No. 17-

IN THE

Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

GREGORY A. CHRISTIAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

PETITION FOR A WRIT OF CERTIORARI

JONATHAN W. RAUCHWAY
SHANNON W. STEVENSON
DAVIS GRAHAM & STUBBS LLP
1550 17th St., Suite 500
Denver, CO 80202
(303) 892-9400

LISA S. BLATT
Counsel of Record
ROBERT J. KATERBERG
ELISABETH S. THEODORE
ANDREW T. TUTT
STEPHEN K. WIRTH
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@arnoldporter.com

QUESTIONS PRESENTED

In a divided decision that conflicts with decisions of federal courts of appeals nationwide, the Supreme Court of Montana held that landowners can pursue common-law claims for "restoration" requiring environmental cleanups at Superfund sites that directly conflict with EPA-ordered cleanups at these sites. The Montana court reached that result for one of the largest, oldest, and most expensive Superfund sites in the country, the Anaconda Smelter site. The court ignored EPA's views that the Superfund statute—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—barred the restoration claims and that plaintiffs' preferred remedies would *hurt* the environment. The state court's holding throws remediation efforts at Anaconda and other massive sites into chaos and opens the door for thousands of private individuals to select and impose their own remedies at CERCLA sites at a potential cost of many millions of dollars per site.

The questions presented are:

1. Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a "challenge" to EPA's cleanup jurisdictionally barred by § 113 of CERCLA.

2. Whether a landowner at a Superfund site is a "potentially responsible party" that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup.

3. Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

PARTIES TO THE PROCEEDING

Petitioner, who was petitioner below and defendant in the trial court, is Atlantic Richfield Company. Atlantic Richfield is a wholly owned subsidiary of BP America Inc., which is a wholly owned subsidiary of BP America Limited. BP America Limited is a wholly owned subsidiary of BP Holdings North America Limited. BP Holdings North America Limited is a wholly owned subsidiary of BP p.l.c., which is a publicly held company. Neither Atlantic Richfield Company nor any of its direct or indirect parent companies other than BP p.l.c, is publicly held.

Respondents, who were counter-petitioners below and plaintiffs in the trial court, are Gregory A. Christian; Michelle D. Christian; Rosemary Choquette; Duane N. Colwell; Shirley A. Colwell; Franklin J. Cooney; Vicki Cooney; George Coward; Shirley Coward; Jack E. Datres; Sheila Dorscher; Viola Duffy, Bruce Duxbury; Joyce Duxbury; Bill Field; Chris Field; Andrew Gress and Frank Gress as Co-Personal Representatives of the Estate of James Gress; Charles Gustafson; Michael Hendrickson; Patrice Hoolahan; Shaun Hoolahan; Ed Jones, Ruth Jones; Barbara Kelsey; Myrtle Koepplin; Brenda Krattiger; Doug Krattiger; Julie Latray; Leonard Mann; Valerie Mann; Kristy McKay; Russ McKay, Bryce Meyer; Mildred Meyer; Judy Minnehan; Ted Minnehan; Diane Morse; Richard Morse; Karen Mulcahy; Patrick Mulcahy; Nancy Myers; Serge Myers; Leslie Nelson; Ron Nelson; Jane Newell; John Newell; George Niland; Laurie Niland; David Ostrom; Rose Ann Ostrom; Judy Peters; Tammy Peters; Robert Phillips; Toni Phillips; Carol Powers; William D. Powers; Gary Raasakka; Malissa Raasakka; Alex Reid; Kent Reisenauer; Peter Reisenauer; Sue Reisenauer; Larry Rupp; John A. Rusinski; Kathryn Rusiski; Emily

Russ; Scott Russ; Carl Ryan; Penny Ryan; Rich Salle; Diane Salle; Dale Schafer; David D. Schlosser; Ilona M. Schlosser; Michael Sevalstad; Jim Shafford; Rosemarie Silzly; Anthony Solan; Kevin Sorum; Don Sparks; Vickie Spehar; Zane Spehar; Cara Svendsen; Caron Svendsen; James H. Svendsen, Sr.; James Svendsen, Jr.; Doug Violette; Ester Violette; Carol Walrod; Charles Walrod; Darlene Willey; Ken Yates; Sharon Yates; Linda Eggen as Personal Representative of the Estate of William Yelsa and as Guardian of Maurine Yelsa; David Zimmer; and Toni Zimmer.

Respondent Montana Second Judicial District Court, Silver Bow County, the Honorable Katherine M. Bidegaray, was the nominal respondent below.

TABLE OF CONTENTS

Page

Questions Presented i
Parties to the Proceedings ii
Table of Authorities vi
Opinions Below 1
Jurisdiction 1
Statutes and Constitutional Provisions Involved 1
Statement of the Case 2
A. Statutory Background 5
B. Factual Background 6
C. Proceedings Below 9
Reasons the Petition Should Be Granted 13
I. The Montana Supreme Court's Interpretation of CERCLA Conflicts with Decisions of Other Courts 15
A. The Decision Conflicts with Other Courts Regarding What Constitutes a "Challenge" Under § 113(h) 15
B. The Decision Conflicts with Other Courts Regarding Who Is a "Potentially Responsible Party" Barred from Non-EPA-Authorized Cleanups 19
C. The Decision Conflicts with Other Courts Regarding the Application of Conflict Preemption to CERCLA 21
II. The Decision Is Wrong 24
III. The Questions Presented Are Immensely Important 30
Conclusion 37

Table of Contents—Continued Page

Appendix A: Opinion of the Montana Supreme Court (Dec. 29, 2017) 1a

Appendix B: Opinion of the Montana Second Judicial District Court (Aug. 30, 2016) 41a

Appendix C: United States' Amicus Brief (Dec. 9, 2016) 56a

TABLE OF AUTHORITIES

Cases Page(s)

Allied Corp. v. Acme Solvents Reclaiming, Inc.,
691 F. Supp. 1100 (N.D. Ill. 1988) 30

Am. Tradition P'ship v. Bullock,
567 U.S. 516 (2012).....36

ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.,
213 F.3d 1108 (9th Cir. 2000) 15, 16, 24

Arizona v. United States,
567 U.S. 387 (2012).....27, 28

BNSF Ry. Co. v. Tyrrell,
137 S. Ct. 1549 (2017).....36

Boarhead Corp. v. Erickson,
923 F. 2d 1011 (3rd Cir. 1991) 17, 30

Broward Gardens Tenants Ass'n v. EPA,
311 F.3d 1066 (11th Cir. 2002).....17

Buckman Co. v. Plaintiffs' Legal Comm.,
531 U.S. 341 (2001).....29

Burlington N. & Santa Fe Ry. Co. v. United States,
556 U.S. 599 (2009).....5, 25, 30

Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.,
613 F.3d 910 (9th Cir. 2010) 20

Cannon v. Gates,
538 F.3d 1328 (10th Cir. 2008).....17

Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.,
710 F.3d 946 (9th Cir. 2013) 30

El Paso Nat. Gas Co. v. United States,
750 F.3d 863 (D.C. Cir. 2014).....17

Cases—Continued Page(s)

Encino Motorcars, LLC v. Navarro,
136 S. Ct. 2117 (2016).....33

Fireman's Fund Ins. Co. v. City of Lodi,
302 F.3d 928 (9th Cir. 2002) 22

Fort Ord Toxics Project, Inc. v. Cal. EPA,
189 F.3d 828 (9th Cir. 1999) 24

Geier v. Am. Honda Motor Co.,
529 U.S. 861 (2000).....29

Hines v. Davidowitz,
312 U.S. 52 (1941).....22

In re Reading Co.,
115 F.3d 1111 (3d Cir. 1997).....22

Key Tronic Corp. v. United States,
511 U.S. 809 (1994).....28

Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot.,
725 F.3d 369 (3d Cir. 2013).....20, 21

McClellan Ecological Seepage Situation v. Perry,
47 F.3d 325 (9th Cir. 1995) 5, 16, 18

New Mexico v. Gen. Elec. Co.,
467 F.3d 1223 (10th Cir. 2006).....17, 18, 22

Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.,
596 F.3d 112 (2d Cir. 2010).....20, 21

Pakootas v. Teck Cominco Metals, Ltd.,
646 F.3d 1214 (9th Cir. 2011) 16, 18

PMC, Inc. v. Sherwin-Williams Co.,
151 F.3d 610 (7th Cir. 1998) 22, 23, 29

Pollack v. U.S. Dep't of Def.,
507 F.3d 522 (7th Cir. 2007) 17

PPL Mont., LLC v. Montana,
565 U.S. 576 (2012).....36

Cases—Continued Page(s)

Rumpke of Ind., Inc. v. Cummins Engine Co.,
107 F.3d 1235 (7th Cir. 1997) 20, 21

Schalk v. Reilly,
900 F.2d 1091 (7th Cir. 1990) 17

United States v. Akzo Coatings of Am., Inc.,
949 F.2d 1409 (6th Cir. 1991) 22, 30

United States v. Atl. Research Corp.,
551 U.S. 128 (2007).....5, 19, 26

United States v. Bestfoods,
524 U.S. 51 (1998).....5, 25, 26

United States v. City & Cty. of Denver,
100 F.3d 1509 (10th Cir. 1996).....22

Constitutional Provisions, Statutes & Rules

U.S. Const. art. VI 2

28 U.S.C.
§ 1257(a).....1
§ 1332 1

42 U.S.C.
§ 9601(9).....5, 26
§ 9601(20)(A).....5, 26
§ 9604 .....1, 28
§ 9604(a).....5
§ 9606(a).....1, 5
§ 9607(a)(1) 5, 19, 20, 26
§ 9607(a)(2) 5, 26
§ 9607(a)(4)(A).....5
§ 9613 .....5, 10, 11, 13, 24, 25
§ 9613(b).....24
§ 9613(h).....1-3, 5, 11, 13, 15-18, 24, 25, 30
§ 9614(a).....12, 22, 29
§ 9617 28

Statutes & Rules—Continued Page(s)

42 U.S.C. (continued)
§ 9621 1
§ 9622(e)(6) 1-3, 5, 10-12, 19, 25-27, 30
§ 9652(d) 12, 22, 29

Mont. R. App. P. 14(3) 11

Other Authorities

132 Cong. Rec. 28,430 (1986) 27

Black's Law Dictionary (5th ed. 1979) 24

EPA, *Anaconda Co. Smelter: Reports and Documents* 7

EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision* (1998) 8

EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision Amendment* (2011) 7, 8

EPA, *Community Soils Operable Unit Record of Decision* (1996) 7, 8

EPA, *Fifth Five-Year Review Report: Anaconda Smelter Superfund Site* (2015) 8, 9

EPA, *Fourth Five-Year Review Report: Anaconda Smelter National Priority List Site* (2010) 8

EPA, *Fourth Five-Year Review Report for Silver Bow Creek/Butte Area Superfund Site* (2016) 8

EPA, *Superfund: National Priorities List (NPL)* 9

EPA, *Superfund National Priorities List (NPL) Where You Live Map*. 34

EPA, *Superfund Sites in Region 8* 34

EPA, *Superfund Sites Targeted for Immediate, Intense Action* (last updated Apr. 16, 2018) 9

Other Authorities—Continued Page(s)

GAO, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements* (2009) 35, 36

C.B. Glasscock, *The War of the Copper Kings* (1935)..... 6

Joe Griffen & David Williams, *Ready, Fire, Aim: Daines and Pruitt to Fix Berkeley Pit Disaster*, Missoulian (Mar. 17, 2017)..... 34

Michael P. Malone et al., *Montana: A History of Two Centuries* (rev. ed. 1991)..... 6

Laurie Mercier, *Anaconda: Labor, Community, and Culture in Montana's Smelter City* (2001)..... 6

Kathie R. Miller, *Attorneys Discuss Possibility of Lawsuit Against ARCo for Anaconda Residents*, Anaconda Leader, Jan. 24, 2018 35

Katherine N. Probst, *Superfund 2017: Cleanup Accomplishments and the Challenges Ahead* (2017)..... 35

U.S. Census Bureau, *QuickFacts*..... 6, 34

OPINIONS BELOW

The opinion of the Supreme Court of Montana is reported at 408 P.3d 515 (Mont. 2017) and reproduced at App. 1a. The opinion of the trial court is unpublished but reproduced at App. 41a.

JURISDICTION

The Supreme Court of Montana issued its opinion and entered judgment on December 29, 2017. App. 1a. On February 20, 2018, Justice Kennedy extended the time to file a petition for certiorari until April 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613(h), provides:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [in five enumerated exceptions].

Section 122(e)(6) of CERCLA, 42 U.S.C. § 9622(e)(6), provides:

> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibil-

> ity study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

This is one of the most consequential decisions interpreting CERCLA in years. While CERCLA encourages public participation in EPA's selection of a remedy at "Superfund" sites, once EPA selects the remedy, CERCLA establishes multiple protections against interference with EPA's plans. *First*, § 113(h) jurisdictionally bars "challenges" to EPA remedies that do not fit within statutory exceptions. 42 U.S.C. § 9613(h). *Second*, § 122(e)(6) bars anyone affiliated with a Superfund site—a "potentially responsible party," innocent or otherwise—from undertaking remedial actions absent EPA's approval. *Id.* § 9622(e)(6). *Third*, under the Supremacy Clause, CERCLA preempts state-law claims that interfere with EPA's remedial plans.

Petitioner Atlantic Richfield has worked with EPA for *35 years* to remediate Montana's Anaconda Smelter Superfund site, at a cost of approximately $470 million. But the Montana Supreme Court, over a strong dissent, held that private landowners may

bring state-law "restoration" claims to require companies to pay for remedies directly at odds with EPA's chosen remedy. The court held that neither § 113(h), § 122(e)(6), nor preemption principles bar restoration claims. In the court's view, "a jury of twelve Montanans" could second-guess the EPA-selected remedies and order implementation of a different remedy. App. 13a. The court remarkably ignored the views of the United States on the interpretation of § 113(h), § 122(e)(6), and preemption. App. 63a-65a. Worse still, the court did not even acknowledge the United States' warning that plaintiffs' proposed remedies seriously threatened to *damage* the environment. App. 73a-74a.

The decision below creates splits on what kind of lawsuit constitutes a "challenge" barred by § 113(h), on who qualifies as a "potentially responsible party" barred from conducting unilateral, non-EPA-approved cleanups under § 122(e)(6), and on whether ordinary principles of conflict preemption apply under CERCLA.

This Court should grant review because the holdings below are simultaneously so wrong and so consequential. The issue whether a state-law claim "challenges" a CERCLA remedy arises frequently in the context of long-term and expensive CERCLA cleanups, as does the definition of a "potentially responsible party." No court has adopted as constricted a view of these provisions as the Montana Supreme Court. And no court has held, as the Montana Supreme Court did, that conflict preemption does not apply in the CERCLA context. This lawsuit would have come out differently had it been filed in federal court in Montana, subject to Ninth Circuit precedent.

Left uncorrected, the decision will create confusion, delay, and immense cost at the Anaconda Smelter site, undermining 35 years of efforts by Atlantic Richfield and EPA. The decision threatens to force Atlantic Richfield to pay tens of millions of dollars to remove soil that EPA determined there was no reason to remove. Plaintiffs' restoration plan requires digging trenches EPA thinks should *not* be dug, erecting barriers EPA thinks should *not* be built, and inserting enzymes into the groundwater that EPA has represented could *endanger* human health. In other words, EPA will have spent the last 35 years, and will spend the next seven years, remediating one of the largest and most complex Superfund sites in the Nation just so the plaintiffs can bulldoze it and start all over again. This is the very definition of madness.

The decision below also provides a roadmap for courts around the country to subvert the finality and efficiency that are CERCLA's principal goals. But the decision's immediate impact at Anaconda and the 16 other Superfund sites across Montana alone warrants this Court's review given the sheer size and scope of these sites. The decision invites thousands of unforeseen plaintiffs-landowners to sue companies to implement expensive and contradictory remedies at each site. The decision permits juries to order "restoration" remedies affecting tens of thousands of people even where EPA concludes those remedies would *harm* the environment. The decision permits countless landowners to undertake remedial efforts on their own without consulting EPA. And the decision threatens the integrity of every future CERCLA settlement EPA enters.

Certiorari is warranted.

A. Statutory Background

CERCLA promotes the "timely cleanup of hazardous waste sites." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). The Act grants EPA "broad power to command government agencies and private parties to clean up [the sites]." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). EPA may undertake remedial action on its own, or compel responsible parties to undertake remedial actions under the agency's supervision. *See* 42 U.S.C. §§ 9604(a), 9606(a), 9607(a)(4)(A); *Bestfoods*, 524 U.S. at 55.

CERCLA contains two key provisions that prevent interference with EPA-ordered remedial actions. First, CERCLA § 113(h), except in circumstances not relevant here, jurisdictionally bars any "challenges" to EPA cleanups. 42 U.S.C. § 9613(h). Section 113 thus "protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort." *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (emphasis omitted).

Second, CERCLA § 122(e)(6) provides that "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by" EPA. 42 U.S.C. § 9622(e)(6). A "potentially responsible party" includes the "owner" of "any site or area where a hazardous substance has ... come to be located." 42 U.S.C. §§ 9607(a)(1)-(2), 9601(9), 9601(20)(A). The phrase is accordingly "broad" and extends to even those landowners "not responsible for contamination." *United States v. Atl. Research Corp.*, 551 U.S. 128, 134 n.2, 136 (2007).

B. Factual Background

Petitioner Atlantic Richfield is the largest landowner at the Anaconda Smelter site, one of the country's oldest and largest Superfund sites. The site itself is massive: it stretches across 300 square miles of residential, commercial, recreational, and agricultural lands in western Montana. Over 9,000 people live within the site's borders. U.S. Census Bureau, *QuickFacts: Anaconda-Deer Lodge County, Montana*, goo.gl/aqJhCD.

From 1884 until 1980, the site was home to one of the world's largest copper smelters. Fueled by Montana's seemingly boundless natural resources, Anaconda employed thousands of workers and produced a massive portion of the world's copper supply, wiring America's homes and cities, powering Montana's economy, and dominating state politics for almost a century.[1]

Over the last 35 years, Atlantic Richfield, the successor to the company that operated the Anaconda Smelter site, has worked with EPA to remediate environmental damage there. EPA designated the site as a Superfund site in 1983, shortly after CERCLA's enactment. At EPA's direction, Atlantic Richfield undertook extensive, expensive, and years-long investigations at the site to assess the extent of the environmental damage. Two targets of the remediation are relevant here—arsenic and lead contamination in certain residential yards and pastures, and

---

[1] Michael P. Malone et al., *Montana: A History of Two Centuries* 229-31, 324-27 (rev. ed. 1991); Laurie Mercier, *Anaconda: Labor, Community, and Culture in Montana's Smelter City* 21-30 (2001); *see also* C.B. Glasscock, *The War of the Copper Kings* (1935).

groundwater contamination throughout the site. Through voluminous "Records of Decision," EPA selected remedies for those units in the 1990s and has continued to update them.[2]

EPA developed the Records of Decision over the course of decades. These remedial orders total more than 1,300 pages and consist of detailed soil and water reports, topographical surveys, scientific analyses, and countless charts, tables, and graphs supporting EPA's decisions. The Records of Decision order Atlantic Richfield to remove and replace up to 18 inches of soil in yards with arsenic levels above 250 parts per million (ppm) and treat water with arsenic levels above 10 parts per billion (ppb). EPA, *Community Soils Operable Unit Record of Decision* (CS ROD) §§ 4.0, 9.1 (1996), goo.gl/FJ5VRc; EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision Amendment* (ARWWS ROD Amend.) § 3.1 (2011), goo.gl/gj1CZ3.

EPA determined that, due to hydrologic and geochemical conditions, targeting groundwater arsenic levels of 10 ppb was technically impracticable. ARWWS ROD Amend. § 6.4.4.1. As an alternative, EPA implemented source-control measures, together with domestic-well monitoring and replacement to protect human health and the environment. *Id.* § 6.4.5. EPA painstakingly considered—and rejected—a host of alternative remedies. *E.g.*, CS ROD §§ 7.0, 8.0.

