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Protecting Drinking Water - Equitable Remedies for Groundwater Contamination

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1. INTRODUCTION

A significant problem facing some drinking water suppliers is obtaining remediation and recovery of damages arising from contamination to their groundwater supplies by third-parties, particularly the federal government. While federal, state and tribal trustees have access to NRD claims to pursue damages for contamination to groundwater aquifers, most municipal water utilities or private purveyors of drinking water are cities, counties or private individuals. These types of parties generally lack the legal status of trustees and, as a result, are not able to pursue NRD damages for contamination of the aquifers that supply their drinking water needs.

Another problem faced by these entities is that CERCLA and its state-law equivalents only provide for remediation of past contamination, and then only require remediation to levels established by either EPA or the states to bring drinking water resources back to acceptable drinking water standards. This approach often leaves water purveyors with large amounts of unrecoverable damages or remediation costs which they cannot claim under either CERCLA or state superfund laws.

In the face of these constraints, many drinking water purveyors have turned to the common law, particularly state tort law, as a basis for recovery of their damages. Often these damages arise from decades of disposal of a variety of pollutants, many times hazardous chemicals, in a manner that contaminates drinking water aquifers. This paper outlines the legal bases for such claims and the strategic issues that should be considered by a municipality or private water company contemplating such claims, as well as the defenses that have been raised to such claims by defendants who have had to defend against them.

Oftentimes, drinking water purveyors are ham-strung by the discrepancy between the EPA's enforcement of CERCLA when dealing with the federal government as compared to its approach when dealing with private industry. In addition, these parties must deal with the fact that CERCLA only provides for remedial action, rather than affording full compensation for damages. Coupled with the fact that CERCLA limits NRD claims to trustees, groundwater purveyors have developed an alternative approach that, while similar to pursuit of an NRD claim, allows them more flexibility and oftentimes provides different avenues to recover more of their damages. It is my belief that the cases outlined in this paper are evidence of a growing trend, and that this type of quasi-NRD claim will become more prevalent in the future.

While there are a number of potential sources of contamination of drinking water, the focus of this paper is contamination of groundwater aquifers as a result of military activity by the United States and its contractors. The cleanup of formerly used military

facilities is one of the most extensive and expensive environmental cleanups ever undertaken, and the lessons learned from the recent groundswell of cases brought by groundwater purveyors can be extrapolated to other areas, as well as applied to more traditional natural resource damage actions.

2. THE LARGEST ENVIRONMENTAL CLEAN UP IN HISTORY: THE U.S. MILITARY'S LEGACY OF CONTAMINATION

For at least the past six decades, the U.S. military ("DOD") has generated, handled, and disposed of toxic chemicals. Only in the past three decades has Congress subjected DOD to scientifically-based regulation and oversight. Despite the statutory regulation of environmental hazards beginning primarily in the 1970's, DOD continues to improperly dispose of toxic chemicals, and is not subject to meaningful oversight or public accountability.

In the 1980's, DOD began closing bases made obsolete by the end of the Cold War. Federal and state agencies have attempted to convert land formerly occupied by DOD to productive local reuse. However, before this can happen, extensive land and water contamination caused by decades of ordnance testing, as well as the improper use, storage, and disposal of hazardous materials must be cleaned up to levels high enough to ensure public safety. This is a huge undertaking. For instance, the EPA estimates that cleanup of just U.S. Department of Energy sites will take over 75 years and cost up to $350 billion.[1]

States, counties, municipalities, private parties, and federal agencies are only beginning to understand the scope of the contamination and consequences of past military practices. Municipalities and private water purveyors are among the parties left to deal with this legacy of contamination, particularly with respect to groundwater contamination.

2.1 The History of Cleanup Laws Governing Federal Facilities and Military Installations

Although the United States is one of the largest polluters in the country, it enjoys an advantage that industrial polluters lack – it regulates itself. This fact has huge complications for the cleanup of federal facilities, particularly DOD sites.

Congress amended federal hazardous waste laws in 1986 to include deadlines for federal agency site cleanup, as well as to provide stronger tools for the EPA to use to enforce those deadlines. DOD is responsible for environmental restoration of properties that were formerly owned by, leased to or otherwise possessed by the United States and under the jurisdiction of the Secretary of Defense – properties known as the Formerly Used Defense Sites ("FUDS"). The U.S. Army Corps of Engineers ("Corps")

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[1] U.S. EPA, *Improving Federal Facilities Cleanup: Report of the Federal Facilities Policy Group Council on Environmental Quality* (Oct. 1995), *at* http://www.epa.gov/swerffrr/documents/octscan.htm.

has identified over 9,000 properties for inclusion in the FUDS program.[2] Still, the Corps finds many properties ineligible for inclusion in the FUDS program for various reasons. In addition, funding and other constraints limit the effectiveness of the FUDS program, and FUDS continues to contribute to severe groundwater contamination nationwide.[3]

