richfield was set to go to jury trial last year when Atlantic Richfield asked the Montana Supreme Court to take a second look at the case. Atlantic Richfield wanted the state’s high court to review Seventh District Court Judge Katherine Bidegaray’s decision to allow a jury trial, which was to start in fall 2016.

But, Atlantic Richfield argued that the state Supreme Court needed to intervene on Bidegaray's ruling because Superfund law barred the property owners' claims for restoration damages.

The majority opinion of the state's high court justices was that Bidegaray did not err when she ruled against Atlantic Richfield in 2015, saying that the residents are not barred by Superfund law from including a claim for restoration damages.

Atlantic Richfield, owned by parent company BP, can contest the merits of the residents' restoration plans in the jury trial.

Atlantic Richfield declined to comment Friday.

EPA, which had previously stayed out of the lawsuit through its long years of bouncing in and out of various courts, filed a brief on behalf of Atlantic Richfield in 2016 for the state's Supreme Court ruling.

EPA stated in their 2016 brief that Opportunity and Crackerville residents are barred by federal law from setting a new cleanup standard and that such an action would create conflict with the current cleanup that is ongoing.

EPA declined to comment other than to say, through a spokesperson, that the agency "will be reviewing the decision."

What it means

University of Montana-Missoula law professor Michelle Bryan said that what makes this ruling unique is that under Montana's constitution, "we get complete cleanup that other states don't necessarily get."

Bryan teaches in the law school's Natural Resources and Environmental Law Program.



A handful of states – Illinois, Hawaii, Pennsylvania, and Montana – specify the right for property owners to get a complete cleanup, regardless of what the property itself is worth, she said. A provision was entered into Montana’s constitution in 1972 to ensure that and it was “largely in response to mining damage,” Bryan said.

Domenic Cossi, a Bozeman-based lawyer with Western Justice Associates, said that this ruling gives Opportunity residents “control over their own land.”

Cossi filed a brief for the court on behalf of the Opportunity residents.

“No matter where your politics lie, if this gets to be a political decision on how far land gets cleaned up, it allows whoever’s in charge to make that decision. That’s a pretty scary proposition. Government can go to a certain standard, but the landowner should retain rights beyond that,” Cossi said.

Montana Supreme Court Justice Beth Baker didn’t agree with everything the majority wrote on the decision but agreed with the majority’s vote in favor of Opportunity.

"What (Atlantic Richfield) may do is offer evidence to support its claim that the property owners' proposed restoration plan is not feasible and thus does not qualify as a temporary injury," she wrote for the ruling.

Justice Laurie McKinnon dissented. She wrote that the residents’ restoration plans “conflict with the ongoing EPA investigation and (Superfund) cleanup.”

Opportunity resident Butch Ryan called the ruling “only fair.”

“If our (Montana’s) standards are higher, they should be. Our water quality and air quality should be better,” Ryan said by phone Friday.

Opportunity resident Shaun Hoolahan said that when the Opportunity and Crackerville residents banded together to start the lawsuit, his son was 8 years old. Now his son is 17.

“We’ll have our day in court,” Hoolahan said.

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