

## Poison and Preemption: U.S. Supreme Court Considers Common Law Claims and CERCLA Remedies

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The Anaconda Smelter served southwestern Montana's mining industry for almost one hundred years before its closure in 1980. Today, the 585-foot "Big Stack" remains as one of the largest free-standing masonry structures in the world and the centerpiece of the Anaconda Smoke Stack State Park. The smelter also has a darker legacy, comprising part of a federal Superfund site of approximately 300 square miles, including soils and groundwater contaminated with arsenic, copper, lead, and other metals from historic mining and smelting operations. Despite more than a quarter century of investigation and cleanup, much of the site remains in remediation overseen by EPA. In a case currently pending before the U.S. Supreme Court, site owner Atlantic Richfield Company (ARCO) has challenged the jurisdiction of Montana state courts to order additional "remediation damages" in a suit by private landowners within the Anaconda Site.

The case now pending before the Court began as one for nuisance, trespass, and strict liability by numerous landowners in and around Opportunity, Montana. Those landowners sought damages for various injuries to their property allegedly caused by the smelter contamination, including "restoration damages." Under Montana law, those damages would compensate the landowners for restoring their property to its pre-contamination state, with the costs placed into a trust upon which they could draw to carry out the restoration work themselves. According to the landowners' experts, that restoration should be based on a lower cleanup level for arsenic in soils – resulting in removal and re-disposal of substantially more "dirty dirt" – and a lengthy, underground permeable barrier wall for treatment of groundwater. Both of these proposed actions were considered and rejected by EPA when it selected the CERCLA remedy for the site years earlier. ARCO moved for summary judgment on the restoration damages claim, arguing that the state court lacked jurisdiction to order remedies that went beyond those approved by EPA, at least while the EPA-approved remediation continued. The state court disagreed and ARCO sought a writ of supervisory control from the Montana Supreme Court.

In its 2017 decision, *Atlantic Richfield Co. v. Montana Second Judicial District Court*, 408 P.3d 515 (Mont. 2017), the Montana Supreme Court rejected ARCO's preemption arguments. The court found that the potential restoration damages did not constitute a challenge to EPA's remedy, which would be prohibited by the timing of review provisions of CERCLA § 113(h). The court reasoned that nothing in the landowners' preferred remedy interfered with ongoing or planned work by EPA and thus fell within CERCLA's state law savings clauses, CERCLA §§ 114(a), 302(d). In that court's view, "The Property Owners are simply asking to be allowed to present their own plan to restore their own private property to a jury of twelve Montanans who will then assess the merits of that plan." *Id.* at 521. Notwithstanding the contrary views of the U.S. Department of Justice and one dissenting justice, the Montana court did not see that potential judgment by 12 Montanans as a challenge to EPA's selected remedy. The Montana court also rejected an argument that the landowners were themselves potentially responsible parties (PRPs), whose "inconsistent response action" would require prior EPA approval under CERCLA § 122(e)(6). Rather, the court found that CERCLA's six-year statute of limitations would bar any efforts to brand them PRPs. Finally, the court concluded that the restoration damages remedy was not otherwise preempted by CERCLA under the doctrine of federal conflict preemption.

The United States Supreme Court granted certiorari in June 2019 to review the Montana court's decision. Joined by a plethora of amici on both sides, Petitioner ARCO and Respondent landowners presented their arguments to the Court, along with those of the Solicitor General. In oral arguments held on December 3, 2019, the Court's liberal justices seemed concerned that ARCO's preemption theories were hard to reconcile with CERCLA's state law savings clauses. The parties disagreed about whether CERCLA remedies were "a floor" or both "a floor and a ceiling." All of the justices seemed concerned over the "restoration damages" procedures requiring that a judgment be deposited into a trust account and doled out to landowners for restoration work in the future. The Solicitor General attempted to address the Court's concerns by arguing that the Respondents remained free to pursue damages and tort remedies that did not question EPA's selected remedy, while states could set more stringent cleanup levels in accordance with the ARAR process of CERCLA § 121. Several commentators noted after the oral argument that the Court seemed to be searching for a narrow rationale to overturn a troublesome decision without eliminating the states' role in cleanups and vindicating the rights of their citizens at common law. The Court's decision is expected before the end of the term in June 2020.

For more information and updates on the Court's decision, please contact [Gary Shockley](#).