

**ORIGINAL**

**FILED**

10/17/2016

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: OP 16-0555

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Case No. OP 16-0555

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ATLANTIC RICHFIELD COMPANY,

Defendant and Petitioner,

v.

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

Respondent,

GREGORY A. CHRISTIAN, *et al.*,

Plaintiffs and Counter-Petitioners.

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**OBJECTION TO PLAINTIFFS' PETITION FOR REHEARING**

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**FILED**

OCT 17 2016

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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***Attorneys for Plaintiffs and Counter-Petitioners***

COMES NOW Defendant and Petitioner Atlantic Richfield Company and, pursuant to Rule 20, M.R.App.P., hereby objects and responds to Plaintiffs' Petition for Rehearing ("Plaintiffs' Petition").

## **INTRODUCTION**

Plaintiffs' Petition is unnecessary and without basis. Plaintiffs primarily contend that they should have an opportunity to respond to Atlantic Richfield's Petition for Writ of Supervisory Control ("Atlantic Richfield's Petition"). The Court, however, has already provided that opportunity by setting a schedule for full briefing—including a response from Plaintiffs—on whether Atlantic Richfield's Petition to reverse the District Court's Order on summary judgment should be granted. Ordering such briefing is expressly allowed under Rule 14, as is this Court's stay of District Court proceedings while Atlantic Richfield's Petition is decided. All other points raised by Plaintiffs go to the merits of the question for which the Court ordered briefing. Not surprisingly, Plaintiffs have a different view of the law than does Atlantic Richfield. That does not mean Atlantic Richfield "misled" the Court. Rather, Plaintiffs' arguments illustrate that full briefing, rather than summary arguments, is necessary to consider Atlantic Richfield's Petition.

In any event, Plaintiffs' merits arguments are demonstrably wrong. Plaintiffs' central contention is that CERCLA § 113(h) does not preclude their restoration claims, but instead, only postpones them until the cleanup is complete.

Section 113(h), however, postpones jurisdiction only over CERCLA citizen suits until a remedy is complete. Other challenges to a CERCLA remedy are precluded unless they fit within the other statutory exceptions. Plaintiffs do not and cannot contend their restoration claims fit within the citizen suit or any other exception to the Section 113(h) statutory bar. And, even if this were a CERCLA citizen suit, the remedy at the Anaconda Smelter Superfund Site is not complete, contrary to Plaintiffs' assertion.

Moreover, Plaintiffs do not address CERCLA § 122(e)(6), which independently bars their restoration claims. This Section prohibits Plaintiffs from implementing their expert's proposed restoration plan because all cleanup work at a Superfund Site must be approved by EPA, and EPA will not approve Plaintiffs' plan. There is no timing component anywhere in this Section—it simply precludes Plaintiffs' alternative remedy and thus their claims for restoration damages.

For these reasons, the Court should deny Plaintiffs' Petition and allow the parties to complete the briefing ordered by this Court.

## **DISCUSSION**

### **I. THE COURT PROPERLY ORDERED ADDITIONAL BRIEFING.**

Plaintiffs contend they are entitled under Rule 14(7), M.R.App.P., to respond to Atlantic Richfield's Petition before any writ is granted. This is exactly what the Court's October 5, 2016 Order provides. That Order did not grant the

writ of supervisory control requested by Atlantic Richfield—consistent with this Court’s practice, such a writ is not granted unless and until the Court determines that a district court’s order should be reversed or vacated. *See, e.g., State v. Mont. Second Jud. Dist.*, 2015 MT 294, ¶¶ 16-17, 381 Mont. 250, 358 P.3d 895 (granting writ only after determining district court order should be vacated); *Meek v. Mont. Eighth Jud. Dist.*, 2015 MT 130, ¶¶ 24-25, 379 Mont. 150, 349 P.3d 493 (same). Instead, the October 5 Order states only “that full briefing is needed” on one issue raised in Atlantic Richfield’s Petition. (Order at 4.) Thus, the Court ordered “more extensive briefing,” as expressly provided for under Rule 14(7)(b), which will include a response from Plaintiffs.

Additionally, the Court granted a stay of district court proceedings. (Order at 4.) Doing so prior to the filing of any response by Plaintiffs is entirely consistent with Rule 14(7)(c)’s authorization of a “stay of further proceedings in the [district] court, pending the supreme court’s disposition of the petition.” *See, e.g., Mont. Quality Educ. Coal. v. Mont. Eleventh Jud. Dist.*, OP 16-0494, Order (Aug. 25, 2016) (granting a stay of district court proceedings prior to the filing of any response to petition for writ of supervisory control). Thus, each aspect of the Court’s Order is expressly provided for in Rule 14(7), and Plaintiffs already have the opportunity they request to oppose Atlantic Richfield’s Petition.

