ENVIRONMENTAL QUALITY COUNCIL

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August 30, 2007

TO: Council Members

FR: Todd Everts, EQC Staff Attorney

RE: September 14th EQC Meeting Agenda Item Regarding the Role of DEQ Remediation in Light of Recent Supreme Court Decisions in Sunburst School District v. Texaco and Shammel v. Canyon Resources

In preparation for the above mentioned agenda item, I have attached a Montana Law Week summary of the Montana Supreme Court's opinion in Sunburst School District v. Texaco and I have attached the actual six page follow up opinion in Shammel v. Canyon Resources. These cases have significant policy implications that will be explored during the EQC's September Meeting.

If you have any questions, do not hesitate to contact me at 406-444-3747 or teverts@mt.gov.

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Montana Law Week

THE WEEKLY DIGEST OF MONTANA LAW

August 11, 2007

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Supreme Court - Civil

ENVIRONMENTAL DAMAGES: $15 million verdict for restoration damages for properties contaminated by leaking refinery gasoline with $2 million pre-damage value appropriate... no CECRA preemption of common law claim for restoration beyond health-based standards... *Restatement of Torts* §929 adopted for restoration damages... jury improperly instructed on constitutional tort in light of §929, but remand of $226,500 award not necessary because verdict form did not apportion between constitutional tort and public nuisance, and sufficient evidence of public nuisance... scheduling order requiring expert disclosure negated need for interrogatory, experts properly excluded for failure to disclose... after-fact negotiations with DEQ, belated attempts to comply with CECRA, not relevant to scope of damage, properly excluded for that purpose, but improperly excluded for determining punitives, $25 million punitives award vacated, remanded for retrial... sufficient incentive to pursue action to ameliorate private rights without possible award of fees, private AG fees improperly awarded... $16,117,500 compensatory verdict affirmed, $25,000,000 punitives verdict reversed... McKittrick affirmed, reversed.

Texaco operated a refinery outside Sunburst 1924-61. Gasoline leaked for many years and contaminated surrounding soil, spread to the groundwater, and migrated under the town. It came to Texaco's attention as early as 1955 when fumes caused a house to explode. Texaco extracted some gasoline over the next few years but left a significant amount of pollution. It notified EPA in 1981 that potentially hazardous substances might still be present. A 1985 EPA investigation revealed soils and surface water contamination. DEQ assumed jurisdiction pursuant to CECRA and entered into a consent order in 1989 requiring Texaco to implement a remediation plan. Its study revealed that groundwater remained contaminated with benzene, a carcinogen. Montana had not yet adopted benzene regulations for groundwater. Texaco hired TRC to conduct benzene tests in homes above the contamination plume. It found no organic vapors in excess of DEQ action levels, and DEQ concluded in 1994 that no further remediation was warranted. It promulgated new regulations for groundwater in 1995, adopting a benzene level of .005 mg/l, the same as EPA's. Sampling indicated that groundwater continued to have excessive benzene. DEQ denied Texaco a waiver as to the new regulation. Texaco hired Tri-Hydro to investigate, and in 5/03 proposed remediation through monitored natural attenuation. Opinions on the degradation period for benzene ranged from 20-100 years to fall below the maximum DEQ level. Tri-Hydro estimated that MNA would cost $1 million compared with $30 million+ for active remediation. In 2003 DEQ proposed, for public comment, that Texaco use MNA. It released information regarding contamination levels in 6/01 and 5/03. Texaco also presented information to the public concerning the contamination and its proposed remediation method, including a map of the plume. Sunburst and 90 property owners sued Texaco in 2/01, alleging trespass, strict liability for abnormally dangerous activity, public nuisance, violation of the Art. II §3 right to a clean & healthful environment, wrongful occupation of property, and constructive fraud. Judge McKittrick granted Plaintiffs' motion to exclude any evidence of DEQ's role in remediation, and sustained their objections to testimony of several Texaco experts for inadequate disclosure. At the conclusion of evidence he found Texaco strictly liable for an abnormally dangerous activity and that its liability for trespass extended to all Plaintiffs who owned property over the plume. The Great Falls jury awarded $170,000 for wrongful occupation of property, $371,000 for constructive fraud, $350,000 for costs of the environmental investigation, $226,500 for private nuisance, public nuisance, and constitutional tort, and $15 million for restoration damages (MLW 8/28/04:4). It specified the amount awarded to each plaintiff for wrongful occupation and constructive fraud, but combined private nuisance, public nuisance, and constitutional tort. It also awarded $25 million punitives. McKittrick ruled that Plaintiffs could recover attorney fees, but did not settle on the amount. Texaco appeals.

