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Article One

The Government's Current CERCLA Action Against The Successors-In-Interest Are Not Barred By The Former Owner/ Operator's Bankruptcy Or Its Earlier Settlement With The Government On RCRA

United States of America v. Land O'Lakes, Inc. and Cushing, Oklahoma Brownfields, LLC
(Case No. CIV-16-170-R, W.D. OK., Feb. 22, 2017)

Via a 1987 court entered Final Consent Decree, the United States (the "Government") settled its RCRA claims against Hudson Oil Refinery Company ("Hudson"), requiring Hudson to undertake RCRA corrective action, i.e., cleanup activities, at the Cushing Refinery ("Refinery Site"). Defendant, Land O'Lakes, had nothing to do with the Government's previous RCRA action against Hudson. Rather, in 1982 Land O'Lakes merged with Midland Cooperative Wholesale ("Midland"), the prior owner of the Refinery Site. In 1995, the Government discovered that the Refinery Site was still contaminated, resulting in a 1998, EPA emergency removal action pursuant to CERCLA. Following rejected demands to Land O'Lakes that it reimburse EPA for its recovery costs "incurred in cleaning up substances allegedly released during Midland's pre-1977 operation of the facility," EPA issued a unilateral administrative order requiring Land O'Lakes to perform the remedial design and action work at the Refinery Site. Under threat of significant daily penalties, Land O'Lakes agreed to EPA's demand, but later filed suit seeking a declaratory judgment that it was not liable to the Government for its past Refinery Site cleanup costs under CERCLA, also alleging a citizen-suit claim under RCRA. The court granted the Government's motion to dismiss eight of Land O'Lake's affirmative defenses and three of its counterclaims on grounds that the Government's settlement agreement. In so doing, the court held that the Government's 1987 RCRA settlement with Hudson, and its 1984 settlement in Hudson's Bankruptcy did not prevent it from pursuing a cost recovery claim under CERCLA against another former owner—Land O'Lakes.

Background

The Refinery Site produced liquid propane gas, gasoline, aviation fuel, diesel fuel and other fuel oils over its operational history from 1915 to 1982. Before Hudson's ownership of the site, a company called Midland Cooperative Wholesale owned and conducted operations at part of the site from 1943 to 1977. During its ownership of the site, Midland operated a refinery that released several hazardous substances that the government is now remediating. Midland sold the site to Hudson in 1977. Land O'Lakes and Cushing, Oklahoma Brownfields are Midland's successors.

Previous Settlements

Hudson ceased operations at the site in 1982. In 1984, the U.S. Environmental Protection Agency sued Hudson in the U.S. District Court for the Western District of Oklahoma for violating the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. ch. 82 § 6901. The EPA and Hudson entered into a settlement in 1987 that required Hudson to undertake cleanup activities at the refinery. As part of the settlement, the government agreed not to sue Hudson for any further violations of the RCRA.

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Article One (cont.)

The Government's Current CERCLA Action Against The Successors-In-Interest Are Not Barred By The Former Owner/Operator's Bankruptcy Or Its Earlier Settlement With The Government On RCRA

The RCRA suit with Hudson came to a close in 1994 when the court found that Hudson had satisfied the conditions of the settlement agreement and entered an order for closure of the 1987 consent decree. At that time Hudson was released from further obligations.

Hudson's Bankruptcy

Hudson filed for Chapter 11 bankruptcy in 1984. The Government and Land O'Lakes participated as creditors in the proceedings in which the Bankruptcy Court approved the sale of Hudson's refinery free of all liens and claims. The final decree of bankruptcy was entered in June of 1996 holding that "the property dealt with by the Plan is free and clear of all claims and interests of creditors of the Debtor." *Id.* Land O'Lakes held a mortgage on the Refinery; after negotiations, Land O'Lakes received $1,755,000 from the sales proceeds.