Regardless, when considering a petition for writ of supervisory control, the Court has broad authority to dictate whatever process it deems appropriate. *See* Rule 14(7)(a)-(b), M.R.App.P. (The Court “*may*” order a response and “*may*” order “more extensive briefing”, and also may “issue any other writ or order deemed appropriate in the circumstances....”) (emphasis added); *see also* M.C.A. § 3-1-113 (“When jurisdiction is, by the constitution or any statute, conferred on a court or judicial officer, all the means necessary for the exercise of such jurisdiction are also given.”). Consistent with its Constitutionally-conferred “general supervisory control over all other courts,” Mont. Const. art. VII, § 2, the Court has even granted writs of supervisory control and vacated district court orders without asking for any response to the initial petition. *See, e.g., Bidegaray v. Mont. Sixth Jud. Dist.*, OP 15-0614, Order (Nov. 4, 2015).

Here, the Court ordered additional briefing, including a response from Plaintiffs, prior to deciding whether to reverse or vacate the District Court’s ruling. Plaintiffs thus already have the relief they seek.

**II. PLAINTIFFS’ MERITS ARGUMENTS ARE MORE APPROPRIATELY ADDRESSED IN FULL BRIEFING AND, IN ANY EVENT, ARE INCORRECT.**

Other than asking for an opportunity to respond that has already been granted, the remainder of Plaintiffs’ Petition serves only to improperly and prematurely argue the merits of Atlantic Richfield’s Petition. In particular,

Plaintiffs contend that, even if Atlantic Richfield's arguments under CERCLA § 113(h) are correct, the effect would only be to postpone Plaintiffs' claims for restoration damages until after Atlantic Richfield's CERCLA cleanup work is complete. Plaintiffs likewise contend that the CERCLA cleanup work on Plaintiffs' properties is, in fact, complete. Because these arguments address the merits of Atlantic Richfield's Petition, they can be asserted as part of the full briefing ordered by the Court. That Plaintiffs disagree with the substance of Atlantic Richfield's Petition is no reason to call into question the Court's order for full briefing and to stay the district court proceedings while Atlantic Richfield's Petition is decided.

In any event, Plaintiffs' merits arguments are wrong. CERCLA § 113(h) precludes, rather than postpones, Plaintiffs' claims for restoration damages. And, even if Section 113(h) only postponed restoration damages claims until after completion of cleanup work, that cleanup work is ongoing and far from complete.

CERCLA § 113(h) performs two functions. First, it specifies that there is no court jurisdiction to "review any challenges" to EPA's selected removal actions but for five enumerated exceptions. 42 U.S.C. § 9613(h); *see also Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Richardson*, 214 F.3d 1379, 1382 (D.C. Cir. 2000) ("Although § 113(h) is subject to limited exceptions....it otherwise effectuates a blunt withdrawal of federal jurisdiction....") (internal quotation and

citations omitted). Second, it specifies the “timing of review” for those five exceptions where courts do have jurisdiction. 42 U.S.C. § 9613(h)(1)-(5). For most of these exceptions, Section 113(h) confers immediate jurisdiction. *Id.* For one exception—citizen suits under 42 U.S.C. § 9659<sup>1</sup>—jurisdiction is postponed until the remedial action is complete. *Id.*; see also *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424 n.11 (6th Cir. 1991) (“While judicial review of citizen suits challenging the implementation of a remedial action plan under CERCLA may not occur until the cleanup has been completed, federal district courts do have jurisdiction over” the other enumerated exceptions in Section 113(h).). None of the enumerated exceptions apply here.

Thus, Plaintiffs’ argument is misplaced. Section 113(h) only specifies the “timing of review” for challenges that qualify as one of the enumerated exceptions, and the only type of challenge that is postponed until completion of remedial action is a citizen suit under 42 U.S.C. § 9659. Because Plaintiffs’ claims for restoration damages are a “challenge” to EPA’s selected remedy but do not constitute a CERCLA citizen suit or any of the other exceptions in Section 113(h), that Section precludes, rather than postpones, jurisdiction. See *North Shore Gas*

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<sup>1</sup> A citizen suit under 42 U.S.C. § 9659 that is excepted in Section 113(h) involves a claim “that the removal or remedial action taken” under EPA orders “was in violation of any requirement of” CERCLA. 42 U.S.C. § 113(h)(4). Plaintiffs make no such claims and indeed have argued that EPA’s orders and CERCLA’s requirements are irrelevant to their claims.

*Co. v. EPA*, 930 F.2d 1239, 1245 (7th Cir. 1991) (observing that, although “section 113(h) is captioned ‘timing of review’....the method of section 113(h) is not to toll judicial remedies, and leave it at that; it is to specify the remedies that survive”); *id.* (for challenges that do not fall under the enumerated exceptions, “section 113(h) would be doing a good deal more than affecting the ‘timing’ of review; it would be extinguishing judicial review”).