McKittrick properly allowed the jury to award restoration damages exceeding the value of the damaged property. *Spackman* (Mont. 1966), which Texaco cites, dealt with readily replaceable personal property with established market value. The difference between the value of the property before and after the injury, or the diminution in value, generally is the appropriate measure of damages, but "no single measure of damages can serve in every case to adequately compensate an injured party." *Burk Ranches* (Mont. 1990). Restoration awards may compensate a plaintiff more effectively than diminution in value in circumstances such as a residence which the plaintiff has an interest in restoring and diminution will not return him to the same position. *Slovek* (Colo. 1986) (flood deposited silt & debris over plaintiff's land). If

the plaintiff wants to use the property rather than sell it, restoration is the only remedy that affords full compensation. *Catholic Church* (La. 1993). We join other jurisdictions in adopting the flexible guidelines of *Restatement of Torts* §929 and cmt. b which allow a remedy for injury to real property that restores a plaintiff as nearly as possible to the state he would have attained had the wrong not occurred. *Butler* (Mont. 1991). A residence is the type of property in which the owner possesses a personal reason for repair. *Slovek* recognized that personal reasons for repair are usually the owners' desire to enjoy and live in their homes. These reasons are compelling and we adopt them. Restoration damages are also appropriate for Sunburst School Dist. as a collateral beneficiary in light of the fact that the responsible party could not remediate the water under the other plaintiffs's residences without also treating the water under the school. *Catholic Church*. Texaco argues that restoration damages exceeding market value would result in a windfall as nothing requires Plaintiffs to use these funds to repair their properties. However, the record indicates that they will use the award to remediate the contamination. For example, in presenting the verdict form which provided for a single sum for restoration damages, Plaintiffs explained that "cleanup is a single expense, and damages cannot be divided between the plaintiffs." Larry Linnell testified that the "first and foremost thing that I want to see done is that the area gets cleaned up," and Bradley Haugen testified that he joined the suit to "leave Sunburst in a much better position than it is now so that other people can live there without danger or worry." As a general rule, courts have assessed reasonableness of restoration damages against market value before the damage. However, a strict cap would give the tortfeasor the equivalent of a private right of inverse condemnation or eminent domain, allowing it to undertake any dangerous activity knowing that damages would be limited to market value of the neighboring property, and injured property owners would be forced to sell homes they do not want to leave or live under increased threat of exposure to toxic chemicals. The Legislature has not granted this power to private tortfeasors and we decline to create it. A strict cap would also fail to provide adequate remedy for injury to the environment or a special purpose property. Testimony established that the properties above the contamination plume have an aggregate value of $2 million. A strict cap would barely cover the $1 million cost of MNA, Texaco's preferred remediation method. Costs of the active remediation plans identified by its consultants could approach $30 million. $15 million falls comfortably within these extremes, and is reasonable.

