

Supreme Court To Review BP Unit's Mont. Superfund Case

By **Michael Phillis**

Law360 (June 10, 2019, 10:04 AM EDT) -- The U.S. Supreme Court on Monday said it would review a Montana Supreme Court decision that allows state residents to sue Atlantic Richfield Co. for cleanup costs related to the Anaconda Smelter Superfund site's pollution despite remediation work that had already occurred.

Arco is arguing the Montana Supreme Court got it wrong when it allowed residents to sue for damages to clean up their properties beyond what the U.S. Environmental Protection Agency already had ordered. Arco, a BP America Ltd. subsidiary, says the Montana high court's decision runs counter to the EPA's sole authority to prescribe how a site should be restored under the Comprehensive Environmental Response Compensation and Liability Act.

The residents had told the high court the case isn't worth the justices' time, arguing that the Montana matter isn't final. They said CERCLA doesn't prevent them from pursuing damages after the company's cleanup was done on their property.

The federal government had argued in an amicus brief that lower court proceedings should be finished before any high court review, saying a district judge can still find at trial that the residents' claims fail. But Arco countered that this makes no sense, saying it would force the company to "engage in an expensive and burdensome trial for no legitimate reason whatsoever."

Arco has spent roughly \$470 million and decades cleaning up the site, working with the EPA along the way. It argues the residents who are seeking "restoration damages" are trying to impose their own solution.

"This is one of the most consequential decisions interpreting CERCLA in years," Arco told the high court in its petition. It called the Montana Supreme Court's opinion "simultaneously so wrong and so consequential."

The Montana high court upheld three key findings from the lower court. First, it said CERCLA's limit on challenges to EPA remedies does not apply in this case because the residents are not challenging or seeking to interfere with any part of the agency's cleanup plan.

Second, the court found that the residents are not "potentially responsible parties" as defined by CERCLA who would be subject to a requirement that the EPA approve any remediation activities.

And third, the court said CERCLA doesn't preempt the residents' claims for restoration damages, which under Montana law can be sought when a few conditions are met, including if ordinary damages don't provide "full compensation." Again, the state high court said that type of relief would be available to the residents because it wouldn't interfere with the EPA's cleanup in any way.

The residents want Arco to reduce arsenic levels in the soil to more than 30 times lower than the EPA's target level, want more top soil removed than the EPA had ordered and trenches built that could actually harm conditions, according to the company's petition. Arco said if those requirements are imposed, it would challenge the EPA's sole role in ordering cleanup, interfere with decades of work that had already been done and make companies wary of agreeing to cleanup Superfund sites because they would worry about being subject to additional litigation, Arco said.

Although the federal government agrees that the residents' claim inappropriately challenges the solution ordered by the EPA, it hasn't pushed for the high court to get involved. It said there's still time for a lower court to rule against the residents and that the case isn't a good one for the Supreme Court to review because of jurisdictional questions about the state court's authority that complicate the issues.

The residents argue that the matter is not yet settled at the state level because the Montana Supreme Court remanded it to the district court for trial.

"This court may review only final state-court decisions. The decision below is anything but final," the residents said.

And they say Arco is wrong to assert that the compensation they seek would somehow interfere with the EPA's plan. The cleanup on the landowners' property as prescribed by the EPA is done — now there is nothing to prevent them from pursuing further damages, the residents said.

"Landowners' suit does not 'challenge' EPA's remediation plan because the remedy they seek will not 'interfere with a 'removal' or a 'remedial' action'; these already have taken place," the residents said in a July filing to the court. They said they are only pushing for their property to be cleaned up in compliance with state law standards.

CERCLA does not mandate that EPA approve every cleanup activity on a site, the residents said.

A representative for the residents declined to comment.

A representative for Arco did not immediately return a request for comment Monday.

Arco is represented by Lisa S. Blatt, John S. Williams and Thomas S. Chapman of Williams & Connolly LLP, Jonathan W. Rauchway and Shannon W. Stevenson of Davis Graham & Stubbs LLP and Robert J. Katerberg, Elisabeth S. Theodore, Andrew T. Tutt and Stephen K. Wirth of Arnold & Porter.

The residents are represented by Joseph R. Palmore, Bryan J. Leitch and James R. Sigel of Morrison & Foerster LLP, Monte D. Beck and Justin P. Stalpes of Beck Amsden & Stalpes PLLC and J. David Slovak, Mark M. Kovacich and Ross Johnson of Kovacich Snipes PC.

The government is represented by Noel J. Francisco, Malcolm L. Stewart and Christopher G. Michel of

the Office of the Solicitor General and Eric Grant and Matthew R. Oakes of the U.S. Department of Justice's Environment and Natural Resources Division.

The case is Atlantic Richfield Co. v. Gregory A. Christian et al., case number 17-1498, in the Supreme Court of the United States.

--Additional reporting by Juan Carlos Rodriguez. Editing by Rebecca Flanagan.

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