Atlantic Richfield Co. v. Christian—CERCLA Superfund sites, state common law remediation remedies, and EPA approval

Ninety-eight landowners in a CERCLA Superfund site in and around Butte, Montana sued Atlantic Richfield Company in state court seeking, inter alia, restoration damages that under Montana common law, once awarded, must be used for restoration of the involved property. The claims for relief—trespass, nuisance and strict liability—also arose under state common law. The Montana Supreme Court granted a writ of supervisory control to review the district court's grant of summary judgment in the landowners' favor over whether CERCLA preempted the action and, with one justice dissenting, agreed with the lower court. *Atlantic Richfield Co. v. Montana Second Jud. Dist. Ct.*, 390 Mont. 76, 408 P. 3d 515 (2017). It also held that the landowners were not potentially responsible parties who, under CERCLA, are prohibited from taking remedial action without EPA approval. The United Supreme Court granted certiorari. On April 20, 2020, it affirmed in part, reversed in part, and remanded. *Atlantic Richfield Co. v. Christian*, ___ S. Ct. ___, 2020 WL 1906542 (Apr. 20, 2020)

A unanimous Court (per Roberts, C.J.) first held that the supervisory writ proceeding constituted a separate lawsuit, not an interlocutory appeal, under Montana law and that the state supreme court's decision was a final judgment subject to review under 28 U.S.C. § 1257(a). Eight Justices further joined in the majority opinion that CERCLA "deprives state courts of jurisdiction over claims brought under the Act" but did "not displace state court jurisdiction over claims brought under other sources of law"—here, Montana common law claims. In so holding, the Court relied on CERCLA section 113(b), 42 U.S.C. § 9613(b), which "provides that 'the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter.'" It continued:

> This case, however, does not "arise under" the Act. The use of "arising under" in § 113(b) echoes Congress's more familiar use of that phrase in granting federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. In the mine run of cases, "[a] suit arises under the law that creates the cause of action." ... The landowners' common law claims for nuisance, trespass, and strict liability therefore arise under Montana law and not under the Act. As a result, the Montana courts retain jurisdiction over this lawsuit, notwithstanding the channeling of Superfund claims to federal courts in § 113(b).

The Court rejected Atlantic Richfield's contrary argument for several reasons, the last of which was "a 'deeply rooted presumption in favor of concurrent state court jurisdiction' over federal claims. ... Only an 'explicit statutory directive,' an 'unmistakable implication from legislative history,' or 'a clear incompatibility between state-court jurisdiction and federal interests' can displace this presumption." It added that the company's "position requires a more ambitious step: Congress stripping state courts of jurisdiction to hear their own state claims. We would not expect Congress to take such an extraordinary step by implication." The Court additionally rejected the amicus United States' contention that the opening phrase of section 113(b)—"Except as provided in subsections (a) and (h) of this section"—precluded state court jurisdiction because "all challenges to remedial plans under § 113(h)—whether based in federal or state law—must 'arise under' the Act for purposes of § 113(b)." It reasoned in part:

> § 113(b) is not subsumed by § 113(h). Many claims brought under the Act, such as those to recover cleanup costs under § 107, are not challenges to cleanup plans. [¶] Sections 113(b) and 113(h) thus each do work independent of one another. The two provisions

> overlap in a particular type of case: challenges to cleanup plans in federal court that arise under the Act. In such cases, the exceptions clause in § 113(b) instructs that the limitation of § 113(h) prevails. It does nothing more.

Six Justices then joined in the Chief Justice's opinion concluding that "[a]lthough the Montana Supreme Court answered the jurisdictional question correctly, the Court erred by holding that the landowners were not potentially responsible parties under the Act and therefore did not need EPA approval to take remedial action." The parties agreed that potentially-responsible-party status was central to the approval issue because CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), provides that "'[w]hen 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 any remedial action at the facility unless such remedial action has been authorized by the President." The Court resolved the issue with reference to the definition of "covered persons" in CERCLA section 107(a), 42 U.S.C. § 9607(a), and the inclusion of arsenic and lead as hazardous materials under EPA regulations:

> "Section 107(a) lists four classes of potentially responsible persons (PRPs) and provides that they 'shall be liable' for, among other things, 'all costs of removal or remedial action incurred by the United States Government.'" .... The first category under § 107(a) includes any "owner" of "a facility." ... "Facility" is defined to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." ... Because those pollutants have "come to be located" on the landowners' properties, the landowners are potentially responsible parties.

It rejected the argument by the landowners and concurring opinion by Justice Gorsuch "that even if the landowners were once potentially responsible parties, they are no longer because the Act's six-year limitations period for recovery of remedial costs has run, and thus they could not be held liable in a hypothetical lawsuit" because it "collapses status as a potentially responsible party with liability for the payment of response costs. A property owner can be a potentially responsible party even if he is no longer subject to suit in court." The Court added that "under the landowners' interpretation, property owners would be free to dig up arsenic-infected soil and build trenches to redirect lead-contaminated groundwater without even notifying EPA, so long as they have not been sued within six years of commencement of the cleanup." It "doubt[ed] Congress provided such a fragile remedy for such a serious problem." The Court turned to the landowners' contention "'that our interpretation of § 122(e)(6) creates a permanent easement on their land, forever requiring them "to get permission from EPA in Washington if they want to dig out part of their backyard to put in a sandbox for their grandchildren."'" It replied that "[t]he grandchildren of Montana can rest easy" because

> [s]ection 122(e)(6) refers only to "remedial action," a defined term in the Act encompassing technical actions like "storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials," and so forth. ... While broad, the Act's definition of remedial action does not reach so far as to cover planting a garden, installing a lawn sprinkler, or digging a sandbox. In addition, § 122(e)(6) applies only to sites on the Superfund list.

The Court ended this part of the opinion by addressing, and finding unpersuasive, additional arguments raised by the landowners and Justice Gorsuch's concurrence. It observed in the decision's penultimate paragraph that EPA's "approval process, if pursued, could ameliorate any conflict between the landowners' restoration plan and EPA's Superfund cleanup, just as Congress

envisioned." Consequently, "[i]n the absence of EPA approval of the current restoration plan, we have no occasion to entertain Atlantic Richfield's claim that the Act otherwise preempts the plan."

Justice Alito concurred in the majority opinion except for the part holding that the state courts possessed jurisdiction. "I would not decide that question because it is neither necessary nor prudent for us to do so. As I understand the Court's opinion, the Montana Supreme Court has two options on remand: (1) enter a stay to allow the landowners to seek EPA approval or (2) enter judgment against the landowners on their restoration damages claim without prejudice to their ability to refile if they obtain EPA approval." And if EPA were to approve their plan wholly or partially, the landowners "may not wish to press this litigation. And if they do choose to go forward, the question of state-court jurisdiction can be decided at that time."

Justice Gorsuch, joined by Justice Thomas, joined in the majority opinion except for the part finding the landowners potentially responsible parties. Aside from making the CERCLA textual arguments responded to by the majority, his concurrence observed, in part, that Congress through the statute

> endorsed a federalized, not a centralized, approach to environmental protection. What if private or state cleanup efforts really do somehow interfere with federal interests? Congress didn't neglect the possibility. But instead of requiring state officials and local landowners to beg Washington for permission, Congress authorized the federal government to seek injunctive relief in court. Atlantic Richfield would have us turn this system upside down, recasting the statute's presumption in favor of cooperative federalism into a presumption of federal absolutism.

Decision link: https://www.supremecourt.gov/opinions/19pdf/17-1498_8mjp.pdf