There is no conflict between DEQ's supervisory role under CECRA and restoration damages awarded under common law, nor does anything in CECRA preclude a common law claim by necessary implication. Texaco argues that Sunburst's common law action would usurp DEQ's authority by requiring more active remediation than proposed by DEQ. However, we have long recognized common law actions for intentional trespass, *Branstetter* (Mont. 1986), and CECRA's private right of action contains no limitation on common law claims for remediation. Texaco also argued that CECRA preempts common law claims by necessary implication in that Plaintiffs could have brought a private right of action pursuant to its "voluntary cleanup" provision, which would have required them to fund an environmental assessment and propose a cleanup plan and reimburse DEQ for any remedial action. However, they would have no guarantee that DEQ would approve the plan or require Texaco to cover the cost. Moreover, Texaco fails to explain by what authority DEQ would impose this extra burden on Texaco when Plaintiffs' proposed voluntary cleanup plan likely would seek to reduce contamination below CECRA's health-based standards, which do not necessarily equate to complete absence of health risks. Plaintiffs would be required under §75-10-733(2)(c) to obtain Texaco's consent, which seems implausible. More importantly, the 1997 amendment intended to "provide potentially liable persons the opportunity to take the necessary remedial action *before* the state takes action." CECRA's focus on cost effectiveness and limits on health-based standards differs from factors for assessing damages under the common law.

McKittrick erred in instructing on Plaintiffs' constitutional tort theory where adequate remedies exist under statutory or common law. *Dorwart* (Mont. 2002) concluded that absence of any other remedy supported a constitutional tort. However, we have now adopted *Restatement of Torts* §929 to allow for restoration damages, which serves to ensure a clean & healthful environment. Plaintiffs have not demonstrated that the common law restoration damages would not adequately address any damages caused by Texaco's contamination.

However, we need not remand the $226,500 award because there is substantial evidence that Texaco created a public nuisance. The verdict form did not apportion between the constitutional tort and public nuisance claims, which normally might require remand of the damages award. *Little* (Mont. 1981). However, Texaco sought to combine damages for all 3 torts in order to "delete any potential for overlap of damages." Although McKittrick denied Texaco's proposed form, his form reflected its suggestion of a single damages figure for the separate torts, and therefore Texaco's successful appeal of the constitutional tort instruction should not force a new trial on damages attributable to public nuisance. *Lumbert* (10th Cir. 1968). Moreover, there was substantial evidence that Texaco allowed gasoline and other substances to leak, thereby creating a plume that contaminates the soil and groundwater under Plaintiffs' properties, and that it contains high levels of carcinogens, continues to expand, and the properties suffer ongoing harm.

McKittrick did not abuse his discretion in excluding testimony of 3 Tri-Hydro experts for failing to comply with the scheduling order regarding disclosures pursuant to Rule 26(b)(4)(A)(i). Texaco argues that the rule applies only to interrogatories. However, the scheduling order negated the need for either party to file interrogatories, and the MRCivP require liberal disclosure by all parties. Neither party filed separate interrogatories, and McKittrick did not intend for separate interrogatories to demand expert disclosures. Texaco contends that exclusion of its experts was too harsh since Plaintiffs had already deposed several Tri-Hydro witnesses and had ample opportunity to depose all of its experts. However, it provided a list of 67 experts 5/12/04, discovery closed 6/15, and trial was set for 7/26. Plaintiffs could not have adequately deposed all 67 experts in that time. In any event, Texaco failed to notify of its intent to have these Tri-Hydro witnesses provide Rule 702 testimony until it disclosed

them as experts after Plaintiffs had deposed them. Without such notice the opportunity to depose does not remove the prejudice. *Jenkins* (9th Cir. 1986).

McKittrick did not abuse his discretion in excluding Texaco's negotiations with DEQ over remediation alternatives when determining Texaco's liability for common law claims. Evidence of its negotiations in the 90s and early 00s to demonstrate cooperation with state regulators after having caused the contamination would not change the scope of the damage or cost of removing the contamination. Neither its negotiations with DEQ nor its belated attempts to comply with CECRA would alter its liability for abnormally dangerous activity or the amount of Plaintiffs' harm. Strict liability applies; thus it would be liable for compensatory damages regardless of the care with which it may have conducted its operations. *Matkovic* (Mont. 1985) (adopting *Restatement of Torts* §519).