As of 1995, there were still environmental issues plaguing the Refinery Site. In 1998, EPA initiated emergency removal action at the Site pursuant to CERCLA Section 104(a), with cleanup and investigations continuing through December 1999. EPA issued a notice to Land O'Lakes seeking to recover costs incurred in cleaning up hazardous substances released during Midland's pre-1977 operation of the Refinery Site.

Following Land O'Lakes' refusal to reimburse EPA, it later issued a unilateral administrative order directing Land O'Lakes to accept responsibility for the Refinery Site cleanup. Land O'Lakes accepted responsibility in February 2009. However, it refused to reimburse the Government for its cleanup costs—suing the Government for declaratory relief alleging that it was not responsible for the past costs and also alleging a citizen-suit under RCRA.

Court's Rationale

The court addressed the Government's motion to strike several Land O'Lakes affirmative defenses which were based on the premise that the past settlement with Hudson barred the Government's request for cost recovery under CERCLA. The court granted the Government's motion.

"Put simply, neither the Consent Decree nor the Closure Order bars the Government's CERCLA claims. As this Court already noted in its Order dismissing Land O'Lakes claims for want of subject matter jurisdiction, the EPA did not covenant not to sue Hudson or its successors or assigns for CERCLA claims….[citation omitted]… Further, the 1987 Consent Decree and 1994 Closure Order were entered under section 3008(a) and (g) of the RCRA and do not even reference CERCLA." Id., internal quotations omitted.

Land O'Lakes argued that the Government knew it would one day sue under CERCLA, so it should have brought such claims in 1984; claims that the Government cannot now reserve. The court rejected this argument based on the Tenth Circuit decision in *Sinclair Oil Corp. v. Scherer*, 7 F.3d 191 (10th Cir. 1993). Similar to this case, Sinclair had previously entered into a consent decree with EPA stemming from the operation of its facility. *Id*., at 192. Later, EPA sued and assessed penalties for violating RCRA waste-disposal restrictions. As in this matter, Sinclair argued that the earlier consent decree shielded it from any liability. *Id.,* at 193. The Tenth Circuit disagreed holding that "there was no mention of resolving RCRA waste-disposal claims in Sinclair's earlier consent decree with the EPA…[as such those claims were] not part of the claims and the complaints filed by the parties or the violations alleged herein which were resolved by entry of the consent decree." *Id.*

That was the case here where the parties did not expressly resolve the presently alleged violations and the court cannot rewrite the parties agreement to include additional matters.

Land O'Lakes *res judicata* argument that the Government's CERCLA claims should have been raised in both its civil case against Hudson and during Hudson's Chapter 11 bankruptcy proceedings fails as well. Regarding the Government's prior RCRA settlement with Hudson, the court held that such does not preclude CERCLA claims against Land O'Lakes and Brownfields today, as the agreement did not so state.

Land O'Lakes alleged that if the prior settlement would not bar the present CERCLA claims, then Hudson's bankruptcy does. Land O'Lakes interpreted the bankruptcy settlement as settling all environmental claims regarding the Cushing Refinery. "So by [Land O'Lakes] account, section 1141 bars a creditor in bankruptcy from later bringing claims that arose pre-petition not only against the debtor *but against a fellow creditor as well." Id.*

The court rejected this claim. "Nothing suggests that in the case. No doubt, if the Government was now seeking to assert a CERCLA claim against Hudson, section 1141 would preclude it. But the Government is not doing that. Instead, it asserts a claim against a creditor from the bankruptcy proceedings, which is why its cited cases do not help it here." *Id.*

Lastly, the court rejected Land O'Lakes' citizen-suit which alleged that by bringing suit under CERCLA, the Government was in violation of RCRA's citizen-suit provision. Land O'Lakes alleged that "because the Government's present suit violates the Consent Decree and Closure Order in the Hudson case, the RCRA grants them the right to sue the United States." *Id.* The court found this argument to be "off-base" because: it could not find any authority for the proposition that the Consent Decree or the Closure Order was an "order which has become effective pursuant to RCRA"; and, permitting Land O'Lakes to sue the Government for violating the Consent Decree—an agreement that Hudson would clean up the Refinery Site—did not mesh with statutory authority allowing citizens to enforce RCRA. *Id.*

