

RECENT MONTANA SUPREME COURT DECISIONS REGARDING DAMAGES FOR ENVIRONMENTAL CONTAMINATION

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I. DEQ's Authority to Address Contamination

A. Comprehensive Environmental Cleanup and Responsibility Act (CECRA)-- CECRA establishes a process for remediation of sites that have been contaminated by the release of hazardous substances, such as petroleum and benzene. Under the CECRA process, cleanup can occur in the following ways: (1) a liable parties can clean up the site voluntarily; (2) DEQ can order one or more liable persons clean up the site; or (3) DEQ can clean up the site. Under CECRA, cleanup is risk-based and is based on state or federal environmental requirements, criteria, or limitations. The liable persons are responsible for the costs of cleanup and DEQ's oversight costs. Before DEQ determines the final remedy, it must notify the public of the remedy and take public comment. CECRA provides that no person may take remedial action on a site at which DEQ has issued an order for remedial action unless DEQ consents.

B. Metal Mine Reclamation Act--Under this act, a person must obtain an operating permit before mining for hard rock minerals, such as copper, silver, and gold. An application for an operating permit must contain an operating plan and a reclamation plan. The plans must ensure that air and water quality standards will not be violated both during and after mining and that adjacent lands are not degraded.

II. Summary of Decisions

A. Sunburst School District et al. v. Texaco

1. Background--Texaco operated a refinery near Sunburst from 1924 to 1961. Petroleum, which contained the carcinogen benzene, had leaked into the deep groundwater below the town. In 1955, fumes from the contamination caused a house to explode. Texaco then cleaned up part of the gasoline, but left a some contamination in the ground. In 1989, Texaco began working with DEQ under CECRA. In 2001, the Sunburst School District and about 90 property owners sued Texaco for restoration and punitive damages. In 2003, DEQ proposed a remediation plan of monitored natural attenuation, but DEQ did not finally adopt this remediation plan and has ordered Texaco to provide additional data. The trial was conducted in 2004. The court did not allow Texaco to present evidence of its work with DEQ under CECRA. The district court instructed the jury that the Constitution does provide a private party to right to sue another for damage for degradation of property and the jury may award as damages the amount it would cost to restore the property to its pre-contamination condition. The jury awarded \$15 million in restoration damages and \$25 million in punitive damages. Texaco appealed to the Montana Supreme Court.

2. Holdings

a. Generally, under the common law, the amount of damages a court may award for injury to real property is the decrease in value to the property resulting from the contamination. However, where damages in this amount is inadequate to reimburse the property owner, such as for the owner of a contaminated residential property who wishes to continue to live in the residence rather than sell it, the court may award as damages under the common law the reasonable cost of restoring the property to its condition before the contamination occurred.

b. When a landowner presents evidence that he or she actually intends to use the award or restoration damages to clean up contamination of real property, the award of restoration damages does not constitute an unreasonable windfall.

c. The award of \$15 million in restoration damages in this case was reasonable even though the value of the property is \$2 million.

d. For purposes of determining the amount of restoration damages, the exclusion of evidence of Texaco's work with DEQ under CECRA was proper because there was no question that Texaco was liable for restoration damages.

e. CECRA does not preempt the award of restoration damages.

f. Evidence that Texaco had been working with DEQ under CECRA was relevant to the award of punitive damages. Therefore, the award of punitive damages of \$25 million is overturned because Texaco was not allowed to present evidence that it had been working with DEQ on a CECRA cleanup.

g. Because there are adequate common law remedies available to the plaintiffs, the Court need not and did not decide whether the clean and healthful environment provision in the Montana Constitution provides a basis for a suit for damages.

h. The plaintiffs are not entitled to an award of attorney fees under the private attorney general doctrine because that doctrine is intended to provide attorney fees to persons to bring litigation in the public interest that might otherwise be too costly to bring. It is not designed for litigants who bring suits that are in their pecuniary interest. Here the plaintiffs secured a large damage award.

2. Shammels v. Canyon Resources

a. Background--The Shammels operate a ranch below Canyon Resources' Kendall Mine. Contamination from the mine allegedly impacted ground water and surface water on the Shammel property. Canyon began capturing the water. When the Shammels noticed a decrease in surface and ground water on their property, Canyon

diverted water around the mine. However, the Shammels allege that surface and ground water is still diminished and contaminated. They sued Canyon alleging common law actions and a Constitutional tort for violation of the right to a clean and healthful environment. The district court held that the Constitutional provision does not provide a basis for one private party to sue another. This holding was appealed to the Montana Supreme Court.

b. Holding--The Montana Supreme Court held that, in view of its holding in *Sunburst v. Texaco* that common law provides a remedy for environmental damage to property, the Court would not establish a constitutional tort for violation of the right to a clean and healthful environment. The Court held that the Shammels could obtain an affirmative injunction ordering Canyon to remediate the mine to the extent required to return the Shammels' water supplies to their pre-mining condition.

III. Potential DEQ Concerns

A. Work at the site should achieve remediation under CECRA or the requirements of the Metal Mine Reclamation Act.

B. Liable parties' funds should be available to achieve remediation under CECRA.

IV. Policy Issues

A. Should the Legislature provide that DEQ be notified of suits for restoration damages and be expressly allowed to intervene in the suit to ensure that the restoration plan proposed by the plaintiffs is adequate to meet CECRA standards?

B. Should the Legislature provide for DEQ oversight of restoration performed by a prevailing party so that the restoration does not exacerbate the situation?

C. Should the Legislature require that awards for restoration damages be used to restore the contaminated property?

D. Should the Legislature provide that an award of damages for restoration include an award of attorney fees so that the amount awarded is adequate to ensure that restoration can be accomplished?