However, McKittrick abused his discretion by prohibiting Texaco from introducing evidence of its attempted compliance with CECRA and DEQ's involvement with remediation for punitives purposes. A good-faith effort to comply with government regulations "would be evidence of conduct consistent with the mental state requisite for punitive damages." *Silkwood* (W.D. Okla. 1979). In upholding the punitives award, McKittrick noted that Texaco's communication with the public regarding the contamination "consistently minimized the problem and failed to accurately report their findings," which he attributed to being motivated by its "own financial interests." He referred to a 1989 document outlining Texaco's "hidden agenda" to save money at the expense of meaningful cleanup. He attributed to Texaco "numerous affirmative misrepresentations concerning the pollution," and found that its decision to rely on MNA "was not scientifically supportable." Thus he relied on Texaco's conduct — or misconduct — since entering the consent decree with DEQ in 1989 in justifying the punitives award, while excluding evidence of its negotiations with DEQ during this same time. He determined that evidence of the negotiations would likely confuse the jury and divert attention from Plaintiffs' common law claims. However, while evidence of its negotiations with DEQ was not relevant to compensatory damages, we cannot agree that it would not be relevant to punitives. While a judge retains authority under Rule 403 to keep a trial within sensible bounds, he may not categorically exclude evidence tending to show why a defendant acted or failed to act in considering punitives. *Swinton* (9th Cir. 2001). Such evidence bears on whether Texaco acted with "deliberate indifference" or concealed material facts and the size of any punitives award. While, as McKittrick noted, Plaintiffs have a strong argument that Texaco's inaction and selection of the MNA alternative demonstrate "deliberate indifference," the debate should not be preempted by disabling it from explaining itself. *Indiana Bell* (7th Cir. 2001). McKittrick compounded this error by refusing to instruct the jury to consider whether Texaco's actions comported with state regulations or had been approved by a state regulator. The $25 million punitives award is vacated and remanded for retrial of the appropriateness of punitives, with Texaco being allowed to present evidence of DEQ's role.

McKittrick abused his discretion in awarding Plaintiffs private AG fees. Plaintiffs maintain that they vindicated an important public policy regarding rights of property owners that will benefit all present & future residents of Sunburst, private enforcement proved necessary in light of DEQ's inaction, and they undertook a significant financial burden litigating the case. Texaco responds that the State properly enforced the rights of Sunburst residents through DEQ, and that Plaintiffs had the opportunity to, and did, win a large judgment. We agree with Texaco that the private AG doctrine provides an incentive to bring public interest litigation that might otherwise be too costly to bring; it "was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protected the public interest." *Flannery* (Cal. 1998). Plaintiffs' litigation resulted in a multi-million-dollar judgment. They needed no incentive to sue.

Morris, Leaphart, Warner, Rice.

Nelson and Cotter concurred, except as to reversal of punitives, with the caveat that the Court is not rejecting per se a constitutional tort for violation of Art. II §3, and **dissented** as to reversal of punitives. Texaco's compliance with DEQ's directions and with CECRA was not relevant to punitives, and in any event was properly excluded because of the very real danger that it would confuse the issues and mislead the jury.

Gray concurred in the results but **dissented** as to several aspects of the Majority's reasoning, particularly where it fails to address the record or arguments and unnecessarily relies on authorities from other jurisdictions, and to its characterization of Texaco's Art. II §3 argument as a challenge to any damages other than the restoration costs or the viability of Plaintiffs' constitutional tort claim.

***Sunburst School Dist. et al v. Texaco*, 04-798, submitted 3/14/06, decided 8/6/07.**

Tom Lewis, David Slovak, and Mark Kovacich (Lewis, Slovak & Kovacich), Great Falls, for Plaintiffs; Stanley Kaleczyc (Browning, Kaleczyc, Berry & Hoven), Helena, Charles Cole (Steptoe & Johnston), DC, and Laurence Janssen & Daniel Blakey (Steptoe & Johnson), LA, for Texaco and Texaco Refining & Marketing; Keith Strong & Stephen Bell (Dorsey & Whitney), Great Falls, for Amici Montana Petroleum Marketers & Convenience Store Association, Town Pump, CHS, and Rocky Mountain Oil; Page Dringman (Dringman & Redmon), Big Timber, for Amicus WETA; William Rossbach (Rossbach Hart Bechtold), Missoula, and Lawrence Anderson, Great Falls, for Amicus MTLA; Jory Ruggiero (Beck, Amsden & Ruggiero), Bozeman, and Jack Tuholske (Tuholske Law Office), Missoula, for Amici NPRC, MEIC, and Women's Voices for the Earth.