Moreover, even if Section 113(h) were to be construed, contrary to its text, to permit jurisdiction over Plaintiffs’ restoration claims *after* EPA’s selected remedial actions are complete, that time has not yet arrived. The EPA Records of Decision addressing soil, groundwater, surface water, and air in Anaconda and Opportunity call for extensive additional sampling, cleanup, and institutional controls that have yet to be implemented much less completed. A remedy is not deemed complete until, at a minimum, all of the cleanup work at a site under EPA’s Records of Decision is concluded. *See, e.g., Frey v. EPA*, 270 F.3d 1129, 1134 (7th Cir. 2001) (Section 113(h) does not authorize a citizen suit under 42 U.S.C. § 9659 while EPA is still “taking active steps designed to clean up a site.”). This is a site-wide determination, not a property-by-property determination. *See id.* The soil removal actions recently conducted on Plaintiffs’ properties in no way signal the completion of EPA’s remedy for the Site or even for Opportunity, and Plaintiffs’ proposed restoration—involving massive additional soil excavation and

construction of numerous underground walls affecting the area's groundwater—would interfere with EPA's remedy no less than they would have before the recent soil removal actions.

Putting aside CERCLA § 113(h), Plaintiffs' Petition also ignores Atlantic Richfield's separate argument that CERCLA § 122(e)(6) precludes Plaintiffs' restoration damages claims because the EPA has not, and will not, authorize Plaintiffs' proposed remedy. This is an independent ground for complete dismissal—not postponement—of Plaintiffs' restoration damages claims that was incorrectly rejected by the District Court. (*See* Dist. Ct. Order at 14-16.) For this reason as well, Plaintiffs are wrong that their claims for restoration damages claims cannot be dismissed because of CERCLA.

### **III. PLAINTIFFS' ADDITIONAL ARGUMENTS THAT ATLANTIC RICHFIELD MISLED THE COURT AND IS JUDICIALLY ESTOPPED ARE BASELESS.**

Plaintiffs contend that, having argued that Plaintiffs' claims are barred by the statute of limitations for being filed too late, Atlantic Richfield cannot now argue—and is estopped from asserting—that Plaintiffs “filed too soon.” (Pls.' Pet. at 10.) But, as explained above, Atlantic Richfield does not argue that Plaintiffs filed too soon. CERCLA prohibits, rather than postpones, Plaintiffs' claims for restoration damages. Granting Atlantic Richfield's Petition and reversing the

District Court's Order addressing CERCLA would be entirely consistent with Atlantic Richfield's statute of limitations defense.

Plaintiffs argue that Atlantic Richfield misled the Court by not disclosing that Judge Newman denied the United States' earlier motion for leave to file an amicus in 2013 due to the lack of time that Plaintiffs had to respond prior to oral arguments. The District Court in 2016, however, provided an opportunity for new briefing and held a new hearing for argument on Atlantic Richfield's motion based on CERCLA. The United States timely asked the District Court both for leave to file an amicus brief as part of the new briefing and to participate in the new hearing. The District Court did not acknowledge much less rule on the United States' requests.

Plaintiffs also accuse Atlantic Richfield of violating Rule 14(5)(b)(iii), M.R.App.P., by attaching to its Petition briefing filed in the District Court on Atlantic Richfield's motions that are the subject of Atlantic Richfield's Petition. Rule 14(5)(b)(iii) prohibits a party from filing a separate memorandum of law in support of a writ petition. Atlantic Richfield complied with the Rule by attaching briefing and other filings from the District Court not as memoranda in support of the Petition but as predicate record materials establishing the procedural basis for

Atlantic Richfield's Petition. This is permitted by Rule 14(5)(b)(iv) and is consistent with common practice in petitions for writs of supervisory control.<sup>2</sup>

### **CONCLUSION**

The Court properly ordered full briefing on the complex issue presented by Atlantic Richfield's Petition, and Plaintiffs will be afforded an opportunity to respond. All other arguments in Plaintiffs' Petition relate to the merits of the issue for which the Court has ordered full briefing and are more appropriately addressed in those briefs. Because Plaintiffs' Petition serves no proper purpose, Atlantic Richfield respectfully requests that the Court deny the Petition.

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<sup>2</sup> Plaintiffs' Motion contains additional false statements intended to portray Atlantic Richfield as a bad actor, including that it purportedly failed to clean up certain Plaintiff properties because this lawsuit was dismissed in 2013. Because these false accusations have nothing to do with the issue before the Court, Atlantic Richfield will not address them here.

Dated this 17th day of October, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John P. Davis", written over a horizontal line.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14(9)(b) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and contains 2,182 words, excluding the certificate of service and certificate of compliance.

A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read "J. R. [unclear]".

## CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, I served true and accurate copies of the foregoing OBJECTION TO PLAINTIFFS' PETITION FOR REHEARING by depositing said copies into the U.S. mail, first-class postage prepaid, addressed to the following:

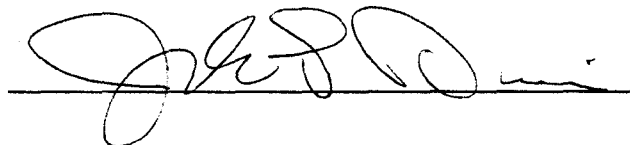
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DATED this 17th day of October 2016.

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