Conclusion

Land O'Lakes' affirmative defenses based on the Bankruptcy proceedings and settlement bar failed as a matter of law. "This outcome makes sense: if Sinclair could not use its own earlier consent decree to shelter it from new liability, it is difficult to see how Defendants cause use Hudson's consent decree;…" especially since Land O'Lakes was not involved in the Hudson case. *Id.*

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Article Two

Plaintiff Cannot Use Superfund As a Shield To Block A State Cleanup Plan
Atlantic Richfield Company v. Gregory A. Christian
(Case No. 15-83-BU-BMM, D. Mont. Feb. 15, 2017)

Atlantic Richfield Company ("Plaintiff") filed this action for declaratory and injunctive relief seeking a determination that an environmental restoration plan proposed by Defendant landowners ("Landowners") in a pending state court action is prohibited under CERCLA section 113(h). Plaintiff filed its action seeking to block a state court lawsuit Defendants brought to force Plaintiff to make the company pay millions to cover the cost of repairs to Defendants' yards and groundwater. Plaintiff alleged that the state lawsuit interfered with EPA's authority to select the best cleanup plan for the Superfund site. Before the lower court was Defendants' motion to dismiss Plaintiff's complaint, and cross motions for summary judgment. The lower court granted Defendants' motion to dismiss a decision which mooted the cross motions for summary judgment. Plaintiff filed objections to the lower court's recommendations and findings to which Defendants responded. On *de novo* review, the Court agreed with the lower court's granting of Defendants' its motion to dismiss.

Background

The 300-square-mile Anaconda Co. Smelter site is located at the southern end of the Deer Lodge Valley in Montana, at and near the location of the former Anaconda Copper Mining Company (ACM) ore processing facilities. ACM facility operations included removal of copper from ore mined in Butte from about 1884 through 1980. Milling and smelting produced wastes with high concentrations of arsenic, as well as copper, cadmium, lead and zinc. These wastes contaminated soil, groundwater and surface water with hazardous chemicals. Cleanup is complete at several areas within the site. At these areas, operation and maintenance activities are ongoing. Cleanup is underway at the remaining areas. Defendants are landowners owning property near the former Anaconda Smelter; Defendants' properties are located within the exterior boundaries of the Anaconda Smelter Superfund site.

Plaintiff has been cleaning up the site under EPA's direction. As part of its efforts, Plaintiff sampled soil for arsenic in some 1,740 residential yards within the Superfund site. Plaintiff's testing found arsenic at levels that exceed the EPA-established action level in approximately 350 residential yards. Plaintiff has remediated some 350 yards.

Defendants filed suit in state court seeking compensation for property damage caused by the Anaconda Smelter—alleging state claim for negligence, nuisance, trespass, constructive fraud, unjust enrichment, and wrongful occupation of real property. Defendants' damage claims include claims for restoration damages seeking to recover the costs to restore the soil and groundwater. Defendants submitted a proposed restoration plan setting forth the work Defendants believe is required to property restore their properties. The proposed restoration plan includes soil and groundwater restoration work not contemplated by the EPA's cleanup plan. Defendants alleged that their plan would cost between $38 million and $101 million.

Court's Rationale

Plaintiff argued that the court should declare that CERCLA bars Defendants' claims for restoration damages. The Court affirmed the district court's holding that no federal question jurisdiction existed in that case. A plaintiff asserting a declaratory relief claim in federal court "that is in the nature of a defense to a…pending [state court] action, the character of the …pending [state court] action determines whether federal question jurisdiction exists with regard to the declaratory judgment action." *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986). If a federal question appears in the complaint of the pending state court action, federal jurisdiction exists over the declaratory judgment action. *Chase Bank USA, N.A. v. City of Cleveland,* 695 F.3d 548, 554 (6th Cir. 2012).