DITCH RIGHTS: Deeds ambiguous, extrinsic evidence properly used... Larson affirmed.

Tom and John McDonald established homesteads east of Bonner over a century ago. They appropriated water from Union Creek and dug ditches to flood irrigate. Their homesteads were eventually purchased by W.K. Wills, who irrigated with 4 ditches. In 1964 the Wills family divided Wills Ranch, creating self-sustaining ranches for sons Ernest, Roy, and William. Ernest's family eventually formed Wills Cattle, currently operated by his son Sidney. In 1999 William & Kathleen Shaw purchased the land previously held by William and Roy and began to install a sprinkler system, filling the middle and north McDonald ditches. Wills Cattle sued, alleging that the parties held an undivided joint interest in the ditches and the 1964 deed to Ernest granted a half interest in all the McDonald ditches including the ones Shaws destroyed. Following trial Judge Larson concluded that the 1964 deeds were ambiguous as they did not contain maps or other identification of the ditches used with the water rights conveyed by the deeds, and thus he looked to extrinsic evidence to determine the parties' intent at the

No. 05-206

IN THE SUPREME COURT OF THE STATE OF MONTANA

2007 MT 206

ALAN and STEPHANIE SHAMMEL, MAURICE and BETTY MAE SHAMMEL, JACK and IDA RUCKMAN, BOB and VICKY RUCKMAN, LEWIS and MONA HARRELL, and DANIEL and LORI HARRELL, individually,

Plaintiffs and Appellants,

v.

CANYON RESOURCES CORPORATION, a Delaware Corporation, and C. R. KENDALL CORPORATION, a Colorado Corporation,

Defendants and Respondents.

APPEAL FROM: The District Court of the Tenth Judicial District, In and For the County of Fergus, Cause No. DV 2001-116, Honorable E. Wayne Phillips, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

A. Clifford Edwards (argued) and Roger W. Frickle, Edwards, Frickle, Anner, Hughes, Cook & Culver, Billings, Montana

For Respondents:

Ronald F. Waterman (argued), Thomas J. Hattersley III, and Teri A. Walter, Gough, Shanahan, Johnson & Waterman, Helena, Montana

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Argued: March 8, 2006
Submitted: March 18, 2006
Decided: August 20, 2007

Filed:

Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 The Plaintiffs, members of the Shammel, Ruckman, and Harrell families (collectively, "Shammels"), sued Canyon Resources Corporation and its wholly owned subsidiary, C. R. Kendall Corporation (collectively "Canyon"), for allegedly contaminating the Shammels' property and diminishing water flows thereto. In addition to other various tort claims, the Shammels asserted a distinct right to recover money damages for a constitutional tort, based on Canyon's alleged violation of their constitutional right to a "clean and healthful environment," Montana Constitution, Article II, Section 3, and Article IX, Section 1. The District Court held that these provisions do not "authorize[] a cause of action in tort as between two private parties." The District Court certified its order denying the availability of such a constitutional tort as a final order, pursuant to M. R. Civ. P. 54(b). The Shammels now appeal. We affirm and remand.

¶2 The sole issue presented is whether the constitutional right to a clean and healthful environment, Montana Constitution, Article II, Section 3, and Article IX, Section 1, provides for the recovery of money damages in a constitutional tort action between private parties.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Between the late 1980's and the mid-1990's, C. R. Kendall Corporation operated a cyanide heap-leach mine in the North Moccasin Mountain Range. The Shammels own various properties downgradient of and downstream from the site of the former mine.

The Shammels allege that the piles of tailings produced by C. R. Kendall's operation of the mine (and left on the site following C. R. Kendall's cessation of active mining) have infused the drainage's waters with toxic leachate. According to the Shammels, storm water and spring run-off that seeped through the tailing piles would flow onto the Shammels' property via surface streams and an aquifer, allegedly contaminating the property with arsenic, cyanide, thallium, selenium, nitrate, sulfate and lead. Consequently, in 1996, at the behest of the Department of Environmental Quality (DEQ), Canyon installed a "pump-back" system to redirect water that had become contaminated through contact with the tailing piles back onto Canyon's property, so that it would not enter the aquifer or surface streams, and would no longer reach the Shammels' property.