Members of the community, including residents, participated in EPA's multi-year decisionmaking process. EPA conducted notice-and-comment periods,

---

[2] *See* EPA, *Anaconda Co. Smelter: Reports and Documents*, goo.gl/pJ2rQL.

public meetings, and extensive outreach to citizens' groups and state and local governments. *E.g.*, CS ROD Responsiveness Summary § 1.0; EPA, *Anaconda Regional Water, Waste, and Soils Operable Unit Record of Decision* (ARWWS ROD) Responsiveness Summary § 1.0 (1998), goo.gl/GG8aQC. EPA offered lengthy responses to public comments and questions. For example, after one plaintiff in this action objected that EPA's 250 ppm arsenic standard was too high, EPA responded that the standard was "based on site-specific toxicological testing" and that arsenic levels below 250 ppm "do not present a risk to residents." ARWWS ROD Amend. Responsiveness Summary § 6.0.C. Since issuing the Records of Decision, EPA has continued to solicit and respond to the views of the community, and several plaintiffs have participated in EPA's five-year site reviews.[3]

For its part, Atlantic Richfield has spent approximately $470 million implementing EPA's orders. The company has remediated more than 340 residential properties and more than 11,500 acres of undeveloped land.[4] And the company has already returned significant portions of the site to productivity, including a world-class golf course designed by Jack Nicklaus, and a wildlife area managed cooperatively with the State.[5]

---

[3] *E.g.*, EPA, *Fourth Five-Year Review Report: Anaconda Smelter National Priority List Site* § 4 tbl.4-1 (2010), goo.gl/7g4RRk; EPA, *Fifth Five-Year Review Report: Anaconda Smelter Superfund Site* § 5.2 tbl.5-1 (2015), goo.gl/7RLczh.

[4] *Fifth Five-Year Review*, *supra* note 3, at ES-1.

[5] *Id.* §§ 8.2.1, 10.1, 10.4; ARWWS ROD Responsiveness Summary § 1.2; *see also* EPA, *Fourth Five-Year Review Report for Silver Bow Creek/Butte Area Superfund Site* § 3.2 (2016), goo.gl/xCnT9e.

Significant work remains. In 2017, EPA identified the Anaconda Smelter site as one of 22 Superfund sites, out of 1184 nationwide, "targeted for immediate, intense action" because Anaconda "requir[es] timely resolution of specific issues to expedite cleanup and redevelopment efforts."[6] EPA projects a construction completion date of approximately 2025, followed by monitoring and maintenance work. Atlantic Richfield and EPA anticipate that, by 2025, the company will have cleaned up an additional 1,150 residential yards, revegetated 7,000 acres of upland soil, and removed tens of millions of cubic yards of hazardous smelting waste. App. 62a; *Fifth Five-Year Review*, *supra* note 3, at tbls.10-1, 10-7.

C. Proceedings Below

In 2008, landowners within the Anaconda Superfund site sued Atlantic Richfield in Montana state court, alleging that their properties were damaged by pollution from the Smelter's operation between 1884 and 1980. Atlantic Richfield raised no CERCLA objections to four out of the five types of damages plaintiffs sought, namely, loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort.

But Atlantic Richfield objected to plaintiffs' common law claim for "restoration" damages. Plaintiffs do not dispute, and the court below held, that to establish a claim for restoration damages in Montana, plaintiffs must prove that they will actually use the award for restoration, *i.e.*, cleaning up the site. App. 5a, 11a; App. 24a n.1 (McKinnon, J., dissenting).

---

[6] EPA, *Superfund Sites Targeted for Immediate, Intense Action* (last updated Apr. 16, 2018), goo.gl/YKa6EN; EPA, *Superfund: National Priorities List (NPL)*, goo.gl/ZFjAx1.

As the court explained, plaintiffs here allege that restoration of their property requires "work in excess of what the EPA required of [Atlantic Richfield] in its selected remedy." App. 4a. Specifically, plaintiffs want to lower the arsenic level in the soil to 8 ppm, *i.e.*, 31 times lower than EPA's level of 250 ppm. App. 72a. Plaintiffs also demand removal of 24 inches of topsoil, at least 33% more than the maximum of 18 inches EPA thinks necessary. *Id*. And plaintiffs demand the construction of 19,000 feet of underground trenches and barriers to change water chemistry flows, even though EPA has determined that *any* trenches and barriers threaten to worsen environmental conditions by creating risks of surface and ground water contamination. *Id*. at 72a-74a.

Atlantic Richfield moved for summary judgment, arguing that the restoration claim constituted a "challenge" to EPA's remedy, and was thus jurisdictionally barred by CERCLA § 113. Atlantic Richfield also argued that because landowners are always "potentially responsible parties," or PRPs, CERCLA § 122(e)(6) barred plaintiffs from pursuing restoration damages without EPA authorization, which they lacked. Finally, Atlantic Richfield argued that CERCLA in all events preempted plaintiffs' restoration claim.

The United States tried to enter the case at the state trial-court level, contending that the court lacked jurisdiction "to consider Plaintiffs' restoration damages claim, because [CERCLA] expressly prohibits challenges to ongoing CERCLA response actions." U.S. Motion for Leave to File Amicus Brief ¶ 1, Dist. Ct. Dkt. 429. The court did not permit the government to file a brief and separately held that CERCLA permitted plaintiffs' restoration-damages claim. Dist. Ct. Dkt. 442; App. 42a-55a. Atlantic Richfield

sought a writ of supervisory control—available only when "urgency or emergency factors exist making the normal appeal process inadequate," Mont. R. App. P. 14(3)—which the Montana Supreme Court granted. App. 3a.

In an amicus brief to the Montana Supreme Court, the United States argued that the trial court misinterpreted § 113 and § 122(e)(6) and should have found the restoration claim preempted. App. 63a-65a. The United States explained that this claim would "undermine EPA's ability to implement its own remedy." App. 71a-75a. The government contended that restoration claims would "discourage the type of final settlements that Congress sought to foster in enacting CERCLA," because "[p]arties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations." App. 71a.

The government also explained that plaintiffs' remedies risked damaging the environment. App. 72a-75a. And it explained that the relief plaintiffs sought constituted "the type of uncoordinated response that CERCLA … was designed to prevent," App. 78a, and would cause "delay of EPA's cleanup efforts contrary to Congress's intent," App. 75a. In short, the United States stated that CERCLA "does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels." *Id.*

Over a dissent, the Supreme Court of Montana rejected all three of the company's and the United States' arguments. The court affirmed the trial court's decision permitting plaintiffs to proceed to a jury trial on their restoration claim. App. 18a.

First, the court held that the claim did not constitute a "challenge" barred by § 113(h). The court did not dispute that plaintiffs sought restoration work that conflicted with the work underway at the site. The court nonetheless held that a state tort remedy that specifies a cleanup different than that selected by EPA is not a "challenge" unless it "would stop, delay, or change the work EPA is doing." App. 11a. The court stated that "any restoration will be performed by the Property Owners themselves and will not seek to force the EPA to do, or refrain from doing, anything at the Site." App. 13a. The court stated that the plaintiffs were "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.*

Second, the court held that § 122(e)(6)'s prohibition on unauthorized remedial actions by PRPs did not bar relief, because plaintiffs were not PRPs. App. 16a-17a. The court reasoned that it was too late to identify the plaintiffs as PRPs: "[T]hey have never been treated as PRPs" since the property was designated as a Superfund site, and thus "the PRP horse left the barn decades ago." App. 16a. The court further reasoned that the lack of a prior judicial or agency finding that the plaintiffs are responsible parties exempted them from the statutory consequences of PRP status. App. 16a-17a. The court accordingly regarded it as irrelevant that EPA would not authorize—and indeed vigorously opposed—the work contemplated by plaintiffs' remedy.

Third, the court concluded that CERCLA did not preempt plaintiffs' claims. App. 17a-18a. The court held that savings clauses in CERCLA §§ 114(a) and 152(d), 42 U.S.C. §§ 9614(a), 9652(d), categorically preserve plaintiffs' ability to bring any state-law res-

toration claims, even those that specifically conflict with CERCLA or an EPA-selected remedy. *Id.*

Justice McKinnon dissented, explaining that the restoration claim constituted a challenge barred under § 113. Justice McKinnon observed that plaintiffs' restoration plan, "which includes digging an 8,000-foot trench for a groundwater wall and removing 650,000 tons of soil over a period of years, would conflict with the ongoing EPA investigation and CERCLA cleanup." App. 23a-24a. She noted that "the undisputed evidence shows the EPA rejected the soil and groundwater remedies proposed by [plaintiffs] during the course of the EPA's regulatory deliberations at the Smelter Site." App. 39a.[7]

Justice McKinnon found the majority's interpretation of § 113 "inconsistent with CERCLA and federal precedent." App. 24a. "Given the substantial weight of authority" interpreting § 113(h) to bar claims like those made by plaintiffs, she declared herself "at a loss to understand how this Court can suggest, without any authority, that we 'simply' allow 'a jury of twelve Montanans' to 'assess the merits of [plaintiffs'] plan.'" App. 35a.

REASONS THE PETITION SHOULD BE GRANTED

The decision below permits state tort suits to obstruct complex and costly CERCLA cleanups undertaken at EPA's direction. The court reached this result by ignoring clear federal-law obstacles, not to mention the position of the relevant expert federal agency. Certiorari is warranted for three reasons.

---

[7] The majority and dissent below focused on plaintiffs' plans to dig an 8,000-foot trench. Plaintiffs also propose to dig 11,000 feet of other trenches, for a total of 19,000 feet. Pls.' Supp. Expert Witness Discl. at 4, Dist. Ct. Dkt. 574 (R. at APP-0905).

First, the decision below splits with decisions interpreting CERCLA by multiple federal courts of appeals, including the court of appeals covering Montana. The three questions presented are squarely presented and outcome-determinative. *Second*, the decision is wrong, and it disregards CERCLA's plain text and purpose of avoiding costly litigation and expediting cleanups. *Third*, the questions presented address important and recurring issues that should be resolved by this Court.

The decision of the Montana Supreme Court upends decades of remediation and delicate negotiation and cooperation among numerous stakeholders over how best to clean up one of the country's oldest and largest Superfund sites. Companies will not willingly enter into settlements and consent decrees with EPA to conduct remediation at a Superfund site if they are simultaneously subject to state-law tort suits that require diametrically different remediation steps. The decision below is a case in point: it exposes Atlantic Richfield to sudden and unexpected liabilities in the tens of millions of dollars. This is so even though plaintiffs' proposed remedy would be wasteful in the extreme, requiring Atlantic Richfield to pay to undo the remedies EPA ordered it to undertake. In other words, not only does the decision frustrate a cleanup that is currently proceeding under federal law, it means that much of the last 35 years of work and the next seven years of work by EPA would be for naught.

The decision also invites thousands more landowners across the State to sue to supplant EPA's remedy or to implement remedial efforts themselves without EPA's authorization. And the decision provides a roadmap for other states to bless similar theories of recovery that run roughshod over CERCLA's

calibrated scheme. Given the sheer number of CERCLA sites in Montana, their great size and complex cleanup efforts, and the many millions of dollars and thousands of hours that EPA, parties at the sites, and the surrounding communities have invested in remediation over decades, the decision plainly warrants this Court's review.

I. The Montana Supreme Court's Interpretation of CERCLA Conflicts with Decisions of Other Courts

A. The Decision Conflicts with Other Courts Regarding What Constitutes a "Challenge" Under § 113(h)

The Montana Supreme Court held that "fundamentally, a § 113(h) challenge must actively interfere with EPA's work, as when the relief sought would stop, delay, or change the work EPA is doing." App. 11a. The court deemed it irrelevant that plaintiffs' proposed cleanup conflicted with the clean-up that EPA ordered and that is currently underway. *Id.* The court failed even to acknowledge EPA's view that the proposed remedy would undermine its decades-long efforts and could even worsen environmental conditions and risks to human health. App. 71a-75a. All that mattered to the state court was that plaintiffs' remedy could be implemented by the owners themselves *after* Atlantic Richfield finished the EPA-ordered cleanup, so that EPA would not need to itself "alter" its own plan. App. 13a. The court's interpretation of the statutory term "challenge" conflicts with the decisions of six other federal courts of appeals.

1. Start with the Ninth Circuit, where Montana sits. In the Ninth Circuit, "[a]n action constitutes a challenge to a CERCLA cleanup if it is related to the goals of the cleanup." *ARCO Envtl. Remediation,*

L.L.C. v. Dep't of Health & Envtl. Quality of Mont., 213 F.3d 1108, 1115 (9th Cir. 2000) (quotation marks omitted). The Ninth Circuit has thus held that § 113(h) bars any situation "where the EPA works out a plan, and a ... suit seeks to improve on the CERCLA cleanup because it wants more." *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011) (quotation marks omitted); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995). "[D]isputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in progress." *McClellan*, 47 F.3d at 329 (internal quotation omitted).

The state court's construction of § 113(h) was outcome-determinative. Plaintiffs' claim for restoration damages would have been barred under the Ninth Circuit's interpretation of § 113(h). Put simply, "EPA work[ed] out a plan," and plaintiffs "want[] more." *Pakootas*, 646 F.3d at 1220. Neither the court below nor the plaintiffs dispute that the restoration claims seeks a different remedy than the one EPA selected. Nor could they. As EPA concluded, "aspects of [the plaintiffs'] plans are a dramatic departure from EPA's ROD requirements." App. 72a. EPA explained that plaintiffs would "apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA"; would "excavat[e] to two feet [of topsoil] rather than EPA's chosen depth of 18 inches within residential areas"; would "transport[] the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA"; and would "construct[] a series of underground trenches and barriers for capturing and treating shallow groundwater." *Id.* The dissent below, applying the Ninth Circuit's test, thus concluded that plaintiffs' "restoration plan … would

conflict with the ongoing EPA investigation and CERCLA cleanup," and consequently is barred as a "challenge" under § 113(h). App. 23a-24a.

Like the Ninth Circuit, the Third, Seventh, Tenth, Eleventh, and D.C. Circuits have held that a challenge under § 113(h) encompasses any suit that "calls into question" or "impacts" EPA's ordered cleanup. Thus, the Third Circuit holds that § 113(h) bars suits contesting "what measures actually are necessary to clean-up the site and remove the hazard." *Boarhead Corp. v. Erickson*, 923 F. 2d 1011, 1019 (3rd Cir. 1991). The Seventh and D.C. Circuits hold that § 113(h) bars any suit that would "impact the remedial action selected." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 880 (D.C. Cir. 2014); *Pollack v. U.S. Dep't of Def.*, 507 F.3d 522, 526-27 (7th Cir. 2007); *Schalk v. Reilly*, 900 F.2d 1091, 1097 (7th Cir. 1990). The Tenth and Eleventh Circuits hold that no suit may be brought that "calls into question" EPA's chosen remedy. *Cannon v. Gates*, 538 F.3d 1328, 1335 (10th Cir. 2008); *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006); *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002).

These circuits have adopted broad functional tests for determining what constitutes a "challenge" under § 113(h). Their tests do not depend on who is implementing the remedy or whether the terms of the EPA order would change. Rather, these courts focus on what is happening at the site. In contrast, the Montana Supreme Court adopted a counterintuitive and highly formalistic test, requiring the plaintiffs' remedy actually to alter the terms of the EPA order or to force EPA to implement those changed terms.

2. The court below found the circuit precedents "inapposite" because they purportedly did not involve claims by "private property owners, against another private party, seeking money damages for the purpose of restoring their own private property." App. 12a. That is incorrect. The Ninth Circuit has explained that the "prohibitory language of Section 113(h) does not distinguish between plaintiffs," *McClellan*, 47 F.3d at 328, and applied its interpretation to preclude suits between two private parties seeking money damages, *Pakootas*, 646 F.3d at 1214. Moreover, the Tenth Circuit barred a common-law tort suit by New Mexico against a private party, expressly rejecting the notion that § 113(h)'s prohibitions exempted suits for "money damages." *New Mexico*, 467 F.3d at 1249-50. The Tenth Circuit concluded that § 113(h) does not permit private parties to be "held liable for monetary damages because they are complying with an EPA-ordered remedy which [they] have no power to alter without prior EPA approval." *Id.*

The court below thus relied on a distinction without a difference. While *some* of the cases involve suits against EPA rather than against private parties, none of them suggested that the question mattered, and the circuits to consider a suit for money damages against a private party hold that § 113(h) applies. Plaintiffs' challenge to EPA's cleanup remedy obviously "impacts" and "calls into question" EPA's remedy, *i.e.*, the controlling standard in the Ninth and all the other circuits. Plaintiffs' restoration claims are a brazen assault on EPA's remedial efforts that no other court would permit.

B. The Decision Conflicts with Other Courts Regarding Who Is a "Potentially Responsible Party" Barred from Non-EPA-Authorized Cleanups

The decision below creates a second split on who is a "potentially responsible party," or "PRP," barred under CERCLA § 122(e)(6) from conducting unilateral cleanups at Superfund sites without EPA's approval.

Once EPA orders or initiates remedial activity at a Superfund site, § 122(e)(6) bars any "potentially responsible party" from "undertak[ing] any remedial action" that EPA has not specifically "authorized." 42 U.S.C. § 9622(e)(6). CERCLA defines a PRP broadly to include any "owner or operator" of property within a Superfund site, without the need for any designation or prior determination. 42 U.S.C. § 9607(a)(1); *see Atl. Research Corp.*, 551 U.S. at 131-32. Section 122(e)(6) naturally applies to all landowners, because site owners or operators are the entities most likely to undertake unauthorized remedial actions. The Montana Supreme Court's holding that plaintiffs are not PRPs, App. 15a-17a, conflicts with the view of the United States and the uniform consensus of every federal court of appeals to have addressed the question. As the United States told the court below, any current property owner is automatically a PRP, regardless of whether they were "somehow 'declared PRPs'" and "regardless of whether they have defenses that could absolve them of liability." App. 79a-80a. Because plaintiffs are property owners at the Superfund site, they are PRPs, full stop. *Id.*

Likewise, the courts of appeals agree that PRP status under CERCLA occurs solely by reference to the party's relationship to a hazardous waste site;

fault is irrelevant. Plaintiffs would be considered PRPs at least in the Second, Third, Seventh, and Ninth Circuits. The Ninth Circuit has explained, for example, that any owner of property at the time of the cleanup is a PRP. *Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 914-16 (9th Cir. 2010). The Seventh Circuit has held that a landowner was a "PRP for CERCLA purposes … based solely on its ownership of the [hazardous waste] site." *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1239-42 (7th Cir. 1997). The Second Circuit likewise held that multiple "property owners" were PRPs simply by dint of their ownership status, "regardless of whether or not they deposited [hazardous waste]." *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010). As the Third Circuit has explained, "in the case of a current operator … [one] is not even required to show that the [PRP] was an operator when an active 'disposal' of hazardous waste occurred." *Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Prot.*, 725 F.3d 369, 381 (3d Cir. 2013).

The Montana Supreme Court did not disagree that plaintiffs are owners under the plain terms of § 9607(a)(1). The court rather "decline[d]" to "treat the [plaintiffs] as PRPs" because the remediation had been occurring for many years and plaintiffs had not previously been "designated" as PRPs by a court or EPA. App. 16a-17a. But the federal appellate decisions just cited reject this extra-statutory exception. The Seventh Circuit held that a current owner was a PRP in 1997 even though it was "not a party that is now or ever has been subject to a civil action under CERCLA" or "any administrative cleanup order from the … EPA," and though CERCLA remediation had been occurring since 1982. *Rumpke*, 107 F.3d at

1239. The Second Circuit recognized parties as PRPs 18 years after remediation began, even though they had never been previously "designated" as PRPs by the courts or EPA. *Niagara Mohawk*, 596 F.3d at 118, 135-36. Likewise, the Third Circuit held that former owners of a polluted parcel in New Jersey were PRPs more than 15 years after cleanup efforts began, and despite the lack of a prior "designation." *Litgo*, 725 F.3d at 375-76, 379-85.

As far as Atlantic Richfield is aware, no court besides the one below has ever suggested that landowners can conduct remediation efforts at Superfund sites without EPA approval. No other court has engrafted onto the statute exemptions from PRP status akin to those the Montana Supreme Court invented here. The holding was outcome determinative and constitutes a radical departure from an established consensus among the circuits. The decision now gives a green light to unilateral remediation by landowners even during an ongoing EPA-ordered cleanup.

