

SYNOPSIS OF THE CASE

2017 MT 324, OP 16-0555, ATLANTIC RICHFIELD COMPANY, Petitioner v. **MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HONORABLE KATHERINE M. BIDEGARAY**, Respondents.¹

The Montana Supreme Court affirmed the Silver Bow County District Court's order that a group of private landowners, who own property within the Anaconda Smelter Superfund Site, could move forward with their claim for restoration damages against the Atlantic Richfield Company (ARCO). The private landowners contend that nearly a century of operation of the Anaconda Smelter deposited unsafe levels of arsenic in the soil and groundwater on their property. Their lawsuit seeks to require ARCO to pay for their plan to restore the soil and water to pre-contamination levels.

ARCO contends that the private landowners' claim for restoration damages is barred by a federal law: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). ARCO argued that the private landowners' claim is barred in three separate ways. First, ARCO contends that it is already complying with a cleanup plan drafted by the Environmental Protection Agency (EPA), and the private landowners' restoration plan cannot require ARCO to do more than what EPA requires. Second, ARCO contends that the private landowners may themselves be "potentially responsible parties" under CERCLA by virtue of their ownership of land that has been contaminated by the smelter; therefore, ARCO argues that CERCLA requires the landowners to have EPA's approval to do any restoration work to their own land. Third, ARCO contends the private landowners' claim for private restoration damages conflicts with the purposes of CERCLA generally.

The Silver Bow County District Court rejected all of ARCO's arguments, and ARCO requested that the Montana Supreme Court review the District Court's order. The Supreme Court reviewed and affirmed the District Court's Order. The Supreme Court held that even if some parts of the private landowners' restoration plan have to wait until EPA has completed its cleanup, CERCLA does not prevent private landowners from seeking money damages from another private party for the purpose of restoring their own private property. Next, the Supreme Court noted that in over thirty years since the private landowners' property was declared a Superfund Site, they have never been treated as potentially responsible parties for any purpose under CERCLA; therefore, the Supreme Court rejected ARCO's argument that the private landowners should now be treated as

¹ This synopsis was prepared for the convenience of the reader. It constitutes no part of the Opinion of the Court and may not be cited as precedent.

potentially responsible parties for the first time. Finally, the Supreme Court held that no other CERCLA provisions prevented the private landowners' claim.

The concurring opinion noted that the Court's preemption ruling was a narrow one and that CERCLA distinguishes between the federal government's remedial action and the recovery of damages to restore private property. The concurrence also explained that ARCO would be able to offer evidence at trial to support its claim that the Property Owners' proposed restoration plan is not feasible and thus does not qualify as a temporary injury eligible for restoration damages. But the Property Owners should have the opportunity to show that the injury to their properties still exists despite cleanup efforts and would cease to exist if their proposed restoration plan is implemented.

Justice McKinnon dissented, concluding that while Property Owners may pursue monetary damages for trespass and nuisance during the pendency of the CERCLA cleanup effort, Property Owners may not pursue restoration damages because, under Montana law, any monies recovered must be used to actually restore the property. CERCLA and Congress have been clear that during the pendency of a CERCLA cleanup effort, federal and state courts do not have jurisdiction to consider restoration plans which challenge the EPA's selected restoration plan. Property Owners' restoration plan was considered and specifically rejected by the EPA and cleanup efforts at the site are ongoing. Justice McKinnon would hold that Property Owners' restoration plan to dig an 8,000 foot trench for a groundwater wall and remove 650,000 tons of soil conflicts with the ongoing CERCLA cleanup effort and, therefore, the state court does not have jurisdiction to consider Property Owners' claim for restoration damages.

The case was remanded back to the District Court for further proceedings.