¶4 In 1998, the Shammels apparently noticed a reduction in stream flow levels and the level of the water table in the aquifer, which they attributed to Canyon's physically altering the topography within the drainage, as well as its implementation of the pump-back system. In response to the Shammels' voicing these concerns, and again at the behest of DEQ, Canyon began augmenting stream flows below the mine site with diverted, purportedly uncontaminated water taken from above the mine site and from deep wells on the mine site. Despite these efforts, the Shammels claim that surface stream flows on their properties have not returned to normal "historic" levels. The Shammels attribute this diminution to Canyon's activities, which, they allege, have drawn down the aquifer and thereby damaged the Shammels' real property. Moreover, the Shammels maintain that elevated levels of toxic contaminants persist in the surface

streams, and that a plume of toxic pollution is presently migrating through the aquifer. The Shammels also vaguely assert some aesthetic injury as a result of Canyon's invasive mining of the adjacent mountains.

¶5 The Shammels filed suit alleging trespass—based on the water-borne pollutants that reached their lands—negligence, and nuisance—based on reduced stream flows, depletion of the aquifer and, presumably, aesthetic effects. More than three years after filing their complaint, and during the final pre-trial conference, the Shammels first indicated their desire to recover for a constitutional tort—based on Canyon's alleged interference with the Shammels' right to a clean and healthful environment, pursuant to Montana Constitution, Article II, Section 3, and Article IX, Section 1.

¶6 The District Court and the parties subsequently agreed to postpone trial, submit briefs addressing the issue of whether Montana law authorizes such a constitutional tort, and designate the District Court's ruling on the issue as a final order, subject to immediate appeal, pursuant to M. R. Civ. P. 54(b). The District Court held that a proven violation of the constitutional right to a clean and healthful environment does not authorize a distinct, constitutionally based cause of action in tort between two private parties for money damages. The Shammels promptly appealed the District Court's ruling. For the following reasons, we affirm.

STANDARD OF REVIEW

¶7 When resolution of an issue involves a question of constitutional law, this Court exercises plenary review of a district court's interpretation of the law. *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 18, 327 Mont. 306, ¶ 18, 114 P.3d 1009, ¶ 18.

DISCUSSION

¶8 In *Sunburst v. Texaco*, 2007 MT 183, __ Mont. __, __ P.3d __, this Court concluded that, where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment, shared by all Montanans, Montana Constitution, Article II, Section 3 and Article IX, Section 1, does not support a cause of action for money damages between two private parties. We reached this conclusion because restoration damages are now available to plaintiffs whose land suffers from environmental pollution, and such damages provide an adequate alternate remedy that will "restore a private party back to the position that it occupied before the tort." *Sunburst*, ¶ 64.

¶9 On the record before us, the Shammels have provided no indication that traditional tort remedies, amplified by restoration damages, will not afford them complete redress for the environmental damage allegedly perpetrated by Canyon. Full restoration of the Shammels' property may necessitate completion of remediation activities on property not owned by the Shammels. While this fact potentially distinguishes this case from *Sunburst*, at this juncture we find this distinction to be without significance. In their complaint, the Shammels requested money damages and "all further relief as may be

appropriate and just under the circumstances." Assuming the Shammels establish tort liability, this prayer for relief would enable the court, pursuant to its equitable powers, to order Canyon to remediate the former mine site sufficiently to restore the Shammels' property to its pre-tort condition.

¶10 Where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties. We affirm and remand for further proceedings consistent with this Opinion.

/S/ W. WILLIAM LEAPHART

We concur:

/S/ KARLA M. GRAY
/S/ PATRICIA COTTER
/S/ JIM RICE
/S/ JAMES C. NELSON
/S/ JOHN WARNER
/S/ BRIAN MORRIS