Bare Legal Title Does a CERCLA Owner Make

ENVIRONMENTAL LAW INSTITUTE SUMMER SCHOOL: HAZARDOUS WASTE AND SITES

JULY 16, 2019

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Current and past owners are liable under CERCLA

- Current owners, and past owners "at the time of disposal" are liable under CERCLA. 42 U.S.C. 9607(a).
- CERCLA does not define "ownership", "own", or "owner". 42 U.S.C. 9601(20)(A) says an "owner" is "any person owning. . .such facility."
- Courts often look to other sources for reasonable interpretation of "ownership" for purposes of CERCLA liability.

Mining sites and Federal government as an owner

- Under the General Mining Act of 1872, citizens could enter and explore the public lands and if they found valuable minerals, they could obtain title to the land on which the deposits were located.
- This title was considered title to an "unpatented claim."
- United States maintained paramount legal title but unpatented claim holder could explore and mine.

To patent or not to patent?

Unpatented Claim

- Claim holder has rights against third parties.
- Claim holder does not have rights against the United States.
- United States maintains paramount title.

Patented Claim

- Claim holder has rights against third parties.
- Claim holder has rights against the United States.

Chevron Mining Inc. v. United States, 863 F3d. 1261 (10th Cir. 2017)

- Chevron and its predecessors mined molybdenum near Questa, NM from 1919 to 2014, resulting in significant amounts of hazardous substances that are estimated to need more than 1 billion dollars and multiple decades to clean up.

- The United States held fee title to portions of the Questa mining lands (Chevron's unpatented mining claims) during the time hazardous substances were disposed. (22, 26)

- Chevron sued the United States for contribution, seeking a declaration that the United States was liable as a past owner. United States argued "bare legal title" is not enough for owner liability under CERCLA.

Chevron v. United States: What does ownership mean?

Because CERCLA does not define "owner", 10th Circuit looked for "contextual clues" to find meaning. It concluded:

- "Ownership" is not the same as "control". 42 U.S.C. 9605(a)(6)
- An entity can be an owner without having contributed in any way to the contamination. 42 U.S.C. 9605(h)(4)(A)
- The ordinary or natural meaning of "owner" includes a legal title holder.

The Friedland legacy: bare legal title does not an owner make

- United States argued "bare legal title" was insufficient to trigger owner liability under CERCLA.
- The unique nature of unpatented mining claims on federal lands demands an exception to CERCLA's ownership liability provision.
- United States v. Friedland, 152 F. Supp. 2d 1234 (D. Colo. 2001), held that the United States, as "bare legal title holder to unpatented mining claims" was not an owner for purposes of CERCLA liability. Id. at 1242-46.

The Friedland test: indicia of ownership

- Because the Friedland court decided bare legal title was not enough, it adopted an "indicia of ownership" test.

- The court looked at "the relationship between the United States, as owner of the bare legal title of the unpatented mining claim/property, and those entities utilizing the property subject to the unpatented mining claim" to determine:

- "whether the United States possessed indicia of ownership sufficient to merit the appellation 'owner' for purposes of CERCLA." Id. at 1244.

10th Circuit rejects Friedland test

- If Congress wanted to use "indicia of ownership" as a standard for all owners, it could have.
- CERCLA uses the term "indicia of ownership" already when it talks about the few exceptions to broad owner liability.
  - 42 U.S.C. 9601(20)(A)(person holding indicia of ownership primarily to protect his security interest) or
  - 42 U.S.C. 9601(20)(E)(i)(lender holding indicia of ownership primarily to protect his security interest).
- Requiring a showing of some indicia of ownership beyond legal title could collapse the owner and operator categories in CERCLA.

10th Circuit rejects Friedland test continued

- Friedland reasoned that bare legal title of unpatented mining claims held by United States was not enough because United States cannot exclude individuals from land subject to unpatented mining claims.

- But SCOTUS has repeatedly stated that Congress has broad, plenary Property Clause powers over national forest land, including lands subject to unpatented mining claims.

- Just because the United States chooses not to exercise its Property Clause powers does not mean those powers do not exist.

Even if an owner, there might be hope

- Allocation is the equitable determination that a court makes when deciding which PRPs are responsible for what part or percentage of the clean up. 42 U.S.C. 9613(f)(1).

- "Of course, a 'bare legal title' holder may in fact be liable for only a small, or perhaps no share of remediation costs as a matter of equity."

- "Because we remand to the district court to address equitable allocation, see 42 U.S.C. 9613(f)(1), we take no position on whether a party's status as a PRP precludes a determination that its equitable share of response costs is zero."

Federal PRPs and CERCLA response authorities

- Laws authorize certain federal agencies to take response actions at Superfund Sites.
  - E.O. 12580 grants USFS authority to perform certain CERCLA response actions in specified circumstances.
- Just because a federal agency may have CERCLA authorities, it still also may be treated as a PRP, and vice versa.
  - The fact that E.O. 12580 exists does not prohibit the USFS from being a PRP under CERCLA.
  - Similarly, the USFS being considered a PRP in a certain context does not render E.O. 12580 meaningless.