C. The Decision Conflicts with Other Courts Regarding the Application of Conflict Preemption to CERCLA

The decision below creates yet a third split, on the applicability of conflict preemption in the CERCLA context. This is a classic case of conflict preemption: the remedy plaintiffs seek conflicts with the CERCLA cleanup that EPA has ordered. The United States accordingly argued that allowing the claim for restoration damages to proceed triggers impossibility preemption principles and would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Con-

gress." App. 77a (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Federal courts of appeals have recognized that CERCLA preempts state environmental laws, including common-law remedies, where they deprive EPA of the "flexibility needed to address site-specific problems," *United States v. City & Cty. of Denver*, 100 F.3d 1509, 1512-13 (10th Cir. 1996), "dramatically restrict[] the range of options available to the EPA," *id.*, conflict with the terms of an EPA consent decree, *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1458 (6th Cir. 1991), or would "create a path around the statutory settlement scheme," *In re Reading Co.*, 115 F.3d 1111, 1117 (3d Cir. 1997).

At least three circuits, including the Ninth, hold that ordinary conflict preemption applies "notwithstanding [CERCLA's] savings clauses." *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 952 n.26 (9th Cir. 2002). Discussing 42 U.S.C. §§ 9614(a) and 9652(d), the Ninth Circuit explained that those clauses "make it clear that CERCLA does not preempt the *field* of hazardous waste cleanup," but do not save state laws that "come[] into conflict with CERCLA." *Fireman's Fund*, 302 F.3d at 952 n.26. The Ninth Circuit then held that various local laws were preempted. *Id.* at 943, 949, 952. The Tenth Circuit holds that "conflict preemption" is "an affirmative defense available to [CERCLA defendants] notwithstanding" §§ 9614(a) and 9652(d). *New Mexico*, 467 F.3d at 1244. Likewise, the Seventh Circuit holds that § 9652(d) "merely … nix[es] an inference that [CERCLA] is intended to be the exclusive remedy," but does not "allow specific provisions of [CERCLA] to be nullified." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). "CERCLA's

savings clause must not be used to gut provisions of CERCLA." *Id.*

In direct conflict with these decisions, the court below held that CERCLA's savings clauses categorically save all state common-law claims from preemption, no matter how much the remedy sought conflicts with EPA's orders. App. 17a-18a. The court accordingly did not even engage in the conflict preemption analysis. *Id.* This Court should grant certiorari to resolve the split with the Seventh, Ninth, and Tenth Circuits. Moreover, the conflict preemption question—and the extent to which the savings clauses negate preemption—is inextricably intertwined with the statutory questions presented, and granting on all three issues would give this Court the greatest flexibility in resolving this case.

* * *

This case is an ideal vehicle to address all three questions. All three questions are squarely presented and outcome determinative; resolving any one of them in Atlantic Richfield's favor would require the dismissal of plaintiffs' restoration claims. Moreover, as the sheer number of cases cited above demonstrates, the decision below raises important and recurring questions concerning one of the most consequential federal environmental statutes. Especially troubling, the Montana Supreme Court split on all three questions presented with the Ninth Circuit, which includes Montana. Plaintiffs in Montana now have every incentive to forum shop. Only this Court can restore uniformity, both within Montana and nationally.

II. The Decision Is Wrong

The Montana Supreme Court's decision is inconsistent with CERCLA's text, structure, and design. The United States agrees. Taken together, the court's three holdings eviscerate the statutory and constitutional protections that prevent interference with EPA-ordered cleanups.

1. Section 113 jurisdictionally bars restoration claims, whether filed in state or federal court, because such claims directly challenge EPA's selected remedy. Section 113(b) gives federal courts "exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. § 9613(b). Section 113(h), in turn, bars federal courts from reviewing "any challenges" to EPA's chosen remedy. 42 U.S.C. § 9613(h) ("No Federal court shall have jurisdiction … to review any challenges" to any EPA removal or remedial action). The court below (App. 9a) noted in passing § 113(h)'s reference to federal courts, but as the Ninth Circuit has long held, §§ 113(b) and (h), when read together, "deprive the Montana state court[s] of jurisdiction" over any claim that "constitute[s] a challenge to a CERCLA cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115; *accord Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999). For this reason, the United States has concluded that "state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim." App. 67a n.2.

Plaintiffs' restoration claim is a quintessential "challenge" to EPA's remedial orders under § 113(h). To "challenge" is "to object or except to; … to call or put in question; to put into dispute; to render doubtful." Black's Law Dictionary 209 (5th ed. 1979). As

the United States argued below and multiple circuits hold, any state-law claim that impacts EPA's remedy at a CERCLA site constitutes an impermissible "challenge." *Supra* pp. 15-16. This Court has repeatedly held that CERCLA's terms should be afforded their ordinary meaning. *See Burlington*, 556 U.S. at 610-11; *Bestfoods*, 524 U.S. at 66.

The Montana Supreme Court's contrary holding disregards § 113(h)'s plain text. Plaintiffs seek to dig up soil that EPA wants in the ground. App. 72a; App. 36a-37a (McKinnon, J., dissenting). The United States described plaintiffs' plans as a "dramatic departure from EPA's" plans. App. 72a. If plaintiffs' restoration claim does not "object" to or "put in question" EPA's remedy, nothing does.

The court below held that § 113(h) did not apply because the remedy could be implemented after EPA's cleanup was conducted, but offered no textual or other basis for creating such an exception. A challenge is a challenge. And as for the court's observation that plaintiffs rather than EPA would implement the restoration, App. 12a, the statute bars "*any* challenges." 42 U.S.C. § 9613(h) (emphasis added). The statute's protections would be flimsy indeed if litigants could simply sue to force EPA's private-sector partner to fund a private effort to undo EPA's work. Moreover, this suit implicates all of the policies that undergird § 113. EPA can hardly superintend complex cleanups at sites across the country while juries second-guess the agency's judgment at every turn.

2. The court's interpretation of § 122(e)(6) was equally erroneous, as the United States agrees. Plaintiffs are barred from bringing their claims because they are "potentially responsible part[ies]" and

their proposed "remedial action has [not] been authorized by" EPA. 42 U.S.C. § 9622(e)(6). Plaintiffs never sought EPA approval, and the United States has stated it is "unlikely to approve the cleanup proposed by the [plaintiffs] because that approach is inconsistent with EPA's." App. 79a.

The court's holding that plaintiffs were not PRPs was wrong. CERCLA defines PRPs to include, as relevant, the "owner" of "any site or area where a hazardous substance has … come to be located." 42 U.S.C. §§ 9607(a)(1)-(2), 9601(9), 9601(20)(A). The Anaconda Smelter Superfund site is indisputably such a site. And it does not matter whether plaintiffs themselves contributed to the hazard. *Atl. Research Corp.*, 551 U.S. at 136. The term "PRP" in CERCLA includes "everyone who is *potentially* responsible for hazardous-waste contamination," *Bestfoods*, 524 U.S. at 56 n.1 (emphasis added), regardless of defenses they may have to any ultimate liability. The term serves many statutory functions other than assigning liability—here, defining a category of persons who are barred from conducting EPA-unauthorized remediation.

The court "decline[d]" to treat as PRPs owners who met the statutory terms but had not been previously "designat[ed]" as PRPs by EPA or a court in one of three ways. App. 15a-17a. But no such exemption or prior "designation" requirement appears in the text or in any of the cases the court cited, and the language of § 122(e)(6) and § 107(a)(1) is not discretionary.

Nor is there any "horse left the barn" exception to PRP status, App. 16a, as the absence of any citation in the decision below demonstrates. The court below pointed to the statute of limitations on private

suits *against* PRPs for recovery of cleanup costs, *id.*, but § 122(e)(6) bars remedial action *by* PRPs without EPA authorization. CERCLA imposes no statute of limitations on that prohibition, nor would such a limitation make sense. And the fact that Atlantic Richfield and EPA did not seek contribution from plaintiffs or otherwise treat them as PRPs until plaintiffs filed this lawsuit, App. 16a, is irrelevant. Their PRP status only became relevant because of this lawsuit. That plaintiffs were never asked to contribute financially to the remediation in the past does not mean they should be allowed to *undermine* it now.

The Montana Supreme Court's cramped reading of the term PRP would drain § 122(e)(6) of its central purpose. Section 122(e)(6) is designed "to avoid situations in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. 28,430 (1986) (statement of Sen. Mitchell). And the type of PRP most plausibly positioned to do such a thing is, of course, current property owners, the very category the Montana court excised by judicial fiat.

The consequences of the court's holding extend well beyond allowing restoration-damage claims. This holding allows any property owner on any of Montana's 17 Superfund sites to immediately start digging trenches, removing soil, and treating contamination—on their own. Congress obviously did not intend to allow landowners to bring in their own bulldozers smack in the middle of EPA-ordered cleanups.

3. Plaintiffs' remedy is preempted under ordinary implied-conflict-preemption principles, which include both impossibility and obstacle preemption. *See Ari-*

zona v. United States, 567 U.S. 387, 398-99 (2012). This is a paradigmatic case. The United States has determined that plaintiffs' restoration plan "conflict[s] with EPA's" remedial plan and "could make [EPA's] remedies difficult or impossible to achieve." App. 78a.

First, compliance with plaintiffs' restoration damages remedy and the mandates of CERCLA is an "impossibility." *Arizona*, 567 U.S. at 399. Plaintiffs' restoration plan directly contradicts EPA's plan. The government articulated four examples: arsenic action levels for treatment (250 versus 8 ppm); depth of soil removal (18 versus 24 inches); location of soil removal (local versus hundreds of miles away); and construction of underground barriers that change groundwater chemistry and flow (none versus thousands of feet). App. 72a, 74a. Nor is it relevant that plaintiffs would implement their conflicting remedies after EPA and Atlantic Richfield "pull up stakes." App. 14a. Plaintiffs can prevail under state law only by persuading a jury that the cleanup EPA ordered was insufficient. Conversely, the only way Atlantic Richfield could avoid liability is by conducting a cleanup that would place the company in flagrant violation of EPA's orders.

Second, plaintiffs' claim "stands as an obstacle to the accomplishment and execution" of CERCLA's purposes. *Arizona*, 567 U.S. at 399. Again as the United States urged, App. 77a-78a, granting a restoration-damages remedy would usurp EPA's exclusive statutory authority to select and implement the appropriate remedy, *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994); 42 U.S.C. §§ 9604, 9617, and would thwart CERCLA's central objectives of promoting settlement and preventing multiple, conflicting remedies at a Superfund site.

The court below essentially ignored the government's carefully considered views. The court observed that the government stated at oral argument that "some" unidentified "aspects" of plaintiffs' plan would not constitute a "challenge." App. 14a. But the court ignored the government's repeated, strenuous representations during argument and throughout its brief that multiple aspects of plaintiffs' plan *would* directly conflict with EPA's remediation. App. 71a-80a. Instead, the court concluded that CERCLA's savings clauses, 42 U.S.C. §§ 9614(a), 9652(d), precluded conflict preemption as a matter of law.

That was wrong. This Court has "repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (quotation marks omitted). A "saving clause" does "*not* bar the ordinary working of conflict pre-emption principles." *Id.* at 869; *accord Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001). That is why multiple circuits have held, in line with the ordinary rule, that CERCLA's savings clauses rule out field but not conflict preemption. *Supra* pp. 22-23. CERCLA's savings clauses preserve state-law causes of action that complement CERCLA, and indeed, Atlantic Richfield conceded that CERCLA did not preempt four out of five types of damages claimed in this case. But where, as here, a common-law restoration remedy would "gut [other] provisions of CERCLA," *PMC, Inc.*, 151 F.3d at 618, it is preempted.

III. The Questions Presented Are Immensely Important

The decision below clearly conflicts with decisions of the Ninth Circuit and other federal appellate courts and would merit review for that reason alone. But the decision also strips away CERCLA's central protections against interference with EPA-ordered remedies, invites damage to the environment, upsets longstanding and massive reliance interests, and threatens to impose immense costs on private companies that for decades have been working side by side with EPA to remediate the nation's most hazardous waste sites.

1. A decision that threatens to frustrate a federal agency's implementation of an important federal scheme warrants this Court's review. Congress enacted CERCLA to "promote the timely cleanup of hazardous waste sites," *Burlington*, 556 U.S. at 602 (quotations omitted), to centralize decisionmaking in expert agencies like EPA, *Akzo Coatings*, 949 F.2d at 1423-24, and to promote finality by "encourag[ing] settlement," *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The United States told the court below that plaintiffs' restoration claims frustrate each of those objectives. App. 77a-78a. A decision so cavalierly ignoring the views of the government warrants this Court's review.

Sections 113(h) and 122(e)(6) play a crucial role in protecting EPA-ordered remedial action from interference and delay. "The limits § 113(h) imposes on a district court's jurisdiction are an integral part of [CERCLA's] overall goal," *Boarhead*, 923 F.2d at 1019, and § 122(e)(6) is part of "the cornerstone of [the modern CERCLA] settlement process," *Allied*

Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1109 (N.D. Ill. 1988).

The Montana Supreme Court opened up massive loopholes in both provisions, while simultaneously holding that ordinary principles of conflict preemption do not apply under CERCLA. Montana's outlier decision turns Superfund cleanups into free-for-alls, where different groups of landowners not only may ask juries to decide for themselves whether EPA's remedy suffices, but also may begin conducting their own remediations without consulting EPA. The decision thus permits multiple, conflicting, uncoordinated cleanups at the behest of thousands of individual landowners across hundreds of miles of Montana Superfund sites.

Beyond that, absent this Court's intervention, the Montana Supreme Court's decision will undermine the ability of EPA and companies to remediate Superfund sites. In many cases, companies have entered into comprehensive and costly remedy-defining consent decrees with EPA that took years to negotiate, involving remedies that take years to implement. The United States put it bluntly: "The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations." App. 71a. The decision thus "discourage[s] the type of final settlements that Congress sought to foster in enacting CERCLA." *Id.*

Atlantic Richfield's history in Montana is illustrative. Atlantic Richfield has worked cooperatively with EPA at Montana Superfund sites for over 35 years, complying with dozens of EPA requests to im-

plement interim and final remedial actions, and entering into six consent decrees to fund and implement EPA's selected remedies in the Upper Clark Fork River Basin Superfund area. The company's primary incentive to enter into agreements like these—certainty and finality—would be lost if the Montana Supreme Court's decision is allowed to stand.

2. The decision below also seriously threatens the environment. It is not just that plaintiffs' plans would "divert cleanup resources from the implementation of EPA's plan." App. 72a-73a. At every stage of the administrative and judicial proceedings, EPA has rejected plaintiffs' plans as infeasible and downright dangerous. In EPA's expert view, for example, plaintiffs' proposed 8,000-foot-long underground barrier and the various shorter barriers "could change the groundwater flow in unpredictable ways," and could "unintentionally contaminate groundwater and surface water." App. 74a. EPA expressly rejected very similar proposals. App. 62a-63a. Likewise, plaintiffs propose to "[t]ear[] up" soil that EPA ordered capped and backfilled, which "could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion." App. 72a-73a. "Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public." App. 73a. As EPA explained, "Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids ad hoc addition of potentially competing cleanup measures." App. 74a.

But under the holding below, newly empowered plaintiffs may substitute their own plans for EPA's remedy or tear up work that has already been com-

pleted, even if those plans are environmentally counterproductive. And they can do all this without so much as a heads-up to EPA. The question whether federal law permits private citizens to impose their own remedial judgment in a way that EPA says will risk environmental damage clearly merits this Court's review. Over 9,000 people live within the Anaconda site's borders and will face the consequences of environmental damage wrought by ill-advised remediation steps that conflict with those ordered by EPA.

3. The costs of this decision for Atlantic Richfield would be substantial and unexpected, and this Court's intervention is necessary to provide meaningful relief. This Court regularly grants certiorari in cases where a lower court has frustrated the petitioner's longstanding reliance on agency rules or settled practice. *E.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). As noted, Atlantic Richfield has cooperated with EPA for 35 years and has already spent approximately $470 million remediating the site. This progress has been possible because Atlantic Richfield and EPA have relied on the finality and durability of the records of decision and other administrative orders that govern cleanup work at the site. That reliance will be frustrated if the Montana Supreme Court's decision is allowed to stand. And Atlantic Richfield, a company working in good faith with EPA, could be required to pay many millions of dollars undoing that same work. *See* Pls.' Supp. Expert Witness Discl., *supra* note 7, at 4-5 (plaintiffs' expert estimating a cost of between $50 million and $57.6 million to "restore" about 70 residential properties).

4. The consequences of the decision below extend far beyond this case, far beyond the Anaconda Smelter site, and far beyond Atlantic Richfield.

Superfund sites are located in some of the most densely populated regions in the country. EPA, *Superfund National Priorities List (NPL) Where You Live Map*, goo.gl/eT92CR. Montana itself has 17 Superfund sites totaling many hundreds of square miles, located within or near some of Montana's largest cities, including sites in or near the cities of Billings, Missoula, Helena, Great Falls, Bozeman, and Butte. Atlantic Richfield has already spent over $1.4 billion to address Superfund obligations in Montana, and is not yet finished with its work. The Smelter site itself is contiguous with three other massive sites; together they form the largest Superfund complex in the country, spanning roughly 500 square miles. The final tally for the complex alone is expected to exceed one billion dollars. Joe Griffen & David Williams, *Ready, Fire, Aim: Daines and Pruitt to Fix Berkeley Pit Disaster*, Missoulian (Mar. 17, 2017), goo.gl/8Kth32. Over 50,000 Montanans live or own property within the borders of a Superfund site. And as many as 250,000 people—nearly a quarter of the State's total population—live in close proximity to a site. EPA, *Superfund Sites in Region 8*, goo.gl/psbrnB; U.S. Census Bureau, *QuickFacts*, goo.gl/FCALki.

Left undisturbed, the decision below will undermine EPA cleanups across the entire State and would provide a troubling roadmap for landowners and courts throughout the country. As EPA noted below, "recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres" in Montana alone. App. 73a. This most immediately includes the roughly 9,000 other

individuals residing at Anaconda, who could demand remedial action that conflicts not only with EPA's plan, but with the action sought by plaintiffs who sued the time before. Indeed, following issuance of the court's opinion, plaintiffs' lawyers began soliciting new plaintiffs to join this lawsuit, and they have publicly discussed bringing another suit on behalf of Anaconda residents. *See* Kathie R. Miller, *Attorneys Discuss Possibility of Lawsuit Against ARCo for Anaconda Residents*, Anaconda Leader, Jan. 24, 2018, at 1.

Plaintiffs at other sites will surely follow suit if this Court does not step in. EPA will be unable to craft remediation plans with any assurance that some property owner will not tear it all up. These suits have the potential to cause greater harm to the environment, at great risk to hundreds of thousands of citizens of Montana alone. And even if no more suits are filed, thousands of Montana residents may immediately undo EPA's remediation by conducting their own unilateral work at sites without obtaining EPA's approval.

The potential burdens on EPA and its private remediation partners are enormous. On average, remediating a Superfund site costs tens of millions of dollars, and, at larger sites, that number soars to nearly $200,000,000.[8] Mining sites—and 12 of Montana's sites are mining sites—are the most expensive, typically costing three times more than the next-most-expensive sites, manufacturing sites.[9] It

---

[8] Katherine N. Probst, *Superfund 2017: Cleanup Accomplishments and the Challenges Ahead* 5 & n.12 (2017), goo.gl/Lm4Dqi.

[9] GAO, *Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate*

takes, on average, ten years from when a site is first proposed as a Superfund site to when it is deemed "construction complete," and almost 15 years for more expensive cleanups.[10] And even after construction is complete, fully executing EPA's remediation plans often requires many more years—and sometimes decades—of additional work, maintenance, and monitoring.[11]

The decision below threatens every company that has worked in good faith with EPA with new lawsuits requiring these companies to spend tens or hundreds of millions of dollars undoing the work the companies have already put in. This Court regularly reviews decisions of the Montana Supreme Court that raise important questions of federal law. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Am. Tradition P'ship v. Bullock*, 567 U.S. 516 (2012); *PPL Mont., LLC v. Montana*, 565 U.S. 576 (2012). It should also do so here.

Future Program Funding Requirements, GAO-09-656 at 58 tbl.11 (2009), goo.gl/2TktVW.

[10] *Id.* at 70 tbl.15.

