

Justices Wrestle With Montana Superfund Dispute

By Juan Carlos Rodriguez

Law360 (December 3, 2019, 7:20 PM EST) -- The U.S. Supreme Court on Tuesday appeared torn between Montana residents' claim that they can sue Atlantic Richfield Co. for money to clean up their properties on a Superfund site, and the company's and federal government's argument that federal law doesn't permit such relief.

At oral arguments, the justices had tough questions for attorneys for both sides and didn't leave much of an impression on how they might resolve the question of whether or not the landowners have a right under Montana state law to seek funds from Arco for cleanups on their property in addition to site mitigation already implemented by the U.S. Environmental Protection Agency.

Justice Ruth Bader Ginsburg waded into the weeds of the Comprehensive Environmental Response, Compensation and Liability Act right off the bat, quizzing Lisa S. Blatt of Williams & Connolly LLP, who represents Arco, about why the justices couldn't simply decide that the residents could sue for further cleanup, as long as the EPA approved.

Blatt asserted that the state law claim for further cleanup is preempted by CERCLA, and that the residents' proposed mitigation plan would cause Arco to violate the EPA's plan, were a state court to order it.

"Your supposition that EPA could approve [the residents' plan] is just not the test under preemption," Blatt said, according to a transcript of oral arguments provided by the Supreme Court. "The test under preemption is whether a party today could independently do under federal law what state law requires."

Arco, a BP America Ltd. subsidiary, asked the high court to overturn the Montana Supreme Court's finding that the landowners can sue the company for cleanup costs related to pollution from the Anaconda Smelter Superfund site in state court despite the company's settlement with the EPA.

The company says the Montana court's decision undermines the EPA's sole authority to prescribe how a site should be restored under CERCLA, and the federal government has taken Arco's side in the matter.

The residents live near the Anaconda site, where companies conducted copper concentrating and smelting operations that contaminated the water and soil with arsenic, lead, copper, cadmium and zinc.

They have fought to keep their so-called restoration damages claim alive so it can proceed to trial alongside their other state law claims for nuisance and trespass.

Joseph R. Palmore of Morrison & Foerster LLP, who represents the landowners, told the justices that Arco's and the government's position means that property owners would not be allowed to so much as install a sandbox on their properties without getting clearance from the EPA.

"Montana, like many other states, has made the judgment that one who puts toxic materials on another person's property is liable for trespass and nuisance and that a measure of recovery is the cost of removal," Palmore said. "Nothing in CERCLA bars that core exercise of state authority to vindicate private property rights."

But Chief Justice John Roberts said there could be a very good reason for the EPA to not want residents having the ability to disturb their land, since that could stir up the contaminants that the agency thinks are better left in the ground.

"You can't overlook the fact that that is going to have harmful effects on everybody else around you," Roberts told Palmore.

Christopher G. Michel of the Office of the Solicitor General, arguing the case for the federal government, said the justices should keep in mind that the restrictions on people's property use are not all-encompassing, and that people who live on or wish to develop property near a Superfund site should expect some limitations on what they can do.

He said the residents could have an alternative avenue for relief by appealing directly to the EPA, which at this point has rejected all of the measures proposed by the residents in their state court lawsuit.

"The government stands ready to listen to ... any proposals from the landowners. They have not formally presented us with any proposals, so we're working off of the best available information, which is the expert reports that they have introduced in the state litigation," Michel said.

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. But that would mean remediation beyond what the EPA ordered in its settlement agreement with Arco, including trying to lower arsenic levels more, removing more topsoil and digging underground trenches and barriers.

"We were pleased to have the opportunity to discuss the importance of state-law property rights and how Congress safeguarded them in the Superfund statute," Palmore said Tuesday.

The other parties did not respond to requests for comment Tuesday.

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, Robert J. Katerberg and Elisabeth S. Theodore of Arnold & Porter and Jonathan W. Rauchway and Shannon W. Stevenson of Davis Graham & Stubbs 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 U.S. Department of Justice's Environment and Natural Resources Division.

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

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

--Additional reporting by Michael Phillis. Editing by Bruce Goldman.