

LexisNexis Expert Commentaries

Brian D. Israel on *State of New Mexico v. General Electric Company*

State of New Mexico v. General Electric Company, et al.,
467 F.3d 1223 (10th Cir. 2006) (Oct. 31, 2006)

Tenth Circuit Examines Preemptive Effect of CERCLA's NRD Provisions on State Claims

State of New Mexico v. General Electric Company, et al., affirmed an important principle of modern environmental law: that its focus and purpose is to “protect the public interest in a healthy functioning environment, and not to provide a windfall to the public treasury” (citation omitted). In so doing, the Tenth Circuit addressed (1) the preemptive effect of CERCLA, (2) the relationship between a Superfund cleanup and a claim for natural resource damages (NRD), and (3) the ability of a trustee to seek compensation for the lost use of groundwater.

The State of New Mexico brought a claim in 1999 seeking \$5 billion in natural resource damages resulting from contaminated groundwater at the South Valley Superfund Site in Albuquerque, New Mexico. The Site has been undergoing groundwater remediation since the late 1980s under the direction of the U.S. EPA (and with the concurrence of the New Mexico environmental agency). Notwithstanding these cleanup efforts, New Mexico asserted that it had suffered, or would suffer in the future, significant natural resource damages, for which it was entitled to compensation. The State sought to recover funds not for restoration but for the general treasury.

The State Attorney General put forward a number of theories in both federal and state court. In federal court, the State filed a claim for NRD pursuant to CERCLA's statutory provisions. Interestingly, the natural resource trustee of New Mexico apparently did not wish to assert a claim, so the State named its own trustee as an “involuntary plaintiff.” Ultimately, the State dismissed its statutory NRD claim. In state court, New Mexico sought the same damages pursuant to state statutory and common law theories. The state law claims were removed to federal district court, which retained jurisdiction even after the federal claims were dismissed.

Conflict Preemption. The Tenth Circuit first examined whether New Mexico's common law NRD claims

were preempted by CERCLA's NRD provisions. The State argued that its claims were not preempted due to CERCLA's two saving provisions. The first protects a state's ability to impose additional requirements beyond those required by CERCLA. The second protects the rights of those exposed to hazardous substances. In light of these provisions, the Court analyzed the issue pursuant to principles of the narrower preemption doctrine of conflict preemption. Conflict preemption would only preclude a claim that “stands as an obstacle to the accomplishment of congressional objectives encompassed in CERCLA.” **Lopez, 467 F.3d at 1244.**

The natural resource damages provisions of CERCLA provide that money recovered is “available for use only to restore, replace, or acquire the equivalent of such natural resources...” **42 U.S.C. § 9607(f)(1).** In other words, a State may not use an NRD claim to obtain funds for purposes unrelated to the natural resource injury. To the extent that New Mexico was seeking “an unrestricted award of money damages,” the Tenth Circuit held that its claim was preempted by the CERCLA NRD regime. Otherwise, according to the Court, States could recover natural resource damages but fail to achieve the restoration purposes inherent in the statute.

The Tenth Circuit also indicated that it would be improper to use NRD recoveries to pay attorney fees. This holding may call into question the use of private lawyers by trustees in some states, including New Jersey.

Impermissible Attack on the Remedy. Having found that CERCLA's NRD provisions preempt any state remedy that seeks something other than restoration, replacement, or acquisition of the resource, the Court then addressed whether the State's claim could survive within those limitations. The gravamen of the State's claim was its assertion that the CERCLA groundwater remediation at the site was inadequate. The Tenth Circuit held that the State's claim was an impermissible attack on the EPA remedy and that it therefore lacked jurisdiction to hear the challenge. The basis of this holding was **Section**

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9613(h) of CERCLA, which provides (with certain exceptions) that once a remedy has been selected, no challenge to the cleanup may occur prior to the completion of the remedy.

Importantly, the Court was unconvinced by the State's argument that the State was not challenging the EPA remedy since it merely sought money damages and did not seek injunctive relief. The Court stated that to allow such a dichotomy could prejudice companies who could be held liable for monetary damages for simply complying with an EPA cleanup plan. While the Court's discussion was clearly within the NRD context, the same logic may apply to certain private tort actions. That is, some may argue that the Tenth Circuit provides further support for the proposition that a toxic tort lawsuit that stems from dissatisfaction with a CERCLA remedy must wait until the remedy is completed even if it seeks only monetary damages.

The Court's language, in part, suggests that because an NRD claim is "residual" to a CERCLA remedy, all NRD claims must wait until the remedy is complete. This language, however, is probably overly broad, because the Court also noted that **Section 9613(h)(1)** does not preclude NRD claims brought pursuant to **Section 9607**. Of course, even in such a statutory claim, the damages calculation must fully account for the remediation so as not to result in a double recovery.

Loss of Use. Trustees often claim compensatory damages for the lost use of a natural resource from the time of the damage until the time of the restoration. The Tenth Circuit ac-

cepted the general proposition that the State was entitled to such damages. However, since the resource in question was the ability to appropriate groundwater, and since it was uncontested that the maximum extraction of groundwater was being accomplished from the area, the Court found that there was no lost use resulting from contamination. Accordingly, the Court affirmed the lower court's grant of summary judgment on the State's loss-of-use damages theory.

Conclusion. This case may represent a perfect storm for NRD trustees: a claim for unrestricted funds *combined with* a direct attack on an ongoing CERCLA remedy *combined with* a complete absence of proof for interim lost use. Even if this lethal combination of flaws may be rare, the decision provides significant arguments to companies confronted with any one of those situations. Trustees will take some solace in the fact that the Court accepted the principle of interim lost use under state law.

For a thorough discussion of natural resource damages law, see [Environmental Law Practice Guide, Ch. 32B: Natural Resource Damages](#), and [The Law of Hazardous Waste, § 14.01\[10\]](#).

For a review of all 50 states' NRD programs, see [Environmental Law Practice Guide, § 32B.12: A State-by-State Guide to NRD Programs in All 50 States](#).

For a one-stop source for all environmental research needs, see the [Environment Research Tasks Page](#).

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