[11] Probst, *supra* note 8, at 15.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

JONATHAN W. RAUCHWAY
SHANNON W. STEVENSON
DAVIS GRAHAM & STUBBS LLP
1550 17th St., Suite 500
Denver, CO 80202
(303) 892-9400

LISA S. BLATT
Counsel of Record
ROBERT J. KATERBERG
ELISABETH S. THEODORE
ANDREW T. TUTT
STEPHEN K. WIRTH
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001
(202) 942-5000
lisa.blatt@arnoldporter.com

Counsel for Petitioner

April 27, 2018

APPENDIX

APPENDIX A

OP 16-0555

IN THE SUPREME COURT OF THE
STATE OF MONTANA

———

2017 MT 324

———

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HON. KATHERINE M. BIDEGARAY,
Respondent,

———

ORIGINAL PROCEEDING:

Petition for Writ of Supervisory Control
District Court of the Second Judicial District,
In and for the County of Silver Bow,
Cause No. DV-08-173BN
Honorable Katherine M. Bidegaray,
Presiding Judge

COUNSEL OF RECORD:

For Petitioner:

Jonathan W. Rauchway (argued), Shannon Wells Stevenson, James R. Henderson, Davis Graham & Stubbs LLP, Denver, Colorado

John P. Davis, Patrick M. Sullivan, Poore, Roth & Robinson, P.C., Butte, Montana

For Plaintiff Gregory Christian, et al.:

Monte D. Beck, Justice P. Stalpes (argued), Beck, Amsden & Stalpes, PLLC, Bozeman, Montana

J. David Slovak, Mark M. Kovacich, Ross Johnson, Lewis, Slovak, Kovacich & Snipes, PC, Great Falls, Montana

For Amicus Curiae:

John C. Cruden, Matthew R. Oakes (argued), Assistant Attorneys General, United States Department of Justice, Washington D.C.

Domenic A. Cossi (argued), Western Justice Associates, PLLC, Bozeman, Montana
(*Attorney for Amicus Curiae Montana Trial Lawyers Association*)

Roger Sullivan, McGarvey, Neberling, Sullivan & Lacey, Kalispell, Montana
(*Attorneys for Montana Environmental Information Center*)

Kurt G. Alme, United States Attorney, Victoria Francis, Assistant United Stated Attorney, District of Montana, Billings, Montana
(*Attorneys for Amicus Curiae United States of America*)

Elizabeth A. Brennan, Brennan Law & Mediation, PLLC, Missoula, Montana
(*Attorneys for Amicus Curiae Clark Fork Coalition*)

Argued: April 7, 2017
Submitted: April 11, 2017
Decided: December 29, 2017

Filed:

/s/ [Illegible]
Clerk

OPINION AND ORDER

Justice James Jeremiah Shea delivered the Opinion and Order of the Court.

¶1 Petitioner Atlantic Richfield Company ("ARCO") petitioned this Court for a writ of supervisory control, seeking reversal of five orders of the Second Judicial District Court in Silver Bow County in the matter of *Christian, et al. v. Atlantic Richfield Co*. Relevant to the issue before us, the action in the District Court concerns a claim for restoration damages brought by property owners in and around the town of Opportunity, Montana (hereafter referred to as "Property Owners"). We accepted supervisory control of this case for the limited purpose of considering the District Court's August 30, 2016 Order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th). We restate the issues as follows:

> *Issue One: Whether the Property Owners' claim constitutes a challenge to EPA's selected remedy, and thus does not comply with CERCLA's timing of review provision.*
>
> *Issue Two: Whether the Property Owners are "Potentially Responsible Parties," and thus cannot proceed with their chosen restoration activities without EPA approval.*
>
> *Issue Three: Whether the Property Owners' claim otherwise conflicts with CERCLA, and is thus preempted.*

PROCEDURAL AND FACTUAL BACKGROUND

¶2 The Anaconda Smelter, originally constructed by the Anaconda Copper Mining Company, processed copper ore from Butte for nearly one hundred years before shutting down in 1980. Also in 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, et seq. Also known as "Superfund," the purpose of CERCLA is to foster the cleanup of sites contaminated by hazardous waste, and to protect human health and the environment. In 1983, the Environmental Protection Agency ("EPA") designated the area impacted by the Anaconda Smelter, now owned by ARCO, as a Superfund site. In 1984, EPA issued an administrative order requiring ARCO to begin a remedial investigation at the Smelter Site. In 1998, EPA selected a remedy pursuant to CERCLA that detailed ARCO's cleanup responsibilities moving forward.

¶3 As part of ARCO's cleanup responsibility, EPA required ARCO to remediate residential yards within the Smelter Site harboring levels of arsenic exceeding 250 parts per million in soil, and to remediate all wells used for drinking water with levels of arsenic in excess of ten parts per billion. The Property Owners, a group of ninety-eight landowners located within the bounds of the Smelter Site, sought the opinion of outside experts to determine what actions would be necessary to fully restore their properties to pre-contamination levels. The experts recommended the Property Owners remove the top two feet of soil from affected properties and install permeable walls to remove arsenic from the groundwater. Both remedies required restoration work in excess of what the EPA required of ARCO in its selected remedy.

¶4 The Property Owners filed this action in 2008, claiming common law trespass, nuisance, and strict liability against ARCO, and seeking restoration damages. Any recovered restoration damages are to be placed in a trust account and distributed only for the purpose of conducting restoration work.

¶5 In 2013, ARCO moved for summary judgment on the grounds that CERCLA barred the Property Owners' claims. The District Court did not address ARCO's CERCLA preemption issue because it dismissed the Property Owners' case on the basis that their claims were barred by the statute of limitations. The Property Owners appealed and we affirmed in part, reversed in part, and remanded the case to the District Court for further proceedings. *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 79, 380 Mont. 495, 358 P.3d 131. On remand, the District Court denied all of ARCO's contested motions for summary judgment. Among the orders denied was ARCO's Motion for Summary Judgment on the Property Owners' Claim for Restoration Damages as Barred by CERCLA. ARCO petitioned this Court for a writ of supervisory control, asking us to vacate four of the District Court's orders denying summary judgment and one order on a motion in limine. On October 5, 2016, we issued an order granting the writ for the limited purpose of considering the District Court's 2016 Order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th).

¶6 The Property Owners bring several claims against ARCO: (1) injury to and loss of use and enjoyment of real and personal property; (2) loss of the value of real property; (3) incidental and consequential

damages, including relocation expenses and loss of rental income and/or value; (4) annoyance, inconvenience, and discomfort over the loss and prospective loss of property value; and (5) expenses for and cost of investigation and restoration of real property. ARCO concedes that the Property Owners may move forward on their first four claims, but contend that the claim for restoration damages is preempted by CERCLA.

STANDARD OF REVIEW

¶7 We review de novo a district court's grant or denial of summary judgment, applying the same criteria of M. R. Civ. P. 56 as a district court. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. Under Rule 56(c), judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citation omitted).

DISCUSSION

¶8 In *Sunburst School Dist. No. 2 v. Texaco*, 2007 MT 183, ¶ 34, 338 Mont. 259, 165 P.3d 1079, we held: "If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation." To recover restoration damages, a plaintiff must show (1) the injury to the property is reasonably abatable, and (2) the plaintiff has "reasons personal" for seeking restoration damages. *Lampi v. Speed*, 2011 MT 231, ¶ 29, 362 Mont. 122, 261 P.3d 1000 (citing *Sunburst*, ¶¶ 31–39). In *Sunburst*, the plaintiffs sought restoration damages from Texaco to restore their properties to the condition the properties

would have been in absent a benzene leak from a Texaco gasoline refinery. *Sunburst*, ¶ 38. Texaco argued that the plaintiffs' common law claim for restoration damages was preempted by Montana's Comprehensive Environmental Cleanup and Responsibility Act (CECRA), a state statute similar in purpose and scope to CERCLA. *Sunburst*, ¶ 55. We further noted in *Sunburst* that "[a] presumption exists against statutory preemption of common law claims. A statute does not take away common law claims except to the extent that the statute expressly or by necessary implication declares." *Sunburst*, ¶ 51 (internal citations omitted). Accordingly, we held: "[N]o conflict exists between DEQ's supervisory role under CECRA and restoration damages awarded under the common law. We further conclude that nothing in CECRA precludes a common law claim by necessary implication." *Sunburst*, ¶ 59.

¶9 ARCO argues that the Property Owners may not bring their state law claim for restoration damages because the claim conflicts with various provisions of CERCLA, and thus are preempted. Preemption is established expressly, through the unambiguous language of Congress in statute, or impliedly through the doctrines of field preemption or conflict preemption. *Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S. Ct. 1591, 1594–95 (2015). Field preemption exists if Congress intended the relevant federal law to entirely occupy the field. *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 109 S. Ct. 1661, 1665 (1989). There is no field preemption in this case, as CERCLA expressly allows for complementary state laws, including common law, through a series of savings clauses:

> Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to

> releases of hazardous substances or other pollutants or contaminants. . . .

42 U.S.C. § 9652(d).

> Nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. § 9614(a).

¶10 ARCO advances three arguments regarding how it contends CERCLA bars the Property Owners' claim for restoration damages: (1) Property Owners' restoration damages claim constitutes a direct challenge to EPA's selected remedy and CERCLA's timing of review provision, 42 U.S.C. § 9613(h) ("CERCLA § 113(h)"), prevents this Court from hearing challenges to an EPA remedy; (2) the Property Owners are "potentially responsible parties" under CERCLA, and as such may not perform any restoration activities without EPA approval; and (3) the Property Owners' claim otherwise conflicts with CERCLA and is barred under the doctrine of conflict preemption. We address each of these arguments in turn.

¶11 *Issue One: Whether the Property Owners' claim constitutes a challenge to EPA's selected remedy, and thus does not comply with CERCLA's timing of review provision.*

¶12 ARCO cites CERCLA's "timing of review" provision, § 113(h), for the proposition that CERCLA expressly preempts the Property Owners' claim by denying Montana courts jurisdiction over any challenges to a CERCLA cleanup. Section 113(h) reads, in relevant part:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section § 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section of § 9604 of this title, or to review any order issued under section § 9606(a) of this title. . . .

At the outset, it bears noting that this statute begins: "No *Federal* court shall have jurisdiction under *Federal* law . . . ." (Emphasis added). Conspicuously absent is any reference to state court jurisdiction over state law claims. It is well-established that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA.

¶13 ARCO relies on a Ninth Circuit Court of Appeals case in which the Ninth Circuit read § 113(h) together with § 113(b) to conclude that Montana state courts lack jurisdiction over any claims that "constitute 'a challenge to a CERCLA cleanup.'" *ARCO Envtl. Remediation, LLC v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000). The Ninth Circuit concluded that because § 113(b) grants federal courts "exclusive original jurisdiction over all controversies arising under [CERCLA]," it interpreted § 113(h)'s reference to "challenges to removal or remedial action" to be a "controversy arising under [CERCLA]," and thus exclusively within the jurisdiction of the federal courts. *ARCO Envtl. Remediation*, 213 F.3d at 1115.

¶14 Irrespective of this jurisdictional question, however, ARCO acknowledges that its argument for conflict preemption under § 113(h) turns on whether the Property Owners' claim for restoration damages "challenges" the CERCLA cleanup. We have not previously addressed what constitutes a "challenge" within the context of § 113(h). In *ARCO Environmental Remediation* the Ninth Circuit defined a "challenge" as a claim that "is related to the goals of the cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115. More specifically, the Ninth Circuit further held that a "challenge" was any action in which a party seeks "to dictate specific remedial actions; to postpone the cleanup; to impose additional reporting requirements on the cleanup; or to ... alter the method and order of cleanup." *ARCO Envtl. Remediation*, 213 F.3d at 1115 (internal citations omitted). Another definition comes from the Southern District of Indiana. In *Taylor Farm Ltd. Liab. Co. v. Viacom, Inc.*, 234 F. Supp. 2d 950, 974–75 (S.D. Ind. 2002), the Indiana District Court rejected the defendant's proposed definition of a challenge as being anything more comprehensive than the EPA-selected remedy. The Court held:

> [T]he only sense in which Taylor's lawsuit can be said to "challenge" Viacom's settlement agreement with the EPA is that, if Taylor is successful, Viacom will be required to spend more money to clean up the land for Taylor's benefit than the EPA required Viacom to spend for the public's benefit.

Taylor Farm, 234 F. Supp. 2d at 976. Yet another interpretation comes from *Samples v. Conoco, Inc.*, 165 F. Supp. 2d 1303, 1315–16 (N.D. Fla 2001), in which the Florida District Court concluded the plaintiffs' claim was not a "challenge" under § 113(h), because:

> [It] is not an action designed to review or contest the remedy selected by the EPA prior to implementation; it is not an action designed to obtain a court order directing the EPA to select a different remedy; it is not an action designed to delay, enjoin, or prevent the implementation of a remedy selected by the EPA; and it is not a citizen suit brought pursuant to 42 U.S.C. § 9659.

Still other interpretations come from the Third Circuit in *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019, 1024 (3rd Cir. 1991) (holding a claim is a challenge only if it "would interfere" with or "delay[] the prompt cleanup" of hazardous sites); and the District of New Mexico in *Reynolds v. Lujan*, 785 F. Supp. 152, 154 (D.N.M. 1992) (holding a claim is a challenge if it would require the court to "alter the [EPA's] ongoing response activities.").

¶15 Synthesizing the various interpretations of what constitutes a "challenge" in light of the nature of the Property Owners' claim and CERCLA's savings clauses evinces that, fundamentally, a § 113(h) challenge must actively interfere with EPA's work, as when the relief sought would stop, delay, or change the work EPA is doing. At a minimum, a "challenge" must be more than merely requiring ARCO to spend more money to clean up the land for the Property Owners' benefit, as the court in *Taylor Farm* noted. In this case, the restoration damages Property Owners seek are to be placed in a trust account and used to further restore affected properties beyond the levels required by the EPA, and the restoration work would be completed by the Property Owners themselves. To the extent that EPA's work is ongoing, the Property Owners are not seeking to interfere with that work, nor are they seeking to stop, delay, or change the work EPA is

doing. The Property Owners' claim is exactly the sort contemplated in CERCLA's savings clauses, and does not present a "challenge" to EPA's selected remedy. Absent a "challenge" to removal or remedial action selected in the CERCLA cleanup process, §§ 113(h) and (b) do not deprive Montana courts of jurisdiction to entertain state-law restoration claims.

¶16 Despite ARCO's efforts to overcomplicate this matter and recast what is, at its essence, a common law claim for damages into a challenge to EPA's cleanup, the fundamental issue before us is one of timing. Specifically, when can private landowners bring a state common law claim for restoration damages for the purpose of cleaning up their own private property? The Dissent maintains that any such claim, if it relates to the goals of the cleanup, must wait until the EPA has completed its work and moved on because CERCLA "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." Dissent, ¶ 48, quoting *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995) (hereinafter referred to as *MESS*) (emphasis in original). Even by the Dissent's analysis, though, the Property Owners' claim does not constitute a challenge to EPA's plan. The Dissent cites a litany of cases from other jurisdictions in ostensible support of the contention that the Property Owners' damage claim constitutes a challenge to EPA's remediation plan. Dissent, ¶ 44. These cases are inapposite to the Property Owners' claim presently before us. None of the cases cited by the Dissent, nor any of the cases cited by ARCO or the United States, involve a claim by private property owners, against another private party, seeking money damages for the purpose of restoring their own private property. The Property Owners are not asking the

Court "to dictate specific remedial actions." The Property Owners are not asking the Court to "impose additional reporting requirements on the cleanup." The Property Owners are not asking the Court to "terminate the Remedial Investigation/Feasibility Study (RI/FS) and alter the method and order of cleanup." Nothing in the Property Owners' claim for restoration damages "stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA," unless Congress's objective was to condemn, in perpetuity, the private property of an individual property owner because that property happened to have been contaminated by a third party.

¶17 Put simply, the Property Owners are not asking the Court to interfere with the EPA's plan. The Property Owners are not seeking to enjoin any of EPA's activities, or requesting that EPA be required to alter, delay, or expedite its plan in any fashion whatsoever. 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. If the jury awards restoration damages, those damages will be placed in a trust for the express purpose of effectuating the Property Owners' restoration plan. Indeed, any restoration will be performed by the Property Owners themselves and will not seek to force the EPA to do, or refrain from doing, anything at the Site.

¶18 The Dissent contends that § 113(h) requires rejecting claims that challenge EPA's *ongoing* remedial action. Dissent, ¶ 43. What, if any, actual remedial action remains ongoing is, at least, unclear. Even assuming there is something that would constitute ongoing remedial action, however, this still does not morph the Property Owners' claim for restoration

damages—for purposes of funding an eventual restoration according to the Property Owners' plan—into a challenge to EPA's cleanup. As Justice Baker notes in her concurrence, the United States' counsel acknowledged during oral argument that some aspects of the Property Owners' restoration plan would not constitute a "challenge" within the meaning of the law. Concurrence, ¶ 32. As to other aspects of the Property Owners' restoration plan, even the federal government has to pull up stakes at some point and leave these private property owners alone to attend to their own private property. If the Property Owners must wait for that eventuality to conclude their restoration plan, the history of this case amply demonstrates that they have the patience for it.

¶19 Whether or not the Property Owners succeed on their claim for restoration damages will not affect, alter, or delay EPA's work in any fashion. Likewise, EPA's work, whether ongoing or not, has no bearing on the success or failure of the Property Owners' claim for restoration damages on the merits. In *Sunburst*, we noted "that CECRA's focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law." *Sunburst*, ¶ 59. The same reasoning applies here: CERCLA's regulatory standards do not apply to the common law claim at issue. The District Court has already recognized this fact when it granted the Property Owners' motion in limine to preclude ARCO from presenting evidence regarding its compliance with EPA requirements, and correctly noted that allowing such evidence at trial "pose[d] the clear risk for ARCO to 'cloak itself' in the authority of the federal government." *See Sunburst*, ¶¶ 107, 121 (discussing Texaco's efforts to cloak itself in the authority of the State of Montana in order to create confusion). That

being noted, nothing in our holding here should be construed as precluding ARCO from contesting the Property Owners' restoration damages claim on its own merits, just as it may contest the Property Owners' other claims.

¶20 The Property Owners' claim for restoration damages in this case arises solely under state common law, and does not implicate federal law or cleanup standards. The Property Owners are not seeking to compel EPA to do, or refrain from doing, any action. Therefore, the Property Owners' claim does not implicate § 113(h), nor does it implicate § 113(b). *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1455 (6th Cir. 1991) ("Clearly preserved [by § 113(h)], are challenges to the selection or adequacy of remedies based on state nuisance law . . . independent of federal response action.").

¶21 *Issue Two: Whether the Property Owners are "Potentially Responsible Parties," and thus cannot proceed with their chosen restoration activities without EPA approval.*

¶22 ARCO argues that under 42 U.S.C. § 9622(e)(6) ("CERCLA § 122(e)(6)"), the Property Owners are "Potentially Responsible Parties" ("PRP"), and are thus prohibited from conducting any remedial action that is inconsistent with EPA's selected remedy without EPA's consent. There are several categories of PRPs. For purposes of our analysis, however, the only relevant category is a class consisting of all current owners of property at a CERCLA facility. 42 U.S.C. § 9607(a)(1).

¶23 Designation as a PRP may occur in one of three ways: (1) if the party has entered into a voluntary settlement with the EPA; (2) upon a judicial determination that the party is a responsible party; or (3) if

the party is currently a defendant in a CERCLA lawsuit and has been found not to be entitled to statutory defenses. *Taylor Farm*, 234 F. Supp. 2d at 966–71 (citing *Pneumo Abex Corp. v. High Point, Thomasville and Denton R. Co.*, 142 F.3d 769, 773, n.2 (4th Cir. 1998) and *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120, n.2 (3d Cir. 1997)). The statutory defenses relevant to the Property Owners are the "innocent landowner" defense and the "contiguous landowner" defense. 42 U.S.C. § 9607(b)(3), (q).

¶24 ARCO argues that a PRP is a strictly defined category, subject to liability even if the PRP did not cause or contribute to the contamination. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956–57 (9th Cir. 2013). ARCO also contends that even if the Property Owners were able to avail themselves of a defense to liability for cleanup costs, they would still meet the broader definition of PRP, and be bound by § 122(e)(6). Essentially, ARCO asks us to treat the Property Owners as PRPs under § 122(e)(6), even though they have never been treated as PRPs for any purpose—by either EPA or ARCO—during the entire thirty-plus years since the Property Owners' property was designated as being within the Superfund site. As the Property Owners correctly point out, the statute of limitations for such a claim (at most six years from the date cleanup work was initiated) has long passed. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 128 (2d Cir. 2010). Put simply, the PRP horse left the barn decades ago.