Here, Defendants complaint was governed on state common law grounds. Defendants alleged state law claims of negligence, nuisance, trespass, constructive fraud, unjust enrichment, and wrongful occupation of real property. "Given that the [Defendants'] state court complaint [sought] no relief under federal law, no federal question exists in this case with respect to [Plaintiff's] claims for declaratory relief." *Id.*

Plaintiff's claim could be brought under diversity jurisdiction as the parties are of diverse citizenship and the amount in controversy exceeds $75,000. Defendants alleged, however, that the Court should decline to exercise jurisdiction based on abstention grounds set forth in *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942). Federal districts has the discretion to dismiss a declaratory judgment action, even if that action otherwise satisfies the requirements for subject matter jurisdiction. *Wilton v. Seven Falls Co.,* 515 U.S. 277, 281 (1995). (Cont.)

Article Two (cont.)

Plaintiff Cannot Use Superfund As a Shield To Block A State Cleanup Plan

Brillhart, supra, set forth three factors to be considered: i) the federal court should avoid needless determination of state law issues; ii) the federal court should discourage litigants from filing declaratory actions as a means of forum shopping, and, iii) the federal court should avoid duplicative litigation.

As to the first factor, given "that diversity of citizenship provides the sole basis for subject matter jurisdiction in this declaratory action, the first *Brillhart* factor would be neutral." *Id.*

The second factor seeks to discourage the use of declaratory judgment procedure as a means to forum shop. Plaintiff filed its action at a time when the underlying state court action had been pending for over seven years. The second factor weighed in favor of declining jurisdiction.

This factor focuses on whether the issues in the case are, or could be, addressed in the state court proceeding. Here, the issue to be determined was whether CERCLA's section 113(h) bars Defendants' claims for restoration damages. This same issue was pending before the state court via Plaintiff's motion for summary judgment. This factor weighs in favor of declining jurisdiction as the state court was deemed capable of address this issue.

Conclusion

Plaintiff tried to "game" the system. The allegations were all based on state law claims, and Plaintiff was afforded the opportunity to argue his CERCLA affirmative defense in state court.

About Thierry R. Montoya

Thierry R. Montoya has achieved successful results for both public and private sector clients in a variety of complex environmental, land use, construction, and eminent domain matters. Thierry's practice includes environmental litigation under CERCLA, RCRA, the Clean Water Act, Proposition 65, and state and federal and common law.

Thierry also represents clients in natural resources issues involving water, oil and gas interests, air and water permitting and violations including NPDES and Title V.

On the land use side, Thierry provides permitting, zoning, CEQA/NEPA, and eminent domain expertise. Thierry also represents public and private sector clients in construction biddings, contracting, and litigation.

Article Three

Court Dismisses Clean Air Act "BACT" Case Against Geothermal Plants

Global Community Monitor v. Mammoth Pacific, L.P.
Case No. 2:14-CV-01612-MCE-KJN 2017 WL 445735 (E.D. Cal., Feb. 2, 2017)

Plaintiffs, individuals and organizational members who live, work, and recreate in the direct vicinity of several geothermal plants located in the Great Basin Valley Air Basin ("Plaintiffs"), brought a citizen suit under section 304 (a) of the Clean Air Act ("CAA"), 42 U.S.C. § 7604, against defendants, the owners and operators of the geothermal plants ("Defendants"). Plaintiffs sought an injunction requiring Defendants to cease and desist from operating the plants, which emitted volatile organic compounds until they had the best available control technology ("BACT") and emissions offsets under rules promulgated by the Great Basin Unified Air Pollution Control District ("Air District"). On cross-motions for partial summary judgment, the court granted Defendants' motion holding that: (1) Plaintiffs did not plead a violation of rule regulation permits to operate through its pleading for violation of rule regulating authority to construct ("ATC") permits; (2) failure to obtain a valid preconstruction permit under rule regulating ATC permits constituted a singular event, rather than an ongoing violation, for limitations purposes; (3) issuance of new ATC permits in two separate years following original permits did not revive, for limitations purposes, any potential violation of rule regulating ATC permits committed when units were originally permitted; and (4) five-year default statute of limitations applies to citizen suits for injunctive relief under the CAA.

