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Court Gives Indian Tribes New Tool for Remediating Contamination on Indian Lands

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A federal district court in the State of Washington recently handed Indian tribes a new tool for funding the remediation of contamination from industrial activities on Indian lands. The court in *United States v. Newmont USA Ltd.* held the United States liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) solely as a result of actions taken in its capacity as a trustee of Indian lands.[1]

The case involved land held in trust for the Spokane Tribe and individual tribal members that had been leased to the Dawn Mining Company, a subsidiary of Newmont USA Limited. The United States had commenced a cost recovery action against Newmont and Dawn, which asserted a counterclaim for contribution under CERCLA §113. The court held that the United States exercised sufficient "indicia of ownership" to be a potentially responsible party (PRP), rendering the United States responsible for a share of the costs of remediating a closed mine site located on trust land.

CREATION OF THE SPOKANE INDIAN RESERVATION

The Executive Order creating the Spokane Indian Reservation set aside and reserved land for the use and occupancy of the Spokane Indians. In 1908 the United States issued ownership interests, known as "allotments," to individual members of the Spokane Tribe. Pursuant to the Order, the United States held an allotment in trust; tribal members could use the land, but not sell it until 25 years after the allotment was issued. At that time, the allottees received the fee patent. The United States also opened to non-Indians the mineral lands of the Spokane Reservation for exploration and development. The lands opened for "exploration, location, occupation, and purchase under the mining laws" included lands remaining after tribal members had received their allotments.

DEVELOPMENT AND OPERATION OF THE MIDNITE MINE

The Midnite Mine includes both Reservation land not allotted to individual Indians and allotted land held by descendents of the original allottee. Spokane tribal members discovered the uranium mineralization that would eventually become the Midnite Mine in 1954. These tribal members thereafter leased 571 acres of Reservation land from the United States for mining purposes. The Bureau of Indian Affairs (BIA) approved the lease.

The mineral lease further required the lessees to pay rents and royalties pursuant to a US Atomic

Energy Commission (AEC) price schedule for uranium recovered. The lessees paid the money to the Tribe's treasury or to the United States for the use and benefit of the Tribe. The lease required the lessees to submit monthly reports to an agency of the Department of Interior (DOI), which also had the right to audit the lessees' accounts and books. Moreover, DOI had authority to:

- Suspend operations and terminate the lease
- Permit assignments of the lease
- Inspect the property
- Approve the lessees' termination of the lease
- Approve or disapprove the location of roads.

The lessees formed Midnite Mines, Inc. (MMI) and assigned their lease to MMI, which later assigned the lease to Dawn. In 1956 Dawn entered into a series of contracts with the AEC under which Dawn constructed and operated a mill for processing uranium and the AEC purchased all of Dawn's uranium concentrate. The AEC purchased all of the uranium ore and concentrate produced at the Midnite Mine and mill through 1966. Throughout the leasehold, the United States exercised authority granted it under the lease and various statutes and regulations pertaining to mining, leases of Indian lands and royalty rates. The United States also reviewed and approved Dawn's mining and reclamation plans under the terms of the 1964 leases and applicable regulations.

In the 1980s DOI monitored the site's environmental conditions and Dawn's reclamation activities, particularly relating to water quality. In 1983 DOI ordered Dawn to take steps to prevent further degradation of water resources in the area and, thereafter, ordered Dawn to undertake certain reclamation activities. In 1990 DOI determined that Dawn had failed to comply with the terms of its leases and terminated the lease. Uranium mining activities ceased shortly thereafter. EPA discovered extensive soil and groundwater contamination, listed the site on the National Priorities List and incurred response costs.

THE CERCLA LITIGATION

The United States initiated a cost recovery action against Dawn and Newmont, who counterclaimed against the United States for contribution as an "owner" of the reservation land. The United States moved to dismiss the counterclaims. Dawn and Newmont jointly moved for summary judgment on whether the United States is liable as an "owner" of the Midnite Mine site under CERCLA. The United States opposed the motion, asserting that it held only "bare legal title" to the land as trustee for the Spokane Tribe and individual tribal members. The United States asserted further that it possessed neither a traditional property interest in the site nor sufficient "indicia of ownership" to give rise to CERCLA liability. The United States relied heavily upon precedent involving hard rock mine sites on public lands, where courts have held that the United States, as bare legal title holder of unpatented mining claims, is not liable as an "owner" under CERCLA when the possessor of the land contaminates it.[2]

The court rejected the United States' argument, finding that the United States as "fiduciary could have effected the disposal of the hazardous wastes on the subject property," and that the United States "had the authority to prevent the very contamination for which it brings this action." The court's determination regarding "indicia of ownership" turned on two factors:

1. The federal government's involvement in the mining leases and its exercise of the authority over the land provided in the leases and codified in statute and regulation, and
2. The fiduciary obligations of the United States arising from its general trust responsibilities and the more specific responsibilities owed to the Tribe under the Indian Mineral Leasing Act and its implementing regulations.

CERCLA § 104(c)(3) requires states to pay a share of cleanup costs for sites within the state, unless the site is located on Indian trust lands or within an Indian reservation. CERCLA § 120(a)(3) exempted states from the § 104(c)(3) requirements with respect to federal facilities. The United States argued that a finding that the United States is the "owner" of Indian lands unlawfully expanded the exemption in § 120(a)(3). The court rejected this argument, holding that finding the United States liable as an "owner" due to its ownership of Indian lands ". . . is in line with CERCLA's overall statutory scheme" because "removing the normally mandated cost-sharing requirements from Indian land held in trust . . . requires the federal government to treat such land exactly as if it were owned by the government."

IMPLICATIONS OF DECISION FOR TRIBAL LANDS

Newmont USA Ltd. appears to be the first decision holding the United States liable as an "owner" under CERCLA, solely as a result of acting in its capacity as a trustee of leased Indian lands. In fact, in settings where the scope and nature of the United States' oversight of activity on Indian lands that results

in environmental contamination, *Newmont* supports an effort to establish governmental CERCLA liability. The critical factual element contributing to the result here was the substantial, direct oversight of the polluting activities by agencies of the United States. This decision enhances the ability of the tribal government to recover from the United States cleanup costs incurred on leased Indian lands. It also supports the ability of industrial entities that have incurred similar costs to recover a portion of them from the United States. According to recent reports, there are more than seven million acres of mining claims on federal lands. As of August 2007, EPA has listed 48 mining sites on the National Priorities List.

NOTES

1. *United States v. Newmont USA Ltd.,* No. CV-05-020-JLQ, 2007 WL 2386425 (E.D. Wash., Aug. 21, 2007).
2. *See, e.g., United States v. Friedland*, 152 F. Supp.2d 1234 (D. Colo. 2001).

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