FILED
10/05/2016
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 16-0555

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 16-0555

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OCT 05 2016
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CLERK OF THE SUPREME COURT
STATE OF MONTANA

ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

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

Respondent,

ORDER

Petitioner Atlantic Richfield Company seeks a writ of supervisory control in relation to five rulings the District Court entered between August 30 and September 7, 2016, in a long-litigated case seeking restoration damages on behalf of 98 plaintiffs as a result of Atlantic Richfield's alleged contamination of their properties in and around Opportunity, Montana. *Christian, et al. v. Atlantic Richfield Co.*, DV-08-173 BN (2d Jud. Dist.). This Court previously reversed the District Court's summary judgment ruling in part, holding that the Plaintiffs had presented sufficient evidence to survive summary judgment on Atlantic Richfield's statute of limitations defense to their claims of continuing nuisance and trespass. *Christian v. Atl. Richfield Co.*, 2015 MT 255, 380 Mont. 495, 358 P.3d 131. We held that the Plaintiffs' "claims of continuing nuisance and trespass are not time-barred if it can be determined by a finder of fact that the contamination is reasonably abatable." *Christian*, ¶ 77. We declined to address how our ruling may impact Atlantic Richfield's affirmative defenses that the District Court had not yet considered. *Christian*, ¶ 77.

On remand, the Hon. Katherine Bidegaray assumed jurisdiction of the case and set a five-week jury trial for November 1, 2016. She determined, in the August and September

2016 rulings that give rise to Atlantic Richfield's petition:

1. That Plaintiffs' claims for restoration damages are not barred by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75;
2. That Atlantic Richfield's operation of the Anaconda Smelter constituted an abnormally dangerous activity giving rise to strict liability;
3. That Atlantic Richfield is prohibited from offering any evidence or argument at trial relating to the involvement of the United States Environmental Protection Agency (EPA) in cleanup activities at the Anaconda Smelter, Atlantic Richfield's alleged compliance or cooperation with EPA, or expectation of future actions under CERCLA, concluding that such evidence has no bearing on the Plaintiffs' common law damages claims;
4. That Plaintiffs' damages for nuisance and trespass, including restoration damages, are not limited to the two-year limitations period preceding the commencement of their action; and
5. That the express easements the Anaconda Company reserved in 1914 when it conveyed property to Deer Lodge Valley Farms Company, a wholly-owned subsidiary, permitting the grantor to pollute the atmosphere and the waters of the Deer Lodge River—a reservation that was incorporated by reference in the deeds of 51 of the 77 properties at issue in this litigation—are invalid.

Atlantic Richfield argues that the exercise of this Court's supervisory jurisdiction is appropriate because the issues are purely ones of law, they are substantial, and their resolution greatly impacts all aspects of this complex case, including the scope and the substance of trial. Atlantic Richfield requests a stay of proceedings during the pendency of its petition.

Supervisory control is an extraordinary remedy that is sometimes justified when urgency or emergency factors make the normal appeal process inadequate, the case involves

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purely legal questions, and, in a civil case, the other court is proceeding under a mistake of law and causing a gross injustice or constitutional issues of state-wide importance are involved. M. R. App. P. 14(3). Supervisory control is seldom appropriate when summary judgment has been denied because it is an interlocutory ruling that may be revisited prior to final judgment, and because appeal after final judgment typically is an adequate remedy. *See American Sheet Metal, Inc. v. First Jud. Dist. Ct.*, No. OP 16-0492, 2016 Mont. LEXIS 791; *Rio v. Macek*, No. OP 10-0232, 2010 Mont. LEXIS 261; *State ex rel. Kosena v. District Ct.*, 172 Mont. 21, 560 P.2d 522 (1977). On the other hand, supervisory control may be warranted where resolution of the issues will significantly shape the proceedings going forward, including the legal theory under which the plaintiff may seek damages. *Great Falls Clinic v. Montana Eighth Jud. Dist. Ct.*, 2016 MT 245, ¶ 8. "Judicial economy and inevitable procedural entanglements [have been] cited as appropriate reasons for this Court to issue a writ of supervisory control." *Truman v. Mont. Eleventh Jud. Dist. Court*, 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654. "In such an instance, 'the denial of a speedy remedy by supervisory control would be a denial of justice.'" *Stokes v. Mont. Thirteenth Judicial Dist. Court*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754 (quoting *Plumb v. Mont. Fourth Jud. Dist. Court*, 279 Mont. 363, 370, 927 P.2d 1011, 1016 (1996)).

In this case, the issues Atlantic Richfield raises are substantial legal issues that may significantly impact the trial of the case. But most of them are issues the Court typically resolves on appeal from a final judgment, with the benefit of a full record. The orders of the District Court reveal, however, that the first issue set forth above—whether CERCLA bars the Plaintiffs' claims for restoration damages—is a potentially dispositive issue. If the District Court's ruling on this issue is determined to be incorrect, then all of the Plaintiffs' claims for restoration damages would be dismissed with prejudice. A ruling on this issue clearly will drive the trial and the legal theory upon which the Plaintiffs' claims for damages may proceed, and could moot many of the other issues Atlantic Richfield raises. The economy of addressing this issue now is apparent, with the case involving nearly 100

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different plaintiffs and many individual properties. The Court concludes that full briefing is needed on this issue, including amicus briefs from the United States and other appropriate interested parties, in accordance with the Rules of Appellate Procedure.

IT IS THEREFORE ORDERED that the Court will take jurisdiction of the case on supervisory control for the limited purpose of considering the District Court's August 30, 2016 Order Denying ARCO's Motion for Summary Judgment on Plaintiffs' Claim for Restoration Damages as Barred by CERCLA and Granting Plaintiffs' Motion for Summary Judgment on ARCO's CERCLA Preemption Affirmative Defenses (11th – 13th). Briefing will proceed in accordance with the Montana Rules of Appellate Procedure, with Atlantic Richfield's opening brief due within thirty days of this Order.

IT IS FURTHER ORDERED that the United States is granted leave to file an amicus brief, which must be filed simultaneously with Atlantic Richfield's opening brief. Motions for leave to file additional amicus briefs will be entertained in accordance with M. R. App. P. 12(7).

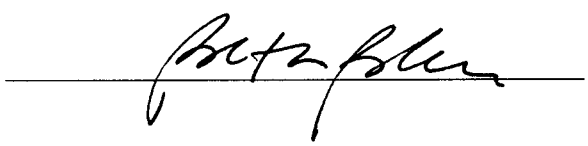
IT IS FURTHER ORDERED that further proceedings in this case are STAYED pending resolution of the issue identified in this Order.

IT IS FURTHER ORDERED that, in all other respects, the Petition for Writ of Supervisory Control is DENIED.

Finally, given the limited issue before it, the Court does not see the need at this juncture to direct transmittal of the entire District Court record. The parties may submit relevant portions of the record with their briefs, and are encouraged to submit a joint appendix pursuant to M. R. App. P. 12(5).

The Clerk is directed to provide immediate notice of this Order to all counsel of record and to the Honorable Katherine Bidegaray, presiding District Judge.

Dated this 5th day of October, 2016.



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Patricia Cotter

Justices

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