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## Montana Supreme Court Undercuts CERCLA, Permits Property Owners to Pursue Restoration Damages Claim

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In an opinion tilting against the weight of precedent elsewhere, the Montana Supreme Court held that private landowners could pursue common-law claims to clean-up their properties beyond what EPA required in its selected CERCLA remedy for the Anaconda Smelter Superfund site. [\*Atl. Richfield Co. v. Mont. Second Judicial Dist.\*](#), 390 Mont. 76 (Mont. Dec. 29, 2017). ARCO has filed a Petition for a Writ of Certiorari asking the U.S. Supreme Court to overrule the Montana Supreme Court. Petition for Writ of Certiorari, *Atl. Richfield Co.*, No. 17-1498 (Apr. 27, 2018).

The Anaconda Smelter, a former copper mine in western Montana, is one of the largest and oldest Superfund sites. The site covers some 300 square miles, and it has been on the National Priorities List since 1983. EPA selected a remedy to address environmental contamination at the site in 1998. In relevant part, EPA's selected remedy obligates ARCO to remediate soils in residential yards with arsenic levels above 250 parts per million (ppm) and treat wells with arsenic levels above ten parts per billion (ppb). *Id.* The estimated completion date for the cleanup is 2025. *Id.* at 99.

In 2008, a group of 98 property owners within the boundaries of the EPA-delineated site sued ARCO in state court, asserting common law trespass, nuisance, and strict liability claims, and claiming restoration damages. *Id.* at 78. The plaintiffs seek to have the top two feet of soil removed from their properties and propose a series of underground trenches and barriers to treat ground water. *Id.* The requested remedy would require "restoration work in excess of what the EPA required of ARCO in its selected remedy." *Id.* at 78. Indeed, in selecting a remedy, EPA rejected the restoration work proposed by the Plaintiffs.

In the Montana Supreme Court, ARCO argued that the restoration claim should be precluded because it constituted a "challenge" to EPA's selected remedy under § 113(h), or, alternatively, because it was preempted due to conflicts with EPA's remedy. *Id.* at 81. The Comprehensive Environmental Response, Compensation, and Liability Act's ("CERCLA") "timing of review" provision prohibits challenges to an ongoing EPA remedy. 42 U.S.C. § 9613(h). ARCO also argued that the plaintiff landowners were barred from conducting restoration activities without EPA approval under § 122(e)(6) because they were potentially responsible parties ("PRPs") under CERCLA. *Id.* The United States government filed an amicus brief arguing that permitting the plaintiffs to pursue their claim would "undermine EPA's ability to implement its own remedy" and "delay [] EPA's cleanup efforts." Pet. for Cert., Appx. C at 71a & 75a.

Over a strong dissent, the Montana Supreme Court held that there was no basis under CERCLA to prohibit the plaintiffs from pursuing what the court characterized as a common law claim for damages. The court narrowly interpreted the term "challenge" in 113(h) and held that "a 113(h) challenge must actively interfere with EPA's work, as when the relief sought would stop, delay, or change the work EPA is doing." *Atl. Richfield Co.*, 390 Mont. at 83. Even though the plaintiffs sought restoration beyond EPA's remedy, the court found that the restoration claim would not "force EPA to do, or refrain from doing anything at the Site." *Id.* at 85. For similar reasons, the court also held that the claim was not preempted. The court also declined to treat the plaintiffs as PRPs - even though they owned property within the Superfund Site - because they had not been treated as PRPs throughout



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the long history of the Site. *Id.* at 86.

Both the dissent and ARCO's Petition for Certiorari argue that the court's interpretation of § 113(h) is out of step with the decisions of six federal courts of appeals. *See id.* at 95-96; Pet. for Cert. at 15-17. The Ninth Circuit, for example, has held that 113(h) applies where the action is "related to the goals of the cleanup." *ARCO Env'tl. Remediation, L.L.C. v. Dep't of Health and Env'tl. Quality of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000). The dissent argued that this was a clear case to apply § 113(h) because EPA had actually rejected the restoration work proposed by the plaintiffs. *Atl. Richfield Co.*, 390 Mont. at 100.

If the Montana Supreme Court's decision stands, it will be a precedent for a narrow interpretation of § 113(h). And as ARCO warns in its Cert Petition, potentially a model for similarly situated landowners at Superfund sites around the country.

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