¶25 The Property Owners have never entered into a voluntary settlement with the EPA. There has never been a judicial determination that the Property Owners are responsible parties. The Property Owners are not currently, nor have they ever been, defendants in a CERCLA lawsuit in which they were found not to

be entitled to statutory defenses. The EPA has not included the Property Owners as a defendant in the legal proceedings in this matter, nor have they been party to any settlement agreements regarding cleanup proceedings. Despite the EPA never engaging the Property Owners as PRPs, ARCO now asks us to treat the Property Owners as PRPs—for the first time in these proceedings solely for the purpose of using § 122(e)(6) to bar their claim for restoration damages. We decline to do so.

¶26 *Issue Three: Whether the Property Owners' claim otherwise conflicts with CERCLA, and is thus preempted.*

¶27 ARCO's final argument is that other conflicts exist between CERCLA and the Property Owners' claim for restoration damages. ARCO proffers three lines of reasoning for this argument. First, ARCO argues that the EPA has sole authority to select environmental remedies at Superfund sites, which would preclude alternative standards and remedies. To adopt this reasoning would be to ignore CERCLA's savings clauses. As stated above, CERCLA's savings clauses expressly contemplate the applicability of state law remedies. 42 U.S.C. §§ 9614(a), 9652(d). Second, ARCO contends there is an "unambiguous congressional intent to foreclose any state law remedy that challenges or obstructs EPA's remedy at a Superfund site." This argument fails for the same reason that § 113(h) does not apply: the Property Owners' claim does not prevent the EPA from accomplishing its goals at the ARCO Site. Lastly, ARCO again characterizes the Property Owners' claim as a challenge to EPA's selected remedy, and argues that the claim cannot proceed until EPA's remedy is fully performed. Yet CERCLA's savings clauses operate to preserve the

Property Owners' ability to pursue this claim. 42 U.S.C. § 9652(d) ("*Nothing* in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, *including common law*, with respect to releases of hazardous substances or other pollutants or contaminants." (emphasis added)). CERCLA does not expressly or impliedly preempt the Property Owners' claim for restoration damages in this matter.

CONCLUSION

¶28 We conclude that the District Court did not err by Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th). To be clear, ARCO is not precluded from contesting the merits of the Property Owners' restoration plans. However, that is an issue of fact to be resolved at trial.

¶29 THEREFORE, IT IS ORDERED:

¶30 The District Court's order Denying ARCO's Motion for Summary Judgment on Property Owners' Claim for Restoration Damages as Barred by CERCLA and Granting Property Owners' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th–13th) is AFFIRMED. This matter is remanded to the District Court for further proceedings consistent with this Opinion.

DATED this 29th day of December, 2017.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ JAMES MANLEY
Sitting for Chief Justice Mike McGrath

/S/ JOHN KUTZMAN
Sitting for Justice Jim Rice
/S/ MICHAEL E WHEAT
/S/ DIRK M. SANDEFUR

Justice Beth Baker, specially concurring.

¶31 I understand the Court's decision today to be a narrow one: CERCLA does not, as a matter of law, preempt all common-law claims for restoration damages to the property of a private individual. I agree with that conclusion and with the decision not to treat the Property Owners as PRPs. I thus concur with the Court's ruling that the District Court did not err in denying ARCO's motion for summary judgment on the restoration damages claims. I appreciate the Dissent's thorough analysis of CERCLA § 113(h), but do not agree that it applies to foreclose the Property Owners' claims.

¶32 It became clear during oral argument in this case that the parties dispute whether aspects of the Property Owners' proposed restoration plan would conflict with actions ARCO has taken in the Superfund cleanup effort. ARCO's counsel characterized the dispute as one of jurisdiction, which empowers the trial court to determine underlying facts. Here, the trial court determined, for conflict preemption purposes, that the Property Owners' claims did not stand as an obstacle to the CERCLA cleanup underway or impede EPA's requirements on the site. Amicus curiae the United States argues that the purpose of CERCLA is to assure that EPA coordinates the cleanup between multiple stakeholders, so that the selected plan may move forward without obstruction, delay, or the diversion of resources that would accompany multiple individual plans and proposals. The government stresses

that state-court lawsuits cannot, under § 113(h), supplement EPA's selected response-action cleanup levels if such a proposed plan challenges or conflicts with EPA's proposed remedy. The government recognizes, though, that CERCLA does not bar all state-law claims by affected landowners, and its counsel acknowledged during oral argument that some aspects of the Property Owners' plan would not be a "challenge" within the meaning of the law. The Property Owners' counsel protested during argument that it was the first time they had heard that some aspects of their plan would "undo" what already has been done, and that in nine years of litigation no evidence had been presented to the District Court that the Property Owners' plan conflicted with EPA's remedy.

¶33 The large-scale environmental remediation projects made possible by CERCLA are intended, and are essential, to clean up severe widespread contamination resulting from decades of historic mining practices that left expansive deposits of toxic tailings and particulate fallout in floodplains, ranchlands, and soils. The massive cleanup efforts in which ARCO, EPA, and the State of Montana have engaged for more than thirty years have gone far to remediate the Superfund site. But CERLCA draws a distinction between remedial action and damages for injury to, destruction of, or loss of natural resources. 42 U.S.C. § 9607(a)(4)(A), (C). Outside of the remediation process, States may pursue recovery of damages on behalf of the public as trustee of the state's natural resources to "*restore*, replace, or acquire the equivalent of such natural resources by the State." 42 U.S.C. § 9607(f)(1) (emphasis added). "CERCLA sets a floor, not a ceiling." *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1246 (10th Cir. 2006). And CERCLA does not cover damages to "purely private property." *Ohio v. U.S. Dep't of*

the Interior, 880 F.2d 432, 460 (D.C. Cir. 1989). It does not force local residents simply to live with the impacts if they can prove, through their nuisance and trespass actions, that state law entitles them to damages for the restoration of their own land. As the Court observes, consistent with our parallel conclusion in *Sunburst*, CERCLA's "focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law." Opinion, ¶ 19 (quoting *Sunburst*, ¶ 59). The dynamic between individual restoration and CERCLA's coordinated large-scale response does not give rise to preemption as a matter of law. "Tension between federal and state law is not enough to establish conflict preemption. We find preemption only in those situations where conflicts will necessarily arise. A hypothetical conflict is not a sufficient basis for preemption." *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007) (internal citations and quotations omitted).

¶34 In our limited Order accepting supervisory control in this case, we did not agree to review the District Court's orders in limine. But the Court observes that ARCO is not precluded at trial from contesting the merits of the Property Owners' restoration plans. Opinion, ¶¶ 19, 28. A claim for restoration damages requires the Property Owners to prove two separate elements: (1) temporary injury and (2) reasons personal for the restoration. *Lampi*, ¶ 29 (quoting *Sunburst*, ¶¶ 31-39). An injury is temporary "if the tortfeasor could restore the destroyed property to substantially the condition in which it existed before the injury. An injury that would cease to exist once remediation or restoration has been completed qualifies as temporary." *Lampi*, ¶ 32 (internal citations omitted). For temporary injury, the ability to repair

the injury "must be more than a theoretical possibility." *Sunburst*, ¶ 31 (citing *Burk Ranches v. State*, 242 Mont. 300, 306, 790 P.2d 443, 447 (1990)).

¶35 The "reasons personal" element requires the Property Owners "to establish that the award actually will be used for restoration." *Lampi*, ¶ 31. The "personal reasons" analysis is required only when the restoration costs "exceed disproportionately" the diminution in value of the property. *McEwen v. MCR, LLC*, 2012 MT 319, ¶ 30, 368 Mont. 38, 291 P.3d 1253; *Sunburst*, ¶ 38. Finally, an "injured party is to be made as nearly whole as possible—but not to realize a profit. Compensatory damages are designed to compensate the injured party for actual loss or injury—no more, no less." *Sunburst,* ¶ 40 (*quoting Burk Ranches*, 242 Mont. at 307, 790 P.2d at 447).

¶36 "[T]hese issues normally present factual questions for the jury to resolve." *Lampi*, ¶ 48. The Court acknowledges the District Court's concern about allowing ARCO to "'cloak itself' in the authority of the federal government." Opinion, ¶ 19. I write separately to add that if ARCO contends that the Property Owners' proposed remedy conflicts with or requires modification of measures ARCO already has taken to clean up the site, ARCO must be able to address those conflicts in seeking to rebut the Property Owners' claim on the essential elements of proof under our standards for a restoration damages claim. What ARCO may not do at trial is point to the EPA's selected remedy and say, "We've done everything the government required; that's all we need to do." What ARCO may do is offer evidence to support its claim that the Property Owners' proposed restoration plan is not feasible and thus does not qualify as a temporary injury. And the Property Owners should have the opportunity to prove their claim that ARCO's cleanup

efforts to date have not returned their properties to substantially the same condition in which they were before the injury, but that the injury will cease to exist if their proposed restoration plan is implemented. The Property Owners' proposals should be considered by the jury in the context of determining whether ARCO is liable for their alleged injuries and whether those injuries are compensable by an award of restoration damages. Evidence on the issue of temporary injury may well overlap with the evidence required to show, pursuant to our holding in *Atlantic Richfield Co.*, ¶ 77, whether the continuing tort doctrine tolled the period of limitations for the Property Owners' claims. It makes sense to allow the parties to develop the evidence for the jury's consideration of these issues and a record that may be reviewed, if necessary, on appeal from any final judgment.

/S/ BETH BAKER

Justice Laurie McKinnon, dissenting.

¶37 Property Owners seek monetary damages for state law claims of nuisance, trespass, and strict liability. ARCO does not contest that litigation of these state law claims may proceed during the pendency of the CERCLA cleanup process and, accordingly, that issue is not before the Court. ARCO does contend that Property Owners' claim for restoration damages proposes a different cleanup plan than that chosen by the EPA, thus constituting a challenge which is preempted by CERCLA. In my view, Property Owners' restoration plan, which includes digging an 8,000-foot trench for a groundwater wall and removing 650,000 tons of soil over a period of years, would conflict with the ongoing EPA investigation and CERCLA

cleanup.[1] The Court's conclusion that, during the pendency of a CERCLA cleanup effort, a jury may determine restoration damages and place the amount of money so determined in a trust for future restoration efforts, Opinion, ¶ 17, is not only inconsistent with CERCLA and federal precedent, but has no authority in Montana law.[2] Property Owners may not "achieve indirectly through the threat of monetary damages . . . what [they] cannot obtain directly through mandatory injunctive relief incompatible with the ongoing CERCLA-mandated remediation." *New Mexico*, 467 F.3d at 1250. Moreover, "[d]amages must be proven by substantial evidence which is not the product of mere guess or speculation." *Sebena v. Am. Auto. Ass'n*, 280 Mont. 305, 309, 930 P.2d 51, 53 (1996). "[W]here no costs have been incurred, and no costs are reasonably certain to be incurred in the future, the plaintiff has not stated a claim for damages," and summary judgment should be granted. *Town of Superior v. Asarco,*

---

[1] To recover restoration damages under Montana law, the plaintiff must present evidence and convince the fact-finder that he will actually conduct the restoration upon which the restoration claim is based. *Lampi*, ¶ 31 ("The reasons personal rule requires plaintiff to establish that the award actually will be used for restoration . . . ."); *Sunburst*, ¶ 43; *McEwen*, ¶ 50. It is the actual performance of Property Owners' restoration plan—a prerequisite to their damage award—that impermissibly challenges the EPA's remedy. For purposes of brevity, I do not address other provisions of CERCLA which ARCO asserts would bar Property Owners from completing their restoration plan.

[2] The Court errs when it applies the *Sunburst* analysis to the instant proceedings. In *Sunburst*, there was no question that Montana state courts had subject-matter jurisdiction over CERCLA and common law claims. Here, however, CERCLA-related activities are the exclusive, original jurisdiction of the federal courts and a challenge in state court to the chosen EPA remedy implicates the Supremacy Clause of the United States Constitution.

Inc., 874 F. Supp. 2d 937, 949 (D. Mont. 2004). *See also B.M. v. State*, 215 Mont. 175, 179, 698 P.2d 399, 401 (1985) ("Where plaintiff presents evidence of damages which are purely speculative, summary judgment is appropriate."). Here, there is no genuine issue of material fact that Property Owners' claim for restoration damages is a challenge to the EPA's remedial action and prohibited by CERCLA as a matter of law.

¶38 CERCLA is a "comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp. v. United States*, 511 U.S. 809, 814, 114 S. Ct. 1960, 1964 (1994).[3] "CERCLA is best known as setting forth a comprehensive mechanism to cleanup hazardous waste sites under a *restoration-based* approach." *New Mexico*, 467 F.3d at 1244 (citation omitted; emphasis added). CERCLA was intended to "promote the timely cleanup of hazardous waste sites, ensure that polluters were held responsible for the cleanup efforts, and encourage settlement through specified contribution protection." *Chubb*, 710 F.3d at 956. "One of the core purposes of CERCLA is to foster settlement through its system of incentives and without unnecessarily further complicating already complicated litigation." *Cal. Dep't of Toxic Substances Control v. City of Chico*, 297 F. Supp. 2d 1227, 1235 (E.D. Cal. 2004). *See also In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992) ("Congress sought through CERCLA . . . to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation."); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1264 (9th Cir. 2010) (noting

[3] CERCLA vests authority in the President, who, in turn, has delegated most of his functions and authority to the EPA. *See* 42 U.S.C. §§ 9606(c), 9615; 40 C.F.R. § 300.100.

that CERCLA was designed to ensure, *inter alia*, "that settlements are encouraged through specified contribution protection"); 42 U.S.C. § 9622. Under CERCLA § 113(f)(2), "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2).

¶39 There are two types of cleanup actions under CERCLA: remedial actions and removal actions. Remedial actions generally are "long-term or permanent containment or disposal programs" while removal actions are "typically short-term cleanup arrangements." *Schaefer v. Town of Victor*, 457 F.3d 188, 195 (2d Cir. 2006) (citation and quotation omitted). CERCLA defines "remedial action" as:

> [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, *to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment*. The term includes, *but is not limited to*, such actions at the location of the release as storage, *confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials*, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, *collection of leachate and runoff*, onsite treatment or incineration, provision of alternative water

> supplies, *and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment*. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24) (emphasis added).

¶40 CERCLA defines "remove" or "removal" as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary . . . to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, pro-

> vision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for . . . .

42 U.S.C. § 9601(23).

¶41 CERCLA-related activities may qualify as removal or remedial actions in at least three ways. *Hanford Downwinders Coal. v. Dowdle*, 71 F.3d 1469, 1474 (9th Cir. 1995). First, the action may be specifically designated as removal or remedial activity. *Hanford Downwinders*, 71 F.3d at 1474. Second, cleanup activity explicitly classified in CERCLA as a "response" is, by definition, a removal or remedial action. *See* 42 U.S.C. § 9601(25) (defining "response" as a "removal" or "remedial action"). Finally, "even if action taken at a CERCLA site is not referred to in the statute as a removal or remedial action or a response action, the Timing of Review provision will still apply if the action satisfies CERCLA's definition of 'removal' or 'remedial.'" *Hanford Downwinders*, 71 F.3d at 1474.

¶42 CERCLA provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA]." 42 U.S.C. § 9613(b). Section 113(h) of CERCLA, titled "Timing of review," provides an exception to federal jurisdiction during the pendency of a CERCLA removal or remedial action: "No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action . . . ." 42 U.S.C. § 9613(h). Section 113(h) clearly and unequivocally precludes contemporaneous challenges to CERCLA cleanups, regardless of whether the challenge is made pursuant to federal or state law. Section 113(h) amounts to a "blunt withdrawal of federal jurisdiction" and precludes any challenge to CERCLA cleanups. *N. Shore Gas Co. v. EPA*, 930 F.2d

1239, 1244 (7th Cir. 1991); *accord Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1075 (11th Cir. 2002). "Section 113 withholds federal jurisdiction to review any . . . claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute 'challenges' to ongoing CERCLA cleanup actions." *MESS*, 47 F.3d at 329. Read in conjunction, § 113(b) and (h) divest state courts of jurisdiction to review any state law claim which amounts to a challenge of a CERCLA removal or remedial action. *Fort Ord Toxics Project v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999). In *Fort Ord Toxics Project*, the Ninth Circuit observed that "by granting district courts exclusive jurisdiction over all controversies arising under CERCLA, Congress used language more expansive than would be necessary if it intended to limit exclusive jurisdiction solely to those claims created by CERCLA." *Fort Ord*, 189 F.3d at 832 (internal quotations and citations omitted).

¶43 The Ninth Circuit explained, "Congress concluded that the need for [swift execution of CERCLA cleanup plans] was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in progress." *MESS*, 47 F.3d at 329 (internal quotations and citations omitted). Accordingly, § 113(h) "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort. This result furthers the policy underlying CERCLA by allowing a quick response to serious hazards." *MESS*, 47 F.3d at 329 (emphasis in original). The court explained in *MESS*:

> We recognize that the application of Section 113(h) may in some cases delay judicial review for years, if not permanently, and may

> result in irreparable harm to other important interests. Whatever its likelihood, such a possibility is for legislators, and not judges, to address. We must presume that Congress has already balanced all concerns and concluded that the interest in removing the hazard of toxic waste from Superfund sites clearly outweighs the risk of irreparable harm.

MESS, 47 F.3d at 329 (internal quotations, citations, and footnote omitted). In *MESS*, the court was careful to explain that it was not deciding "whether or to what extent the district court can entertain MESS's various claims after implementation of the CERCLA cleanup at McClellan is complete." *MESS*, 47 F.3d at 329, n.6. Accordingly, § 113(h) bars *any* claim that challenges an ongoing CERCLA cleanup effort. Further, the language of § 113(h) does not distinguish between federal and state claims or constitutional and statutory claims; instead, it delays judicial review of *any* challenges to unfinished remedial EPA efforts. *See Broward Gardens*, 311 F.3d at 1075.

¶44 The Ninth Circuit has provided clear guidance concerning what constitutes a "challenge" to a CERCLA cleanup effort. In *Razore v. Tulalip Tribes*, the court explained that "[a]n action constitutes a challenge if it is *related to the goals of the cleanup*." 66 F.3d 236, 239 (9th Cir. 1995) (emphasis added). Challenges to CERCLA cleanups were found where the plaintiff seeks to dictate specific remedial actions, *Hanford Downwinders*, 71 F.3d at 1482; to postpone cleanup, *Fort Ord*, 189 F.3d at 831; to impose additional reporting requirements on the cleanup, *MESS*, 47 F.3d at 330; and to terminate the Remedial Investigation/Feasibility Study (RI/FS) and alter the method and order of cleanup, *Razore*, 66 F.3d at 239. Consistent with the Ninth Circuit, the Tenth Circuit

has held that a state claim is preempted by CERCLA if the "claim, or any portion thereof, stands as an obstacle to the accomplishment of congressional objectives as encompassed in CERCLA." *New Mexico*, 467 F.3d at 1244. The Eleventh Circuit similarly explained that "[t]o determine whether a suit interferes with, and thus challenges, a cleanup, courts look to see if the relief requested will impact the remedial action selected." *Broward Gardens*, 311 F.3d at 1072. The Eighth Circuit held that a suit challenges a remedial action within the meaning of § 113(h) if it interferes with the implementation of a CERCLA remedy. *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 675 (8th Cir. 1998).

¶45 The Ninth Circuit has also distinguished when a claim does not constitute a challenge to a CERCLA cleanup effort. In *Beck v. Atlantic Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995), the court held that a state law claim by water users seeking financial compensation for lost crops and profits resulting from the EPA's diversion of water was not a challenge to the CERCLA cleanup plan; however, the water users' claim for injunctive relief to prevent ARCO from diverting the water was a challenge to the EPA cleanup. In *ARCO Environmental Remediation*, 213 F.3d at 1113, a state law claim for access to public records and meetings did not relate to the goals of the EPA's cleanup and therefore did not constitute a challenge divesting the court of jurisdiction to entertain the claim. The lawsuit did not alter cleanup requirements or environmental standards and did not seek to delay or terminate the cleanup. Instead, the lawsuit involved the public's right to information about the cleanup. *ARCO Envtl. Remediation*, 213 F.3d at 1115.