Background

At the plants, Defendants used hot geothermal water pumped from deep underground to heat volatile organic compounds ("VOCs"), which in turn spin turbines to generate electricity. The facilities emit VOCs through valves, flanges, seals, or other unsealed joints in facility equipment. VOCs combine with nitrogen oxides to form ozone in the atmosphere, which is a criteria air pollutant regulated by the CAA, making VOCs regulated as ozone precursors. According to EPA, breathing ground-level ozone can result in a number of negative health effects.

The Air District is a state agency that has established rules and regulations to reduce the emission of ozone-forming pollutants in the relevant county. In this action, Plaintiffs allege that Defendants violated the Air District's Rules 209-A and 209-B, which were promulgated in 1979.

Rule 209-A prohibits the Air District from issuing an authority to construct ("ATC") permit for any new stationary source or modification to a stationary source that emits 250 pounds of VOCs unless the facility obtains emissions offsets and installs the BACT. Emissions offsets are reductions from other facilities equal to the amount of increased emissions and BACT is advanced pollution control technology that dramatically reduces pollution. Rule 209-B prohibits the Air District from issuing a permit to operate ("PTO") for any new or modified stationary source to which Rule 209-A applies unless the owner or operator of the source has obtained an ATC permit granted pursuant to Rule 209-A. These rules together ensure that all required emissions offsets will be implemented at start-up and maintained throughout the source's operational life. (Footnote: Rules 209-A and 209-B were approved by the EPA as part of California's State Implementation Plan ("SIP") in 1982, making the regulations fully enforceable federal law.)

With regard to the existing plants, Plaintiffs allege that although originally separately permitted as four plants in the late 1980s, in 2010 Defendants applied for and obtained PTOs from the Air District that authorized emissions limits for two separate plants as a single source, and two other separate plants as a single source. Each single source was permitted to emit up to 500 pounds per day of fugitive VOC emissions, which was double the limit under Rule 209-A, without receiving ATC permits that required the installation of BACT and obtaining emissions offsets. Plaintiffs further alleged that in 2013, the Air District issued ATC permits for a modification in one of the plant facilities without requiring Defendants to install BACT or obtain emissions offsets. Furthermore, Plaintiffs complaint further alleges that Defendants have operated three existing geothermal plants for over twenty years as a single stationary source without applying for the permits required by Rules 209-A and 209-B; Plaintiffs base this contention on the fact that the complex of plant facilities should be viewed as a single stationary source because the plants are owned and operated by the same company and located on adjacent lands, and sharing single geothermal wellfield, a common control room, common pipes carrying geothermal liquid to and from the wellfield, and other common facilities.

Court's Rationale

Before the court in the instant action, was Plaintiffs' final cause of action, and the subject of Plaintiffs' motion for partial summary judgment, which alleged that all four plants should be considered a single source. Because Defendants' plants were all permitted individually when constructed, Plaintiffs contend that Defendants are in violation of Rule 209-A and should be required to install a BACT.

The basis for Defendants' motion for summary judgment is on the basis that Plaintiffs' claims are time-barred under the statute of limitations, and that their claims fail as a matter of law. Alleging that Plaintiffs have only alleged a violation of Rule 209-A, and any violation of that rule could only have occurred when the units were originally constructed, they claim that the applicable five-year statute of limitations under 28 U.S.C. § 2462 applies and Plaintiffs brought this suit well after the original ATCs were issued in the late 1980s.

In its analysis of determining whether a violation of Rule 209-A was ongoing, the court assessed whether failure to obtain a valid preconstruction permit constituted a singular event or an ongoing violation.

(Cont.)

Article Three (cont.)

