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Owner Means Owner: Tenth Circuit Finds US Liable Under CERCLA Based on Title in Lands Subject to Unpatented Mining Claims

JULY 28, 2017

Introduction

The Tenth Circuit on July 19, 2017, in *Chevron Mining, Inc. v. United States*,[1] reversed a decision by the District Court for the District of New Mexico and held that the United States is liable as an "owner" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at a series of mining waste disposal sites on former federal land in New Mexico (Questa Site) because it has "owner" liability. While the appellate court's decision may seem obvious at first blush, the United States had prevailed in avoiding Potentially Responsible Party (PRP) status below, and in an earlier case in the District of Colorado (*United States v. Friedland*), by arguing that where a private party has an unpatented mining claim on federal land, the government's ownership interest is diminished to the point that it should no longer be considered an "owner" under CERCLA.

The Tenth Circuit's decision is good news for private PRPs who are on the hook for cleanups at mining waste disposal sites on federal land, but a word of caution is warranted. The court expressly declined to address the question of what the United States' equitable share of the costs should be for the Questa Site cleanup, including whether it is possible for a PRP to have an equitable share of zero. The decision also affirmed the District Court's determination that the United States does not have separate "arranger" liability under CERCLA because it did not own or possess the relevant hazardous substances.

Mining and Waste Disposal at the Questa Site

Chevron Mining, Inc., and its corporate predecessors operated a series of molybdenum mines, both underground and open-pit mines, at the Questa Site beginning in 1919. Initially, Chevron's predecessor, R&S Molybdenum Company of Denver, conducted those operations pursuant to unpatented mining claims under the General Mining Act of 1872. That Act provides claimholders "exclusive right of possession and enjoyment of all the surface included within the lines of their location,"[2] while the United States retains fee title in the land. The United States retained title to the

Questa Site until 1974, when R&S's successor, the Molybdenum Corporation of America (Molycorp) acquired the property through a land exchange with the United States.

The operations between 1919 and 2014, when the last mine closed, generated over 328 million tons of waste rock and 100 million tons of mine tailings. The waste rock, in particular, was disposed of in the immediate vicinity of the mines, on land that was owned by the United States until the 1974 exchange.

CERCLA Owner Liability

Section 107 of CERCLA imposes liability on parties that "owned" a "facility" during the disposal of hazardous substances.[3] The United States had successfully argued before the district court that it was not liable under this provision, notwithstanding its prior ownership interest, because (1) the rights of R&S and Molycorp to "possession and enjoyment" reduced the United States' interest to "bare legal title," to which CERCLA owner liability should not attach, and (2) although the United States owned the land, it did not own the "facility" because the "facility" should be understood as the structures and equipment associated with the mining operation itself.[4]

The Tenth Circuit rejected both rationales. First, the court said, "We conclude that, at a minimum, the term 'owner' covers fee title holders for purposes of CERCLA liability, irrespective of any additional indicia of ownership."[5] This reversed the district court's ruling[6] and the decision of the United States District Court for the District of Colorado in *United States v. Friedland*,[7] where courts held that the indicia of federal ownership in lands subject to unpatented mining claims are so diluted that the United States is no longer an "owner" within the meaning of CERCLA.[8] Distinguishing between "ownership" and "control," the Tenth Circuit avoided a complex, "indicia of ownership" analysis by adopting the simpler principle that a fee title holder is always an "owner."

Second, the Tenth Circuit quickly dispensed with the notion that the United States did not own the relevant "facility" for CERCLA purposes. The Court pointed to CERCLA's broad definition of facility, noting it reaches "'any site or area' (i.e., land)."[9] Limiting the "facility" definition to the industrial equipment involved in mining was too narrow.

Equitable Allocation and Arranger Liability

The July 19 decision and the arguments the parties advanced to the court have significant implications for the allocation of liability. The United States is now a PRP at the Questa Site, and the principles announced by the Tenth Circuit mean that it is all but certainly a PRP at every other mining site within that jurisdiction where hazardous mining wastes were disposed of on federal land subject to unpatented mining claims.

However, how much private parties will be able to recover from the government in a CERCLA cost recovery or contribution action at a mining waste site remains an open question for future courts to address. The Tenth Circuit decision suggests that the degree of US involvement at the Questa Site is a relevant consideration for the equitable allocation phase of the proceedings.[10]

The extent of federal responsibility for costs to clean up old mining sites on federal land may also

be limited by the Tenth Circuit's ruling on the second question before it. The court upheld the district court's determination that the United States did not have CERCLA "arranger" liability.[11] Chevron argued that by selling federal land to Molycorp knowing hazardous substances would be disposed of there, and by approving federal permits allowing the transportation of hazardous substances by pipeline across federal land for disposal, the United States "intentionally arranged for the disposal of hazardous substances."[12] The court disagreed, holding that arranger liability attaches only if a party "own[s] or possess[es]" the relevant hazardous substances, which the United States did not.[13] As the court acknowledged, its finding that the United States does not have arranger liability "may affect the determination of [its] equitable allocation of the response costs."[14]

Conclusion

In rejecting the reasoning of two lower courts, the Tenth Circuit has created broad liability for the federal government at mines where hazardous substances were disposed of on federal lands, even when those lands were subject to unpatented mining claims. Although the decision clarifies federal CERCLA liability, the practical impact of the decision remains unclear, as principles of equitable allocation will govern the amount the United States must contribute to the ultimate cleanup costs.

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[1] No. 15-2209 (10th Cir. 2017).

[2] 30 U.S.C. § 26.

[3] 42 U.S.C. § 9607(a)(2).

[4] *Chevron Mining*, No. 15-2209, slip op. at 22, 27.

[5] *Id*. at 27.

[6] *Chevron Mining, Inc. v. United States*, 139 F. Supp. 3d 1261 (D.N.M. 2015).

[7] 152 F. Supp. 2d 1234 (D. Colo. 2001).

[8] Both cases relied heavily on a Second Circuit decision that establishes the "indicia of ownership" test for determining CERCLA owner liability. *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321 (2d Cir. 2000). It bears noting that Commander Oil addressed the question whether a lessee, not a fee title holder, could be considered an "owner" for CERCLA purposes.

[9] *Chevron Mining*, No. 15-2209, slip op. at 27 (quoting 42 U.S.C. § 9601(9)).

[10] *Id*. at 3 & n.1.

[11] *See* 42 U.S.C. § 9607(a)(3).

[12] *Chevron Mining*, No. 15-2209, slip op. at 33.

[13] *Id*. at 41.

[14] *Id*. at 30.

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