

Landowners Tell High Court To Keep Claims Against Arco

By **Michael Phillis**

Law360 (October 16, 2019, 3:05 PM EDT) -- Montana landowners told the U.S. Supreme Court on Tuesday pollution levels on their properties are still a problem and Atlantic Richfield Co. shouldn't be able to use federal environmental laws to shield itself from further cleanup costs.

Nothing in the Comprehensive Environmental Response, Compensation and Liability Act blocks state-law-based claims against Arco, even if the company has fulfilled its U.S. Environmental Protection Agency-mandated cleanup, the landowners argued.

They say the Montana Supreme Court got it right when it allowed the suit to proceed. The properties in Opportunity, Montana, were polluted by a copper smelting operation, and the Superfund law shouldn't stand in the way of efforts to force Arco to pay for more cleanup, the landowners said.

The residents filed 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." The residents' properties were contaminated with arsenic, lead, copper, cadmium and zinc from the former smelting operation that became the Anaconda Smelter Superfund site.

If the residents were to win restoration damages, they said, the money would be held in a trust and spent on efforts to remove arsenic pollution on their properties. That would mean remediation beyond what the EPA ordered in its settlement agreement with Arco.

While Arco and the federal government contend only federal courts have jurisdiction to decide CERCLA disputes, the landowners said that was a misreading of the statute.

"Neither Arco nor the government attempts to reconcile the theory that CERCLA strips state courts of jurisdiction over state-law actions with the fact that CERCLA's key jurisdiction-stripping provision expressly exempts state-law actions," the landowners said.

The landowners said Arco is trying to combine two sections of CERCLA that don't actually fit together. One section gives exclusive jurisdiction to federal courts for disputes "arising under" CERCLA, but the action at issue here is not a CERCLA case — the landowners are pursuing state-based claims, they argue.

Plus, the landowners disagreed with Arco's argument that there is a conflict between the EPA's cleanup order and the additional restoration that the residents are pursuing. Montana's laws aim to "restore a

party to the condition that existed before the injury,” which is not in conflict with the EPA’s remediation efforts, they said.

Nor, does CERCLA prevent additional cleanup activities from occurring on the properties without EPA’s prior approval.

“Had Congress intended to take the unprecedented step of granting EPA perpetual veto power over private property owners’ efforts to clean up their own land within a vast Superfund site, it would have spoken more clearly,” the landowners said.

The federal government sided with Arco and argued in August the Montana Supreme Court erred in finding the restoration damages claims do not constitute a challenge to EPA’s remedy for the site because they would not "affect, alter or delay EPA's work in any fashion."

The landowners also said the high court should find it doesn’t have jurisdiction to hear the case in the first place since the Montana Supreme Court issued a remand order, which “does not satisfy the ordinary prerequisites of finality.”

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

The U.S. Supreme Court agreed to hear the case in June. Oral arguments are scheduled for Dec. 3.

Representatives for the landowners and Arco did not immediately respond to requests for comment Wednesday.

The landowners are represented by Monte D. Beck and Justin P. Stalpes of Beck Amsden & Stalpes PLLC; J. David Slovak, Mark M. Kovacich and Ross Johnson of Kovacich Snipes PC; and Joseph R. Palmore, Deanne E. Maynard, Dustin C. Elliott and Samuel B. Goldstein of Morrison & Foerster LLP.

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 DOJ's Environment and Natural Resources Division.

Arco is represented by Lisa S. Blatt, John S. Williams, Sarah M. Harris, Charles L. McCloud, Meng Jia Yang and Thomas S. Chapman of Williams & Connolly LLP; and Robert J. Katerberg and Elisabeth S. Theodore of Arnold & Porter; and Jonathan W. Rauchway and Shannon W. Stevenson of Davis Graham & Stubbs LLP.

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

--Additional reporting by Juan Carlos Rodriguez. Editing by Gemma Horowitz.