Court Dismisses Clean Air Act "BACT" Case Against Geothermal Plants

The court, looking at Eleventh Circuit case law put forth by Plaintiffs to support their claims that the violations of Defendants were ongoing, determined that while the Eleventh Circuit was instructive, it did not base its decision on whether the obligation to comply with BACT requirements was ongoing but rather on whether the obligation to apply a BACT was ongoing. The court found that the SIP at issue in the instant case did not place an ongoing obligation to obtain an ATC, but only required that a new or modified stationary source receive and comply with an ATC before receiving a PTO. While the PTO issued under Rule 209-B required obtaining and complying with an ATC, PTOs were considered separate permits such that obtaining a legally invalid ATC did not necessarily invalidate the PTO. Further, the court found that a PTO obtained under Rule 209-B required only that the owner or operator of a source obtain an ATC and comply with that ATC, which the court found Defendants had done. Furthermore, the court found that even if an invalid ATC rendered a resulting PTO also invalid, the Plaintiffs had failed to allege a violation under Rule 209-B, and therefore could not obtain relief based upon such a theory.

In 2009, new ATCs and PTOs were issued, combining emissions limits between two facilities, and another two facilities. In 2014, new ATCs and PTOs were issued for a "major equipment overhaul." In each case, Plaintiffs argued that the complex of Defendants' facilities should have been treated as a single source, and thus that the ATCs issued in those years were unlawful, and that their claims were properly brought within the requisite statutory time period.

In determining this issue, the court found that invalidating the 2009 and 2014 ATCs would not provide the relief Plaintiffs sought. Defendants, instead, would simply be forced to apply for an ATC that combined the emissions limits of all four units, and because the court had already ruled that combining the emissions limits of the facilities was not a modification that would trigger imposing a BACT on the combined units, combining the emissions limits of all four plants would not constitute a modification, which would render any new ATC "remedied" by the errors of the 2009 and 2014 ATCs.

Reiterating that BACTs can only be imposed when a new stationary source or a modification to a stationary source results in a net increase in emission of 250 or more pounds per day, the court reasoned that reissuing permits to treat the plant units as a single source would not constitute a modification or result in any increase in emissions. The court further reasoned that creating a legal fiction that Defendants had a new stationary source, would not be warranted by invalidation of the 2009 or 2014 ATCs. And furthermore, the "major equipment overhaul" completed in 2014 decreased emissions and therefore cannot form the basis for imposing a BACT. Thus, the 2009 and 2014 ATCs do not revive any potential Rule 209-A violations committed when the units in Defendants' plants were originally permitted.

Last, the Court recognized 28 U.S.C. § 2462, five-year statute of limitations for "action[s], suit[s] or proceeding[s] for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." While Plaintiffs sought injunctive relief, the court recognized Defendants' argument that the five-year statute of limitations nonetheless applied because of the concurrent remedy doctrine that bars injunctive relief if legal relief is time-barred. In citing to a Ninth Circuit decision, the court reasoned that because 28 U.S.C. § 2462 applied to suits for injunctive relief under the Federal Election Campaign Act, the ruling was instructive in this regard, in that there was no doubt that the claim for injunctive relief is connected to any claim by Plaintiffs that could have been asserted for legal relief. Furthermore, the court reasoned that other circuits have not created a "noble distinction" between purposes for relief and that the five-year statute of limitations applied to Plaintiffs' claims for injunctive relief.

Conclusion

On the timing issue, any of the alleged CAA violations could only have occurred over twenty years ago when Defendants' plant units were built. On that basis alone, the court could have rested its ruling that Plaintiffs' claim was time-barred.

About AlvaradoSmith

AlvaradoSmith is experienced in all facets of public and private project development and implementation, environmental review and compliance, and natural resource law. We represent public utilities, public agencies, private developers, commercial property owners, and private landowners in major facilities and infrastructure development projects, land acquisition, pipeline development, soil and groundwater cleanups, and renewable energy projects. We know the ins and outs of environmental and natural resource law compliance.