¶46 CERCLA does not completely occupy the field of environmental regulation. Congress expressly declared that it had no intent for CERCLA to do so by enacting two savings clauses within CERCLA upon which Property Owners rely. The first savings clause, 42 U.S.C. § 9614(a), provides: "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." The second, 42 U.S.C. § 9652(d) provides: "Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." Furthermore, Congress recognized the role of state law in hazardous waste cleanup when it addressed the overlap of CERCLA and state law in 42 U.S.C. § 9614(b), which provides, in relevant part, that "[a]ny person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act." Congress clearly expressed "its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." *United States v. Colorado*, 990 F.2d 1565, 1575 (10th Cir. 1993); *accord Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125-26 (3d Cir. 1991). The Ninth Circuit also explained that "Congress did not want § 113(h) to serve as a shield against litigation that is

unrelated to disputes over environmental standards." *Fort Ord*, 189 F.3d at 831.[4]

¶47 While a principle purpose of CERCLA's savings clauses is to reinforce the right to demand hazardous waste cleanup apart from CERCLA, a savings clause "is not intended to allow specific provisions of the statute that contains it to be nullified." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998). *See also Wyoming v. United States*, 279 F.3d 1214, 1234 (10th Cir. 2002) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864, 120 S. Ct. 1913, 1916 (2000), for the proposition that "[t]he Supreme Court has 'repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law'"). "CERCLA's savings clause must not be used to gut provisions of CERCLA." *PMC*, 151 F.3d at 618. Moreover, CERCLA does not establish a "new font of law on which private parties could base claims for personal and property injuries." *Artesian Water Co. v. Gov't of New Castle Cnty.*, 659 F. Supp. 1269, 1286 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988) (internal quotations and citations omitted). The purpose of a savings clause "is merely to nix an inference that the statute in which it appears is intended to be the exclusive remedy for harms caused by the violation of the statute." *PMC*, 151 F.3d at 618. Thus, CERCLA's savings clause was enacted because Congress did not want to "wipe out people's rights inadvertently, with the possible consequence of making the intended beneficiaries of the legislation worse off than before it was enacted.

---

[4] For examples of state courts dismissing state law claims under § 113(h) of CERCLA, *see O'Neal v. Department of the Army*, 742 A.2d 1095, 1100 (Pa. Super. Ct. 1999), and *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032-33 (Colo. Ct. App. 1996).

The passage of federal environmental laws was not intended to wipe out the common law of nuisance." *PMC*, 151 F.3d at 618.

¶48 Any state law claim raised pursuant to CERCLA's savings clause which challenges the remediation efforts of the EPA must wait until after the response actions are completed because CERCLA "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." *New Mexico*, 467 F.3d at 1249 (quoting *MESS*, 47 F.3d at 329) (emphasis in original). When the EPA selects a remedy, no challenge to the cleanup may occur prior to completion of the remedy. This is true even if the claim is made pursuant to state law and attempts to invoke the state court's jurisdiction through CERCLA's savings clause. Federal courts have exclusive and original jurisdiction over any CERCLA-related activity. As explained in *Fort Ord*, 189 F.3d at 831, Congress made federal subject-matter jurisdiction broad, enacting a bar to jurisdiction through the provisions of § 113(h) during the pendency of a CERCLA cleanup effort. *See also Cannon v. Gates*, 538 F.3d 1328, 1336 (10th Cir. 2008). Accordingly, if the state claims call "into question the EPA's remedial response plan, it is related to the goals of the cleanup, and thus constitutes a 'challenge' to the cleanup under [§ 113(h)]." *New Mexico*, 467 F.3d at 1249.

¶49 Neither a federal court considering CERCLA-related activity nor a state court considering a state claim pursuant to CERCLA's savings clause has subject-matter jurisdiction to consider the claim when the claim constitutes a challenge to CERCLA's cleanup effort. It makes little difference that the claim originated in state court when the relief sought constitutes a challenge. In *New Mexico*, 467 F.3d at 1252, the

Tenth Circuit dismissed state claims of public nuisance and negligence for lack of subject-matter jurisdiction under § 113(h). In *Cannon*, 538 F.3d at 1334-36, the Tenth Circuit affirmed the trial court's dismissal of landowners' claims under the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-81, concluding that § 113(h) stripped subject-matter jurisdiction from the trial court to consider the claims. In *Broward Gardens*, 311 F.3d at 1076, the Eleventh Circuit affirmed the trial court's dismissal of landowners' claims because the court lacked subject-matter jurisdiction over the case because of § 113(h). In *Hanford Downwinders*, 71 F.3d at 1484, the Ninth Circuit affirmed the district court's dismissal of claims for lack of subject-matter jurisdiction and for failure to state a claim because of § 113(h). Given the substantial weight of authority which establishes the matter as being one of subject-matter jurisdiction, I am at a loss to understand how this Court can suggest, without any authority, that we "simply" allow "a jury of twelve Montanans" to "assess the merits of [the Property Owners' restoration] plan" and then instruct any resulting damages "be placed in a trust for the express purpose of effectuating the Property Owners' restoration plan." Opinion, ¶ 17. Most respectfully, the Property Owners should not be permitted to proceed to a jury trial when the District Court clearly lacks subject-matter jurisdiction over the controversy. Indeed, any order denying ARCO's motion would be reviewable as an interlocutory order pursuant to M. R. App. P. 6(3)(c).

¶50 Property Owners seek monetary damages for: (1) "Injury to and loss of use and enjoyment of real and personal property"; (2) "Loss of the value of real property . . . "; (3) "Incidental and consequential damages, including relocation expenses and loss of rental income and/or value"; (4) "Annoyance, inconvenience,

and discomfort over the loss and prospective loss of property value . . . "; and (5) "Expenses for and cost of investigation and restoration of real property" pursuant to Property Owners' restoration plan. ARCO does not dispute that Property Owners may proceed on the first four types of damages, which are being made pursuant to nuisance, trespass and strict liability.[5] ARCO does dispute that Property Owners may proceed on the fifth type of damage, contending that the District Court lacks subject-matter jurisdiction because of the ongoing CERCLA cleanup effort and the provisions of § 113(h). Accordingly, pursuant to the aforementioned authority, the District Court's grant of summary judgment to Property Owners on their claim for restoration damages must be reversed if Property Owners' restoration plan constitutes a challenge to the CERCLA cleanup effort at the Smelter Site. If Property Owners' proposed restoration plan "relate[s] to the goals of the cleanup," *Razore*, 66 F.3d at 239, it constitutes a challenge to the CERCLA cleanup effort and the District Court is divested of jurisdiction.

¶51 Property Owners assert claims based on contamination to properties located within the legally defined boundaries of a federal Superfund site. The EPA issued its first administrative order to ARCO in 1984, which required ARCO to perform a site-wide RI/FS. Following completion of the study in 1987, the EPA divided the Smelter Site into five major sections called Operable Units, each relating to different cleanup remedies. Property Owners seek to restore

---

[5] Given the requirement that damages not be speculative, remote or conjectural, *Sebena*, 280 Mont. at 309, 930 P.2d at 53, it is difficult to comprehend how damages can be calculated prior to completion of CERCLA remedial efforts for those areas of compensation ARCO does not contest. *See New Mexico*, 467 F.3d at 1250. That issue, however, is not before the Court.

land contained within several of these sections. The EPA continues its cleanup efforts in the designated area consistent with its selected remedies. The EPA estimates that active remediation of the Smelter Site will not be completed until 2025. ARCO filed affidavits and reports from its expert, Richard E. Bartlett, supporting its position that cleanup is ongoing and that as recently as 2016 residential soils and pasture were being cleaned to remove arsenic. ARCO also filed an Administrative Order on Consent, entered pursuant to CERCLA, that set forth how the cleanup effort was to proceed. As a result of monitoring and reexamination, the EPA has made amendments to its cleanup plan, primarily to incorporate the federal drinking water standard for arsenic from 18 ppb to 10 ppb. The EPA also added the action level for lead in 2013. The EPA asserts that it continues to monitor, modify, and reexamine remedies since the remedial plan was first implemented, which may result in additional amendments. Once the EPA remedy is completed on the Property Owners' land, the soil will be capped or backfilled with clean soil, vegetation, or other protective barrier. ARCO and the EPA maintain that tearing up the protective cap or layer of soil could increase dust transfer, bioavailability of lead, and soil ingestion—all of which were concerns addressed by the EPA when it initially designed the cleanup plan. ARCO has filed affidavits and expert reports in support of its position. ARCO, the State, and local governments are currently negotiating a final site-wide consent decree that will encompass all remaining remedies and cleanup work to be conducted at the Smelter Site.

¶52 Property Owners propose a different cleanup or restoration plan. Property Owners do not dispute that their properties are located within the boundaries of

the Superfund site. Nor do Property Owners dispute that they seek "full restoration" of their property, which is different from that selected by the EPA. Although Property Owners and this Court conclude, without any analysis, that Property Owners are not seeking to "stop, delay, or change the work EPA is doing," Opinion, ¶ 15, the Property Owners' plan is plainly contrary to the EPA's remediation plan. *See, e.g., New Mexico*, 467 F.3d at 1249-50; *MESS*, 47 F.3d at 329. Property Owners' experts, Richard Plaus and John Kane, advocate a lower level of arsenic in the soil than that proposed by the EPA. Property Owners propose excavating the soil to a deeper level and suggest the excavated soil be transported to Spokane, rather than local depositories. Property Owners also propose that a series of underground trenches and barriers be constructed to capture and treat shallow groundwater. The reactive barriers proposed by Property Owners would be 8,000 feet long, 15 feet deep, 3 feet wide, and situated upgradient of the town. The barriers would contain enzymes designed to remove arsenic in the water, which the EPA maintains could unintentionally contaminate both ground and surface water.

¶53 A district court must determine whether the complaint states facts that, if true, would vest the court with subject-matter jurisdiction. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552. Summary judgment should be granted "'if the pleadings, depositions, answers to interrogatories, and admissions on file,' together with any affidavits demonstrate that no genuine issue exists as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law." *Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶ 10, 344 Mont. 435, 188 P.3d 1063 (quoting

M. R. Civ. P. 56(c)). A defending party may be entitled to summary judgment on a certain type or category of damages. *See Corporate Air v. Edwards Jet Ctr. Mont., Inc.*, 2008 MT 283, ¶ 54, 345 Mont. 336, 190 P.3d 1111. Here, at the risk of stating the obvious, Property Owners request in their Third Amended Complaint "full restoration" of their properties while a restoration-based remedial plan selected by the EPA is being implemented. In addition, the affidavits and reports of each party's expert witnesses establish as a matter of law that Property Owners' claim for restoration damages challenges the EPA's selected remedial action and that the cleanup is still ongoing. Indeed, the undisputed evidence shows the EPA rejected the soil and groundwater remedies proposed by Property Owners during the course of the EPA's regulatory deliberations at the Smelter Site. In my opinion, the District Court erred, as a matter of law, in concluding that Property Owners' claim for restoration damages did not constitute a challenge to the remedial action plan chosen by the EPA.

¶54 I dissent from the Court's conclusion that Property Owners' claim for restoration damages is not barred pursuant to the provisions of § 113(h). The issue before this Court is one of subject-matter jurisdiction which, if lacking, bars Property Owners from proceeding to trial on their claim for restoration damages. I would reverse because there is no genuine dispute of fact that Property Owners' restoration claim conflicts with the ongoing EPA investigation and

CERCLA cleanup.[6] The District Court, as a matter of federal law, lacks subject-matter jurisdiction to consider Property Owners' claim for restoration damages.

/S/ LAURIE McKINNON

[6] The question of whether Property Owners' claim for restoration damages constitutes a challenge to CERCLA cleanup efforts is pivotal to resolution of many issues in this case. For example, in *New Mexico*, 467 F.3d at 1250, the Tenth Circuit, having found that CERCLA's cleanup efforts were ongoing, determined that damages for common law public nuisance and negligence must be addressed at the conclusion of the EPA-ordered remediation. "Only then will we know the effectiveness of the cleanup and the precise extent of residual damage." *New Mexico*, 467 F.3d at 1250. Accordingly, I would not address ARCO's contention, at this juncture, that Property Owners are PRPs under 42 U.S.C. § 9622(e)(6) (CERCLA § 122(e)(6)) and therefore precluded from proceeding with their chosen remedy.

APPENDIX B

MONTANA SECOND JUDICIAL
DISTRICT COURT SILVER BOW COUNTY

Katherine M. Bidegaray
Seventh Judicial District Court
Department No. 2
300 12th Ave. NW, Suite #2
Sidney, Montana 59270
Telephone: (406) 433-5939
Facsimile: (406) 433-6879

CAUSE NO. DV-08-173 BN

GREGORY A. CHRISTIAN; *et al.,*
Plaintiffs,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant.

ORDER DENYING ARCO'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR RESTORATION DAMAGES AS BARRED BY CERCLA and GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ARCO'S CERCLA PREEMPTION AFFIRMATIVE DEFENSES (11TH - 13TH)

INTRODUCTION

On May 17, 2013, Defendant Atlantic Richfield Company ("ARCO") filed a Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA. On June 10, 2013, Plaintiffs have filed a Cross-Motion for Summary Judgment on ARCO's

CERCLA Preemption Affirmative Defenses (11th - 13th). The Court heard oral argument on both motions on June 20, 2016.

For the reasons set forth below:

1. ARCO's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA is DENIED; and
2. Plaintiffs Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th -13th) is GRANTED.

BACKGROUND

CERCLA was enacted in 1980 to ensure the cleanup of contaminated sites and eliminate threats to human health and the environment posed by uncontrolled hazardous waste sites. CERCLA sets forth a mechanism to clean up hazardous waste sites under a remediation-based approach. *United States v. Bestfoods,* 524 U.S. 51, 55 (1998). CERCLA's principle aims are to effectuate the cleanup of hazardous waste sites and impose cleanup costs on responsible parties. *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 483 (1996). CERCLA's overall objective is to "promptly remediate polluted sites to bring land back to its original uncontaminated condition." *Johnson Controls, Inc. v. Employers Ins. of Wausau,* 665 N.W.2d 257, 273 (Wisc. 2003).

The Anaconda Smelter Site ("Site") became a federal Superfund Site in 1983. *See* 48 Fed. Reg. 40,658 (Sept. 8, 1983). Plaintiffs' properties are encompassed within the Site. Plaintiffs allege that Atlantic Richfield and its predecessors damaged their property while conducting "a milling and smelting operation located near the towns of Anaconda and Opportunity ... from 1884 to 1980."

Plaintiffs have pursued damages allowed under Montana tort law for Defendant's alleged trespass and nuisance, including restoration damages. Plaintiffs' have testified in depositions that the primary goal of this lawsuit is to have their properties restored. Plaintiffs have also disclosed expert CPA Thomas Copley, who has been retained to serve as a controller to oversee funds that are recovered by the Plaintiffs in this litigation for restoration damages and ensure that they be used for the cleanup of property.

LEGAL STANDARD

Summary judgment is an extreme remedy and should never be substituted for a trial if a material factual controversy exists. *Hajenga v. Schwein,* 2007 MT 80, & 11, 226 Mont. 507, 155 P.3d 1241. The party moving for summary judgment must demonstrate the absence of genuine issues of material fact. Only then, must the opposing party establish factual issues. *First Sec. Bank v. Jones,* 243 Mont. 301, 302, 794 P.2d 679, 681 (1990). All evidence must be viewed in the light most favorable to the party opposing summary judgment and all reasonable inferences drawn in their favor. *Oliver v. Stimson Lumber,* 1999 MT 328, & 22, 297 Mont. 336, 342, 993 P.2d 11, 16.

RATIONALE

ARCO seeks a ruling that CERCLA's timing of review provision (Section 113(h)) and CERCLA's inconsistent remedy provision (Section122 (e)(6)) bar Plaintiffs' claim for restoration damages. To bar Plaintiffs' claim, however, the Federal CERCLA provisions must preempt Plaintiffs' state common law for trespass and nuisance, which allows Plaintiffs to recover restoration damages. As recognized by the Montana Supreme Court in the context of a trespass and nuisance claim, like the one here:

> If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation.

Sunburst School Dist. No. 2 v. Texaco, 2007 MT 183 ¶34, 338 Mont. 259, 165 P.3d 1079 *(citing Roman Catholic Church v. Louisiana Gas,* 618 So.2d 874, 877 (La. 1993).

Preemption is the only way a federal law may bar recovery pursuant to state common law. *Pritchard Petroleum v. Farmers Co-Op. Oil & Sup. Co.,* 121 Mont. 1, 15, 190 P.2d 55, 63 (1948) ("A statute does not take away common law claims except to the extent that the statute expressly or by necessary implication declares.").

1. CERCLA Does Not Preempt Plaintiffs' Right to Recover Restoration Damages Pursuant to Montana's Common Law.

CERCLA does not expressly preempt Montana's common law, which allows for the recovery of restoration damages. *See New Mexico v. General Electric Co.,* 467 F.3d 1223, 1244 (10th Cir.2006) ("[w]e may safely say Congress did not intend CERCLA to completely preempt state laws related to hazardous waste contamination.").

In fact, CERCLA contains three separate savings provisions preserving the right to impose additional liability for the release of a hazardous substance, one of which provides:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of

> this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

42 U.S.C. § 9652(d) (emphasis added). The principle purpose of § 9652(d) "is to preserve to victims of toxic waste the other remedies they may have under federal or state law." *PMC, Inc. v. Sherwin-Williams Co.,* 151 F.3d 610, 617 (7th Cir. 1998) (citing *Beck v. Atlantic Richfield Co.,* 62 F.3d 1240, 1243 n. 8 (9th Cir. 1995)). Inclusion of these CERCLA savings provisions makes clear that Congress did not intend to preempt state causes of action. *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 25 (1983).

In the absence of express preemption, which is not present here, a federal statute may impliedly preempt a state law in two ways. First, if Congress intends that federal law should entirely occupy a particular field, state laws in that field (such as the common law right to recover restoration damages) are preempted. *California v. ARC America Corp.,* 490 U.S. 93, 100, (1989).

As stated above, Congress had no intention of occupying the fields of property law or environmental clean-up by passing CERCLA. Nor did Congress intend to preclude state law claims or damages such as those at issue in this case. Various courts have found that Congress did not preempt state laws related to hazardous waste contamination. *Fireman's Fund Ins. v. City of Lodi,* 302 F.3d 928, 941-43 (9th Cir.2002) ("Congress clearly expressed its intent that CERCLA should work in conjunction with other

federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem."); *United States v. Colorado,* 990 F.2d 1565, 1575 (10th Cir.1993); *accord Manor Care, Inc. v. Yaskin,* 950 F.2d 122, 125-26 (3d Cir.1991) (Alito, J.).

Second, if Congress does not intend to occupy the field, a state law may be preempted by federal law to the extent that it actually conflicts with federal law. *California v. ARC America Corp.,* 490 U.S. 93, 100, (1989). Allowing Plaintiffs to pursue restoration damages as allowed by Montana's common law would not conflict with CERCLA §113(h) or §122(e)(6). Actual conflict between state and federal law occurs "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Choate v. Champion Home Builders Co.,* 222 F.3d 788, 792 (10th Cir.2000). For conflict preemption to apply, the common law remedy must be a "material impediment to the federal action, or thwart [ ] the federal policy in a material way." *Id.* at 796 (quoting *Mount Olivet Cemetery Assoc. v. Salt Lake City,* 164 F.3d 480, 489 (10th Cir.1998)).

In this case, recovery of restoration damages by the Plaintiffs would not stand as an obstacle to Congress's objectives in passing CERCLA or to the CERCLA cleanup underway. The EPA has required ARCO to remove soil containing more than 250 ppm of arsenic or 400 ppm lead from all residential property within the Superfund site and to remove soil exceeding 1,000 ppm of arsenic from all pasture property. The EPA has not required ARCO take any action with respect to arsenic, lead or any other contaminant in groundwater.

Plaintiffs intend to remove all of the arsenic and other heavy metal contaminants left in their groundwater and from the upper two feet of the soil on their properties. Plaintiffs' common law property damage claims do not make it "impossible" for ARCO to comply with the EPA's requirement. Nor do Plaintiffs' common law claims impede the CERCLA framework or EPA's requirements on site. While ARCO is currently remediating portions of a minority of Plaintiffs' residential yards due to the results of testing performed in the course of this litigation, ARCO represented at oral argument that this cleanup will be finished before the trial scheduled on November 1, 2016. No further cleanup is contemplated by ARCO. Plaintiffs' restoration plan as to these properties, therefore, will not interfere with any ongoing or proposed CERCLA mandated cleanup.

2. Plaintiffs' Common Law Claim is Not a Proscribed "Challenge" to the EPA-Selected Remedy.

ARCO argues next that, regardless of whether CERCLA preempts Montana's common law right to recover restoration damages, this Court does not have jurisdiction over Plaintiffs' claim for restoration damages because Plaintiffs' restoration plan is a prohibited "challenge" to the remedial action selected by the EPA, citing CERCLA's "timing of review provision," §113(h).

Section 113(h) states:

> No federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup

> standards) to review any challenges to removal or remedial action selected under section 9606(a) of this title[.][1]

42 U.S.C. § 9613(h).

In order to invoke the timing of review provision to block Plaintiffs' state law claim for restoration damages, ARCO is required to demonstrate that Plaintiffs' common law suit for trespass and nuisance is a "challenge" to the remedial action selected by the EPA, which is set forth in the Record of Decision ("ROD"). ARCO cannot satisfy this requirement. Claims are interpreted as a "challenge" pursuant to § 113(h) only if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup. *ARCO Environmental Remediation, LLP (AERL) v. Dept. of Health and Environmental Quality of Montana,* 213 F.3d 1108, 115 (9th Cir. 2000).

In this case, Plaintiffs do not seek to alter the ROD or change any of the requirements that the EPA has imposed upon ARCO. Instead, Plaintiff seeks to recover restoration damages and perform the cleanup themselves.

ARCO cites several extra-jurisdictional cases which it contends compel a determination that Plaintiffs' common law claims are a challenge to the EPA-selected remedy. However, all of the cases cited by ARCO are distinguishable in that none involve a private landowner whose common law claim for restoration damages was considered a proscribed challenge to the EPA selected remedy. For example, ARCO cites *New Mexico v. General Electric Co.,* 467 F.3d 1223 (10th Cir.2006). In that case, the plaintiff was not a

---

[1] Plaintiffs admit that exceptions 1-5 to §113(h) are inapplicable.

private landowner but instead represented the state's broader sovereign and public trust. Further, and unlike the Plaintiffs' claim here, the claim was pled and characterized by New Mexico not as a common law claim, but instead as "residual to a CERCLA remedy." *Id.* at 1249. New Mexico brought suit because the EPA "abandoned the ROD and required remediation of only the shallowest portion of the total plume." *Id.* New Mexico's claim was, in essence, a CERCLA NRD claim, which is created by the CERCLA statutory scheme and which *is* affected by the CERCLA timing of review provision. In dismissing New Mexico's claim, the *Gen. Elec.* court stated, "[t]his is not to say the State's public nuisance and negligence theories of recovery are completely preempted... Rather, the remedy the state seeks to obtain through such causes of action – an unrestricted award of money damages – cannot withstand CERCLA's comprehensive NRD scheme." *Id* at 1248.

ARCO also relies on *Razore v. Tulalip Tribes of Wash.,* 66 F.3d. 236 (9th Cir. 1995). In *Razore,* the plaintiff formerly operated a landfill on property owned by the defendant tribe. *Id* at 238. The landfill was declared a CERCLA site and Razore was a principal Potentially Responsible Party (PRP) required to pay for the EPA cleanup. *Id.* Prior to the EPA initiating cleanup, Razore sued the tribe, attempting to require the tribe to take immediate remedial action that would, in turn, limit the cost Razore would ultimately be required to pay. *Id.* at 239.

Section 113(h) barred Razore's claim as a challenge to the CERCLA remedy. Because it was not a property owner and was, in fact, responsible for the pollution in the first place, Razore could not sue the tribe under Washington's common law. *Id.* Instead, Razore alleged the tribe's landfill was in violation of the federal

Resource Conservation and Recovery Act (RCRA) and the federal Clean Water Act (CWA). *Id.* Neither RCRA nor CWA could be enforced in that manner by a private party such as Razore. *Id.* Therefore, Razore did not have a cognizable claim that could be preserved by CERCLA's savings provision. *Id* at 240.

ARCO also relies on *McClellan Ecological Seepage Situation v. Perry,* 47 F.3d 325 (9th Cir. 1995). *McClellan* is distinguishable because that case involved a public interest group's suit in federal court seeking to enforce federal environmental regulations. The public interest group alleged that RCRA and CWA were not being complied with during the CERCLA mandated cleanup. *Id.* at 326. The court found that the management plan effectuated by the EPA required compliance with both RCRA and CWA. *Id.* Therefore, a suit alleging that those federal regulations were not being complied with was a challenge to the CERCLA cleanup. *Id.*

The Court does not find ARCO's reliance on these cases persuasive. Further, ARCO's interpretation of §113(h) conflicts with the plain language of the CERCLA savings provision, which states:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants...

42 U.S.C. § 9652(d).

The CERCLA statute must be interpreted as a whole. *Montana Sports Shooting Ass'n, Inc. v. State, Montana Dept. of Fish, Wildlife, and Parks,* 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003, 1006. If the statutory language is not clear and unambiguous,

courts look to legislative effect and give effect to the legislative will. *Id.*

The language of §113(h) does not clearly and unambiguously prohibit common law trespass and nuisance claims where the plaintiff seeks restoration damages. Further, to read §113(h) as a prohibition on common law claims for restoration damages creates a possible incongruity with the savings provision, 42 U.S.C. § 9652(d). The legislative history, however, describes the legislative will and intent behind §113(h).

The Congressional Committee of Conference that drafted the 1986 amendments to CERCLA explained that the "[n]ew section 113(h) is not intended to affect in any way the rights of persons to bring nuisance actions under State law with respect to releases or threatened releases of hazardous substances, pollutants, or contaminants." H.R. Conf. Rep. No. 99-962, at 224). The Senate agreed to this Committee of Conference Report. *Bernice Samples v. Conoco, Inc.,* 165 F.Supp.2d 1303, 1312 (N.D. Florida, 2001) *citing* 132 CONG. REC. 28, 406, 28, 456 (1986). Senator Stafford "who insisted upon stating expressly what all had agreed was their intent," provided additional explanation of the "purpose and meaning" of the provisions in § 113:

> The time of review of judicial challenges to cleanups is governed by 113(h) for those suits to which it is applicable. It is not by any means applicable to all suits. For purposes of those based on State law, for example, 113(h) governs only those brought under State law which is applicable or relevant and

> appropriate as defined under Section 121.[2] In no case is State nuisance law, whether public or private nuisance, affected by 113(h).

Bernice Samples at 1312 citing 132 CONG. REC. 28, 410. Senator Mitchell echoed Senator Stafford, explaining that "[s]tate nuisance suits would, of course, be permitted at any time." *Bernice Samples* at *Id.* at 1312 citing 132 CONG. REC. at 28, 429.

The House of Representatives also agreed to the Committee Conference Report on the 1986 CERCLA amendments. Representative Glickman clarified the intended interplay between § 113(h) and state law claims such as those maintained by Plaintiffs here:

> Section 113(h) does not affect the ability to bring nuisance actions under State law for remedies within the control of the State courts which do not conflict with the Superfund legislation. The language preserving State nuisance actions in a limited manner is intended to preserve the use of State enforcement authority to compel private party cleanup or to otherwise assure that the State or private party citizens can continue to abate nuisances resulting from hazardous waste disposal when such actions do not conflict with CERCLA.

Bernice Samples at 1314 *citing* 132 CONG. REC. 29, 737 (1986).

Congress' intent in passing §113(h) was, therefore, not to bar claims such as that brought by Plaintiffs in

---

[2] This sentence applies to enforcement actions that require state government standards be incorporated and enforced by the EPA in the CERCLA clean-up and is not applicable here.

this case, which do not conflict with CERCLA for the reasons set forth above.

3. CERCLA § 122(e)(6) Does Not Apply to Plaintiffs' Claims.

ARCO also argues that Plaintiffs are barred from pursuing their state law claim for restoration damages by CERLA's "inconsistent response" action section (§ 122(e)(6)). ARCO submits that Plaintiffs are Potentially Responsible Parties (PRPs), and Plaintiffs' claims for monetary restoration damages qualify as an "inconsistent response" to CERCLA. ARCO's argument must be rejected for three reasons.

First, as explained above, CERCLA does not preempt Plaintiffs' common law claims for nuisance, trespass, negligence and strict liability. Section 122(e)(6) cannot preclude Plaintiffs from recovering for restoration damages where CERCLA does not preempt Montana's common law.

Second, Plaintiffs, as private landowners, are not PRPs as contemplated by CERCLA. The Site was declared a Superfund site 33 years ago and ARCO has failed to show that any of the Plaintiffs, or any other private landowner in Opportunity or Crackerville have been declared PRPs. The cases cited by ARCO relate to successor liability or contribution situations in which parties have inherited a business or have otherwise become involved in the polluting business, and are subsequently named PRPs.

Third, even if Plaintiffs' had been declared to be PRPs by the EPA, Plaintiffs' state law restoration claims are not "inconsistent with" EPA's final remedy. Therefore, §122(e)(6) does not apply. Under CERCLA § 122(e)(6), Congress only forbade remedial actions by PRPs that are inconsistent with the ROD without EPA's approval. "This provision is to avoid situations

in which the PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." *Interfaith Comm. Org. v. Honeywell Intern, Inc.,* 2007 WL 576343 * 3 *quoting* 132 CONG. REC. S14919 (daily ed. Oct. 3, 1986). This section is part of CERCLA's overall objective to "promptly remediate polluted sites to bring land back to its original uncontaminated condition," and impose liability on "the parties responsible for the polluted condition of the land." *Johnson Controls, Inc. v. Employers Ins. of Wausau,* 665 N.W.2d 257, 273 (Wis. 2003).

Plaintiffs' restoration plan is not inconsistent with the EPA selected remedy, nor would it exacerbate the pollution issue in Opportunity and Crackerville. Plaintiffs seek to remove all of the pollution left on Plaintiffs' personal property by the Anaconda Smelter. "CERCLA sets a floor, not a ceiling." *New Mexico,* 467 F.3d at 1246. As evidenced by the savings provisions, CERCLA contemplates additional state actions for cleanup that may exceed the EPA mandated action for a property. Congress even contemplated the situation where a private party receives funds from a polluter for restoration damages on a site regulated by CERCLA, and precludes that private individual from double recovery of the same costs through a CERCLA action. *See* 42 U.S.C. § 9614(b).

While ARCO suggests that the Plaintiffs' restoration plan would conflict with ongoing EPA investigation and cleanup, it has failed to carry its burden to demonstrate the absence of genuine issues of material fact. According to ARCO's expert and Rule 30(b)(6) designee, Richard Bartelt, prior to the filing of this action, the remediation required by EPA under CERCLA had already been completed by ARCO. As a result of the filing of this lawsuit, ARCO conducted

additional sampling on every Plaintiffs' property, and now acknowledges contamination exceeding the regulatory level for arsenic in soil remains on some of the Plaintiffs' properties. At oral argument, the Court was informed that ARCO plans to remove contaminated soil on twenty-four of the Plaintiffs' properties, however, none of the Plaintiffs will have the entirety of their yards cleaned up. The work began in June, 2016 and is scheduled to be finished before the start of trial in November, 2016. No restoration of groundwater is contemplated.

CONCLUSION

For the foregoing reasons, the Court does not find that the CERCLA provisions raised by ARCO should bar Plaintiffs from the recovery of restoration damages.

IT IS HEREBY ORDERED that Defendant Atlantic Richfield Company's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA is DENIED and Plaintiffs' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th -13th) is GRANTED.

DATED, this 30th day of August, 2016.

/s/ Katherine M. Bidegaray
Hon. Katherine M. Bidegaray
DISTRICT COURT JUDGE

APPENDIX C

OP 16-0555

IN THE SUPREME COURT OF THE
STATE OF MONTANA

[Filed 12/09/2016]

ATLANTIC RICHFIELD COMPANY

Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY, THE HONORABLE
KATHERINE M. BIDEGARAY

Respondent,

UNITED STATES' AMICUS BRIEF

JOHN C. CRUDEN
Assistant Attorney General
United States Department of Justice
MATTHEW R. OAKES
United States Department of Justice
Environment and Natural Resources
Division
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 514-2686
Fax: (202) 514-4231

MICHAEL W. COTTER
United States Attorney
VICTORIA FRANCIS
Assistant United States Attorney
District of Montana
U.S. Courthouse
2601 Second Ave. North
Billings, MT 59101
Telephone: (406) 247-4633
Fax: (406) 657-6989

Attorneys for Amicus Curiae United States of America

TABLE OF CONTENTS

STATEMENT OF THE CASE 1
STATEMENT OF ISSUES..... 1
STATEMENT OF FACTS 1
STANDARD OF REVIEW..... 3
SUMMARY OF ARGUMENT 3
ARGUMENT..... 5
I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages. 6
A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site. 6
B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy. 13
C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses. 18
II. Principles of Conflict Preemption Independently Bar the Landowners' Restoration-Damages Remedy. 19
III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6). 21
CONCLUSION 23

TABLE OF AUTHORITIES

Cases

ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality,
213 F.3d 1108 (9th Cir. 2000) 7, 9, 10

Anacostia Riverkeeper v. Wash. Gas Light Co.,
892 F. Supp. 2d 161 (D.D.C. 2012) 19

Beck v. Atl. Richfield Co.,
62 F.3d 1240 (9th Cir. 1995) 10

Broward Gardens Tenants Ass'n v. US. EPA,
311 F.3d 1066 (11th Cir. 2002) 10

Cannon v. Gates,
538 F.3d 1328 (10th Cir. 2008) 10

Chubb Custom Ins. Co. v. Space Sys.,
710 F.3d 946 (9th Cir. 2013) 12

Diamond X Ranch, L.L.C. v. Atl. Richfield Co.,
51 F. Supp. 3d 1015 (D. Nev. 2014) 9

Fla. Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 19

Fort Ord Toxics Project, Inc. v. Cal. EPA,
189 F.3d 828 (9th Cir. 1999) 8, 9

Hanford Downwinders Coal. v. Dowdle,
71 F.3d 1469 (9th Cir. 1995) 10

Hines v. Davidowitz,
312 U.S. 52 (1941) 19

McClellan Ecological Seepage Situation v. Perry,
47 F.3d 325 (9th Cir. 1995) 7, 9, 17

New Mexico v. GE,
467 F.3d 1223 (10th Cir. 2006) 8, 10

Oneok, Inc. v. Learjet, Inc.,
135 S. Ct. 1591 (2015) 20

PMC, Inc. v. Sherwin-Williams Co.,
151 F.3d 610 (7th Cir. 1998) 18

Pakootas v. Teck Cominco Metals, Ltd.,
646 F.3d 1214 (9th Cir. 2011) 10

Razore v. Tulalip Tribes,
66 F.3d 236 (9th Cir. 1995) 9, 10, 18

Schalk v. Reilly,
900 F.2d 1091 (7th Cir. 1990) 8

Tohono 0 'odham Nation v. City of Glendale,
804 F.3d 1292 (9th Cir. 2015) 20

Town of Acton v. WR. Grace Co.,
No. 13-12376-DPW, 2014 WL 7721850
(D. Mass. Sept. 22, 2014) 9

United States v. City & Cry. of Denver,
100 F.3d 1509 (10th Cir. 1996) 9, 20

United States v. Gonzales,
520 U.S. 1 (1997) 11

United States v. James,
478 U.S. 597 (1986) 11

Villegas v. United States,
926 F. Supp. 2d 1185 (E.D. Wash. 2013) 10

Voluntary Purchasing Groups, Inc. v. Reilly,
889 F.2d 1380 (5th Cir. 1989) 8

State Cases:

Lampi v. Speed,
261 P.3d 1000 (Mont. 2011) 6

O'Neal v. Dep't of the Army,
742 A.2d 1095 (Pa. Super. Ct. 1999) 8

Sunburst Sch. Dist. No. 2 v. Texaco, Inc.,
165 P.3d 1079 (Mont. 2007) 6

Constitution

U.S. Const. art. VI, cl. 2 20

Statutes

42 U.S.C. § 9601(35)(A) 23
42 U.S.C. § 9604 ..... 3, 6
42 U.S.C. § 9606(a) 7
42 U.S.C. § 9607(a)(1) 22
42 U.S.C. § 9607(b)(3) 23
42 U.S.C. § 9607(q) 22
42 U.S.C. § 9613 3
42 U.S.C. § 9613(b) 8, 9
42 U.S.C. § 9613(h) ..... passim
42 U.S.C. § 9614(a) 19
42 U.S.C. § 9621(a) 20
42 U.S.C. § 9621(d) 20, 21
42 U.S.C. § 9622 ..... passim
42 U.S.C. § 9652(d) 18
42 U.S.C. § 9659 12
42 U.S.C. § 9659(h) 19

Miscellaneous

132 Cong Rec. S14929 (daily ed. Oct. 3, 1986) 12

STATEMENT OF THE CASE

In an October 5, 2016, order this Court invited the United States Environmental Protection Agency (EPA) to file this *amicus* brief, addressing whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) bars or otherwise prevents a claim for restoration damages under Montana law that a group of 98 landowners has filed against the Atlantic Richfield Company (ARCO).

STATEMENT OF ISSUES

Does CERCLA bar the landowners' claim for restoration damages?

STATEMENT OF FACTS

The United States relies on ARCO's November 17, 2016 brief to set out the primary factual and procedural background. In addition, however, we note that though EPA has been actively responding to hazardous-substance contamination at the Site for more than 30 years, significant work remains. This includes cleanup of an additional 1,150 residential yards, revegetation of 7,000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds. Final Residential Soils Report, August 7, 2015, available at https://semspub.epa.gov/src/document/08/1549208; Fifth Five-Year Review (Sept. 25, 2015), Table 10-1 at 10-7 https://semspub.epa.gov/src/document/08/1549381. EPA estimates that ARCO will complete this work by approximately 2025, though monitoring and maintenance work will continue indefinitely. Fifth Five-Year Review, Table 10-7 at 10-58.

Response actions at two of EPA's five Operable Units (OUs) directly impact the landowners' property: Community Soils (CSOU), which primarily addresses residential yards contaminated with arsenic and lead

in Anaconda, Opportunity, and the surrounding area; and Anaconda Regional Water, Waste, and Soils (ARWWS OU), which addresses a variety of soil, surface water, and groundwater contamination issues throughout the Site. *See generally* Record of Decision, Community Soils Operable Unit, Sept. 1996, CSOU ROD; *see also* Record of Decision, ARWWS OU, Sept. 1998 (ARWWS OU ROD).[1] EPA considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners, along Willow Creek for collecting and treating groundwater south of Opportunity to protect surface water in Willow Creek to the south and east of Opportunity. ARWWS OU ROD Am. § 6.4.2.1; ARWWS OU ROD Am. Responsiveness Summary § 3.0. EPA concluded, however, that this approach would not necessarily achieve the human health standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving waters. *Id.* § 6.4.3.1 & Responsiveness Summary § 3.0. EPA also determined that it was technically impracticable to reduce arsenic concentrations below 10 ppb in shallow groundwater in the South Opportunity aquifer. *Id.* § 6.4.1. EPA therefore did not select below-ground structures to address groundwater arsenic concentrations.

STANDARD OF REVIEW

EPA adopts the Standard of Review set out in Petitioner's brief.

SUMMARY OF ARGUMENT

In CERCLA, Congress narrowly circumscribed when and how to challenge an EPA-selected remedy and provided EPA with authority to review and

[1] The ARWWS OU ROD is available at http://goo.gl/DWzlpF.

approve remedial actions undertaken by potentially responsible parties to ensure that contaminated sites are cleaned up efficiently and without delay. Specifically, CERCLA section 113(h) bars "any challenges" to a removal or remedial action selected under CERCLA section 104. *See* 42 U.S.C. §§ 9604, 9613. The landowners' restoration-damages claim challenges EPA's selected response actions at the Site because the landowners would require different cleanup standards and actions for soil cleanup, and require installation of underground groundwater barriers, which could undermine EPA's cleanup approaches. Section 113(h) prohibits this claim because it would impose different response actions than those selected by EPA.

Additionally, the doctrine of conflict preemption independently bars ARCO's restoration-damages remedy. Congress delegated the President authority to set cleanup levels and select response actions. Implementing the landowners' restoration-damages remedy would undermine Congress's approach, and aspects of the landowners' proposed remedy conflict with EPA's response action. Because Congress intended to supersede these types of non-federal remedies, the doctrine of conflict preemption bars the landowners' proposed cleanup.

Even if these principles did not bar the landowners' claim, CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), requires EPA authorization of any remedial action at a CERCLA site by potentially responsible parties where, as here, EPA has already initiated a remedial investigation and feasibility study. The landowners own property at the Site, and the District Court did not properly assess whether the landowners are potentially responsible parties under CERCLA. It is likely that some, if not all, of the landowners are potentially responsible parties. No landowner has sought EPA

approval to undertake any remedial action at the Site. EPA is unlikely to approve the landowners' approach, and no court should assume that the landowners' proposed remedy could be implemented. Thus, the landowners' proposed remedy is not a reliable basis for an award of restoration damages.

ARGUMENT

Over the course of more than three decades, EPA has invested millions of dollars in agency resources and thousands of hours of employee time, and has required ARCO to spend hundreds of millions more characterizing the Site, developing RODs, and cleaning the Site. The remedy-selection process continues to respond to public concerns and new data. For example, EPA significantly amended the RODs in 2011 and 2013 based on new information. The remedy-selection and implementation processes account for a wide range of technical, scientific, and community concerns.

EPA's responsibility is to protect human health and the environment based on sound science. It is vital that cleanups proceed expeditiously once EPA selects a remedy. Congress was concerned that consideration of the same broad interests that make for a robust remedy-selection process should not work to prevent EPA's selected remedy from moving forward.

Congress included statutory provisions such as CERCLA's section 113(h), 42 U.S.C. § 9613(h), and section 122(e), 42 U.S.C. § 9622(e), to ensure that an EPA-selected cleanup moves forward without obstruction, delay, and the diversion of resources accompanying judicial challenge and litigation-based additional cleanup requirements and expenses. No matter how well intentioned, any attempt to impose conflicting

cleanup standards and response actions is prohibited by CERCLA.

I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages.

Under Montana law, restoration damages redress an injury to property, and may exceed the diminution in market value of property caused by the particular injury. *See Lampi v. Speed*, 261 P.3d 1000, 1004 ¶ 21 (Mont. 2011); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 ¶¶ 28-31, 38 (Mont. 2007). To prevent a windfall, Montana requires a plaintiff asserting a claim for restoration damages to show that any award of such damages will actually be used to abate the injury. *Sunburst*, ¶ 40-43; *Lampi*, ¶ 31. The landowners' claim for restoration damages poses a prohibited challenge because it would (1) impose more stringent cleanup levels, (2) impose additional requirements, and (3) require approaches to groundwater remediation and soil disposal that directly conflict with EPA's ROD.

A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site.

The section 113(h) bar applies to any claims that in their effect "challenge[] any removal or remedial action selected under section 9604 of this title" or seek "to review any order under section 9606(a) of this title." 42 U.S.C. § 9613(h). The Ninth Circuit has found this language to be "clear and unequivocal," and "amount[ing] to a blunt withdrawal of ... jurisdiction" for "any challenges" to an ongoing CERCLA response action, including any attempt to interfere with, strengthen, or control the cleanup or remedy. *McClellan Ecological Seepage Situation*, 47 F.3d 325, 328 (9th

Cir. 1995) (internal citations omitted). Congress chose to prioritize expeditious cleanup of hazardous substances and to ensure that litigation would not interfere with such cleanup actions.

The District Court here held that the restoration-damages claim could proceed to trial because a claim challenges EPA's cleanup "*only* if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup." August 30 Slip Op. at 9 (emphasis added) (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)). This holding is erroneous, mischaracterizes Ninth Circuit law, and reflects an overly narrow view of section 113(h). In the case cited by the District Court, *ARCO Environmental Remediation*, the Ninth Circuit held only that a claim regarding the right to access public information about a cleanup was not a "challenge" because that claim was not, in any way, related to the goals of the challenged cleanup. *Id.* The Ninth Circuit did not hold that termination or delay was *necessary* to trigger section 113(h). Rather, it recognized, in dicta, that termination or delay of an EPA-mandated cleanup was *sufficient* to trigger the section 113(h) bar.[2] *See* 213 F.3d at 1115.

---

[2] Section 113(h) states that "[n]o Federal court shall have jurisdiction ... under State law ... to review any challenges to removal or remedial action ...." 42 U.S.C. § 9613(h) (emphasis added). The landowners did not argue in district court that section 113(h) is inapplicable to state courts, but state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim. CERCLA section 113(b) gives "the United States district courts" "exclusive original jurisdiction over all controversies arising under [CERCLA] ...." *Id.* § 9613(b). The Ninth Circuit has explained that section 113(h) speaks in terms of actions brought in federal courts because Congress required CERCLA controversies be litigated in federal courts. *See Fort Ord Toxics Project, Inc. v. Cal. EPA,* 189 F.3d

The District Court should have dismissed the restoration-damages claim. Most courts have correctly concluded that any suit that will "impact the implementation" of the government's selected CERCLA response action constitutes a "challenge" within the meaning of section 113(h). *See Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990). While Congress did not intend to bar all state-law claims related to hazardous substances, *see New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243-44 (10th Cir. 2006) (citing cases), many courts have correctly found that Congress did intend to bar attempts to apply *any* law that even indirectly works to control, alter, or interfere with an EPA-selected remedy, or that otherwise affects the goal of the remedy. *See McClellan*, 47 F.3d at 330. Even claims that purport to strengthen EPA's selected remedy are barred. *Id.; see also United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996) (zoning requirements barred); *Town of Acton v. W.R. Grace Co.*, No. 13-12376—DPW, 2014 WL 7721850 (D. Mass. Sep. 22, 2014) (municipal groundwater cleanup standards barred).

A "challenge" includes actions that are "related to the goals of the cleanup." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Courts have even barred claims seeking to enforce other federal laws and state laws that attempt to supplement EPA's CERCLA remedy. *See, e.g., Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014). The Ninth Circuit has made clear that the prohibition of section 113(h) applies equally to both federal and state actions because "Congress did not intend to preclude dilatory litigation in federal courts

---

828, 832 (9th Cir. 1999); *see also O'Neal v. Dep't of the Army,* 742 A.2d 1095, 1100-01 (Pa. Super. Ct. 1999).

but allow such litigation in state courts." *Fort Ord*, 189 F.3d at 832; *see also ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *McClellan*, 47 F.3d at 328; 42 U.S.C. § 9613(b).

In *McClellan*, the Ninth Circuit ruled that a suit seeking to impose additional reporting requirements would "second-guess" EPA's determination and interfere with the remedial action selected, and was accordingly barred by section 113(h). 47 F.3d at 329-30. Similarly, in *Razore*, the court held that section 113(h) barred the plaintiffs' claims regarding EPA's cleanup of a former landfill, which amounted to an "attempt to dictate specific remedial actions and to alter the method and order for cleanup." 66 F.3d at 239-40; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220-23 (9th Cir. 2013); *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995); *ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *Villegas v. United States*, 926 F. Supp. 2d 1185, 1196 (E.D. Wash. 2013) ("CERCLA's broad jurisdictional bar applies to any suit that challenges any aspect of a CERCLA removal or remediation action, regardless of whether the suit purports to be based on CERCLA."). Other circuits have reached similar holdings. The Tenth Circuit held that a state public-nuisance and negligence suit seeking an unrestricted award of money damages was barred by section 113(h). *New Mexico*, 467 F.3d at 1249-50; *see also Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002); *Cannon v. Gates*, 538 F.3d 1328, 1335-36 (10th Cir. 2008).

The District Court incorrectly distinguished the Tenth Circuit's decision by drawing a distinction between common-law and statutory claims. Aug. 30 Slip Op. at 10. But CERCLA section 113(h) does not

focus on the nature of the underlying cause of action. Rather, it requires courts to assess the impact of the non-federal remedy (here, the restoration-damages claim) to determine if that remedy poses a prohibited "challenge." *See* 42 U.S.C. § 9613(h). *New Mexico*, along with *McClellan*, *Razore*, and the other cases cited above, shows how courts have assessed what constitutes a prohibited challenge. While many common-law claims survive, the express statutory language of CERCLA makes clear that no claim survives if it seeks to challenge or has the effect of challenging EPA's ROD.

These readings of the scope of section 113(h) are dictated by the broad language used by Congress. Congress emphatically barred "*any* challenges to removal or remedial action ... in *any* action," 42 U.S.C. § 9613(h) (emphasis added); and the United States Supreme Court recognizes the comprehensive scope of the term "any." *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *see also United States v. James*, 478 U.S. 597, 605 (1986) ("Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction" (emphasis in original)). The sweeping nature of Congress's word choice supports a broad reading of the language of section 113(h).

Legislative history also supports a broad reading of section 113(h). The Chairman of the Senate Judiciary Committee explained:

> The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the actions that are performed by EPA. The section covers all

> issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of "all lawsuits" under "any authority," and to cover "all issues," supports the conclusion that section 113(h) bars the landowners' challenge to EPA's ROD.

Finally, actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA. *See* 42 U.S.C. § 9622; *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013). The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations.

Importantly, Congress also provided mechanisms to challenge EPA's ROD. Those mechanisms are listed in section 113(h). For example, if the landowners believe that EPA's remedy is not sufficiently protective, they may bring a citizen suit under 42 U.S.C. § 9659. *See id.* § 9613(h)(4). By barring litigation that challenges a cleanup plan, section 113(h) ensures that EPA, state agencies, and potentially responsible parties participating in a cleanup can develop and implement an adequate and fully realized cleanup plan.

B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy.

In the prior section, we address law surrounding the nature of a "challenge" under section 113(h). Here,

we focus on how the landowners' claim impacts EPA's remedy at the Site. Under Montana law, the landowners must use any restoration-damages award to restore the affected properties. It follows that obtaining restoration damages under state law necessarily means implementing a cleanup action different from the one selected by EPA. The landowners' experts take issue with the cleanup standards selected by EPA, seeking to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA. The landowners' experts also proposed actions that differ from those EPA has required, including: (1) excavating to two feet rather than EPA's chosen depth of 18 inches within residential areas; (2) transporting the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (3) constructing a series of underground trenches and barriers for capturing and treating shallow groundwater. The landowners' experts' reports are not detailed, but do indicate that aspects of those plans are a dramatic departure from EPA's ROD requirements. Given the ongoing cleanup at the Site, the landowners bear the burden of showing consistency with section 113(h)—any missing details weigh in favor of dismissing the landowners' claim.

The District Court, disregarding the 1150 properties that remain to be cleaned, appeared to rely heavily on ARCO's representation that the cleanup of the landowners' residential yards will be finished by November 1, 2016, to support its conclusion that the landowners' supplemental restoration requirements will not interfere with ongoing ROD requirements. Aug. 30 Slip Op. at 8. The District Court's conclusion ignores the full impact of permitting the restoration claim to go forward. Allowing individual property owners to divert cleanup resources from the implementation of EPA's

ROD is a direct conflict with EPA's cleanup process. Goals of the CSOU ROD, for example, include minimization of dust transfer, bioavailablity of lead, and soil ingestion. CSOU ROD Am. at II-11. Once the EPA remedy at the landowners' properties is complete, the completed yards are either capped or backfilled with clean soil. *See, e.g.*, CSOU ROD Am. 11-18 – II-19 (setting residential-soils requirements including a "soil swap" and ensuring "replacement with clean soil and a vegetative ... or other protective barrier"). Tearing up that protective cap or layer of soil directly impacts EPA's chosen remedy and could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion. Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public. Even if the landowners attempt to coordinate their efforts with EPA, their involvement would slow the implementation and timeline of EPA's ROD and increase the agency's costs. The District Court's analysis wrongly assumed that the restoration on the Site proposed by the landowners' experts could proceed without risk or consequence. *See* Aug. 30 Slip Op. at 8. Additionally, even if EPA could coordinate with the landowners, recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres.

The landowners' proposal to install underground reactive barriers is plainly inconsistent with EPA's cleanup, and may pose even greater risks. First, it is important to understand that water from domestic wells in the town of Opportunity is generally clean and drinkable, due to natural conditions in the deep underground aquifer accessed by the wells, and to hydraulic controls (a drain-tile system) that intercept arsenic contamination in shallow groundwater beneath the

town of Opportunity. ARWWS ROD Am. at 6.4.1. If conditions change, EPA can take additional actions that it deems appropriate to protect human health and the environment based on what it learns through monitoring. ARWWS ROD Am. at 6.4.5.

By contrast, the landowners would build several underground permeable reactive barriers. Kane Rep., Opinion 4(b), at 10. These barriers, intended to treat shallow groundwater moving toward Opportunity, would be 8,000 feet long, 15 feet deep, three feet wide, and situated upgradient of the town. *Id.* Shorter barriers would be placed upgradient of individual landowners' properties. *Id.* These barriers could change the groundwater flow in unpredictable ways, which could impact current hydraulic controls. The barriers proposed by the landowners' experts contain elements and enzymes that supposedly strip arsenic in water but could unintentionally contaminate groundwater and surface water. *Id.* In other words, the landowners' remedy could upset a balance that currently protects human health and the environment. Additionally, if EPA sampling detects elevated contamination following landowners' installation of underwater barriers, EPA will not be able to determine whether the contamination was impacted by the landowners' project, complicating potential remedial options. If other property owners later filed similar claims and demanded construction of additional structures not envisioned by the ROD the situation becomes even more complex. Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids *ad hoc* addition of potentially competing cleanup measures. The District Court took far too narrow a view of the impact of the scope of a prohibited challenge—looking primarily to whether the landowners "seek to alter the ROD" or

"change any of the requirements that the EPA has imposed upon ARCO." August 30 Slip Op. at 9.

CERCLA cleanups are often iterative in that EPA uses data obtained during the remedial investigation and early monitoring to inform subsequent adjustments to its cleanup plan. *E.g.*, CSOU ROD Am. Part II § 3.0 (describing how data obtained through sampling implemented under the original CSOU ROD led EPA to add lead remediation to its soil cleanup). Lawsuits that seek to impose different or additional remedial actions while a cleanup is in progress not only would result in diversion of limited government resources and delay of EPA's cleanup efforts contrary to Congress's intent, *McClellan*, 47 F.3d at 329, but also would force the parties to litigate the details of a cleanup plan that may not be final.

Not only would the landowners set a new remedial goal for soils (8 ppm for arsenic, compared to the 250 ppm ROD standard), they would achieve their goals through different methods. As in *McClellan*, the landowners' experts advocate remediation levels that are "directly related to the goals" and methods of the cleanup of the Site prescribed by EPA. Section 113(h), however, does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels.

C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses.

The District Court relied on CERCLA's savings clauses in holding that section 113(h) did not bar the landowners' restoration-damages claim. Aug. 30 Slip Op. at 5-8. No savings clause, however, shields the landowners' restoration-damages claim. Section 302(d) of CERCLA, which provides in part that

"[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law," 42 U.S.C. § 9652(d), is not in conflict with section 113(h). As the Ninth Circuit stated in *Razore*, "[t]he temporary bar to citizen enforcement does not change [a potentially responsible party's] 'obligations or liabilities' under other statutes. 66 F.3d at 240. Moreover, reading section 302(d) to govern the interpretation of section 113(h) "would effectively write [section 113(h)] out of the Act," a result that would be contrary to the court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (alteration in original) (citations omitted). As the Seventh Circuit has pointed out, while "federal environmental laws [were] not intended to wipe out the common law of nuisance," section 302(d) "must not be used to gut provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998).

Two other provisions of CERCLA, sections 114(a) and 310(h), also contain savings provisions, but neither provision trumps the limitations Congress set out in section 113(h). 42 U.S.C. §§ 9614(k), 9659(h). Section 310(h) provides that the statute "does not affect or otherwise impair the rights of any person under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title*." 42 U.S.C. § 9659(h) (emphasis added). The express language of this savings clause demonstrates the primacy of section 113(h). *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012). Section 114(a) likewise contains no language that would overcome the limitations Congress set out in section 113(h). This case presents a perfect example of how these provisions interrelate. CERCLA does not bar all of the

landowners' state-law claims – only the landowners' claim for restoration damages.

II. Principles of Conflict Preemption Independently Bar the Landowners' Restoration-Damages Remedy.

If there is a conflict between federal and state cleanup standards, federal law prevails where it is "a physical impossibility" to comply with both the federal and state mandates, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Where state action conflicts with a CERCLA cleanup, state cleanup standards are preempted. *See City & County of Denver*, 100 F.3d at 1512-14. Even if section 113(h) did not bar the landowners' restoration damages claim, the doctrine of conflict preemption, grounded in the Supremacy Clause, U.S. Const. art. VI, cl. 2, independently bars the landowners" restoration-damages remedy here. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015).

In conducting a preemption analysis, two bedrock principles guide the courts: (1) the purpose of Congress; and (2) "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Nation v. City of Glendale*, 804 F.3d 1292, 1298 (9th Cir. 2015) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress, in CERCLA, established how EPA should determine the degree of cleanup at a site, including how EPA should consider non-federal standards (such as state standards) in selecting the final cleanup level. *See* 42 U.S.C. § 9621(d). Congress was clear that the President or his

delegates were responsible for remedy selection, after considering state-law cleanup standards and a host of other factors. *See id.* § 9621(a). Allowing the landowners' restoration-damages claim to proceed cannot be reconciled with that congressionally mandated approach for consideration of state and local requirements.

Aspects of the landowners' restoration plan also conflict with EPA's RODs or could make those remedies difficult or impossible to achieve, as discussed more fully in argument section I-B. For example, the landowners' proposed construction of a series of underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater-monitoring efforts under EPA's selected cleanup plan. Additionally, the same excavated soil cannot be transported to EPA-approved onsite repositories, as provided for in the CSOU ROD, and also be transported to Missoula or Spokane, as required in the landowners' restoration plan.[3] This is the type of uncoordinated response that CERCLA section 121(d), 42 U.S.C. § 9621(d), was designed to prevent.

III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6).

As Congress provided in section 122(e)(6) of CERCLA:

> When either the President, or a potentially responsible party ... has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake

[3] Even if the landowners deposit excavated soil onsite, that approach would create additional costs for EPA's cleanup.

> any remedial action at the facility unless such remedial action has been authorized by [EPA].

42 U.S.C. § 9622(e)(6). The President has initiated a remedial investigation and feasibility study (RI/FS) for the Anaconda Smelter Site under CERCLA, through EPA securing ARCO's agreement to perform the RI/FS for the various operable units within the Site. Consequently, no PRP may undertake any remedial action at the Site without EPA authorization. *See id* § 9622(e)(6). EPA has not authorized the remedial action the landowners appear to seek in their restoration-damages claim, and therefore neither ARCO nor any landowner PRP may undertake it. Though the landowners seek money damages, those damages presuppose a subsequent remedy that is unauthorized. EPA is unlikely to approve the cleanup proposed by the landowners because that approach is inconsistent with EPA's RODs for the reasons discussed in sections I-A, I-B, and II of this brief. Such a tentative proposal is not a proper basis for a damages award.

CERCLA designates current owners of contaminated property as PRPs, *see* 42 U.S.C. § 9607(a)(1), unless they meet certain requirements, *see id* § 9607(q). The District Court improperly concluded that the landowners need to be somehow "declared PRPs" to be considered a potentially responsible party. Aug. 30 Slip Op. at 15. That conclusion is incorrect, and is untethered to the statutory language. Parties that meet the requirements set out in 42 U.S.C. § 9607(a)(1) are, by definition, potentially responsible parties—regardless of whether they have defenses that could absolve them of liability. Most relevant here are the so-called "third party" and "innocent landowner" defenses, by which a PRP may show that the release of hazardous substances was caused solely

by "an act or omission of a third party," *id*. § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before the PRP acquired the property, *id*. § 9601(35)(A). However, those defenses are defenses to a PRP's liability for cleanup costs. Section 122(e)(6) prohibits PRPs from initiating a remedial action without EPA permission.

The District Court failed to undertake the proper statutory analysis by focusing on whether the landowners were "*potentially* responsible parties." The District Court likewise failed to assess whether any of the 98 landowners qualified as a protected "third party" or "innocent landowner" under the statutory definitions. Thus, the District Court's conclusion that all 98 landowners are not subject to the requirements of CERCLA section 122(e)(6) is fatally flawed.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over, and should dismiss, the landowners' claim for restoration damages.

DECEMBER 8, 2016

MATTHEW R. OAKES
/s/ Matthew R. Oakes
Attorney, Env't & Natural Res. Div.
(202) 514-2686
matthew.oakes@usdoj.gov