2.2 FUDS Contaminate Groundwater, Which Supplies Drinking Water to About Half of the American People

The EPA has listed significant numbers of domestic military bases on the National Priorities List ("NPL") due to severe contamination.[4] Of over 17,000 potentially contaminated former and current federal military installations and defense manufacturing facilities, 100 were placed at the beginning of the NPL in 1994.[5] Contamination at a number of these sites threatens drinking water systems.[6]

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[2] The FUDS program was officially established in December 1983, when the FY84 Defense Appropriations Act required that the Department of Defense establish a program to manage environmental cleanup at properties formerly controlled by the Department of Defense. In 1985, the Army became the executive agent in charge of executing the FUDS program, with the U.S. Army Corps of Engineers assuming the primary management role. The Army's responsibility includes addressing environmental restoration at any previously controlled DOD site, regardless of which Department of Defense component originally controlled the property or was responsible for the suspected contamination. *See, generally*, http://www.dtic.mil/envirodod/derpreport95/vol_1/fud.html. The Defense Environmental Restoration Program, a cleanup program specifically targeting FUDS and the Base Realignment and Closure environmental restoration program constitutes the DOD's primary regulatory program. Defense Authorization Amendments and Base Closure and Realignment Act, § 101, *et seq.*, 102 Stat. 2623. The Superfund Amendments and Reauthorization Act of 1986 established the Defense Environmental Restoration Program ("DERP") and the DERP Account to fund the FUDS program. U.S. General Accounting Office ("GAO"), *Environmental Contamination: Cleanup Actions at Formerly Used Defense Sites* 3 (July 2001).

[3] The most pervasive and unsolved problem for the FUDS program remains a lack of funding. For example, the GAO report on FUDS, "Environmental Contamination: Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup" (GAO-02-658, August 23, 2002), points out that the FUDS program cannot accomplish its stated objectives without an increased budget. *See also* Lenny Siegel, *Review of GAO FUDS Report, 2002 CPEO Military List Archive* (Oct. 2, 2004) (corroborating this reading of the GAO report), *at* http://www.cpeo.org/lists/military/2002/msg15328.html. The United States spent $2.6 billion on the FUDS program between 1984 and 2001, but the DOD estimates it will take over 70 years and cost over $26 billion to clean contamination at its properties. GAO, *Environmental Contamination: Cleanup Actions at Formerly Used Defense Sites* 3 (July 2001); GAO, *Environmental Contamination: Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup* 1 (Aug. 2002). U.S. Department of the Interior sites will cost between $4 and $8 billion; U.S. Department of Agriculture sites approximately $2.5 billion, and National Aeronautics and Space Administration sites between $1.5 and $2 billion, for a total of almost $400 billion in federal agency site cleanup costs. *Id.*

[4] *See* Richard A. Wegman & Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S, Bases are Closed,* 21 ECOLOGY L.Q. 865, 868 (1994). In 1995, 81% of all federal sites on the NPL were DOD sites (129 of 160 sites). EPA, *Federal Facilities Sector Notebook: A Profile of Federal Facilities* 2-1 (Jan. 1996).

[5] Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees,* 18 HARV. ENVTL. L. REV. 137, 139 (1994).

[6] The EPA acknowledges this fact. *See, e.g.,* U.S. EPA*, Cleanups Progressing at Military Bases, Former Defense Sites* (Feb. 24, 2004), (stating that "hazardous waste, unexploded bombs and artillery

Groundwater provides drinking water for between 40 and 51 percent of the United States' population;[7] it provides 99 percent of drinking water for the nation's rural population.[8] The percentages are much higher than the national average in several states: for example, groundwater provides over 91 percent of all drinking water in Hawaii, 90 percent in Mississippi, 87 percent in New Mexico, 84 percent in Florida, and 77 percent in Idaho.[9] Most of the groundwater used for drinking water is delivered by municipal and private water supply systems, although up to 20 percent of people in the United States get their drinking water from private wells on their own land.[10]

Because nearly half of all Americans rely on groundwater for domestic consumption, the protection of groundwater quality is one of the EPA's highest priorities. EPA routinely pursues aggressive enforcement tactics against industry and local governmental entities whose facilities discharge contaminants into groundwater. In 1997, costs to remediate soil and groundwater at federal Superfund sites ranged from between $500 billion and one trillion dollars[11] and included expensive treatment systems involving pumping water out of the ground and stripping contaminants.[12]

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shells, and a variety of toxic materials, including radioactive waste" from military bases and former defense facilities contaminate groundwater), *at* http://www.epa.gov/region6/6xa/base_cleanups.htm. Reports by the Agency for Toxic Substances and Disease Registry ("ATSDR") also confirm it. *See, e.g.,* Wash. State Dept. of Health & ATSDR*, Health Consultation: Moses Lake Wellfield Contamination* (Dec. 1998) (reporting on TCE contamination in excess of maximum contaminant levels in the Skyline Water System, which consists of two public wells), *at* http://www.atsdr.cdc.gov/HAC/PHA/moses/mos_p1.html; *see also* ATSDR, *Internet HazDat – Site Contaminants List* (reporting Moses Lake TCE groundwater contamination exceeding 32 ppb as of November 15, 2004), *at* http://www.atsdr.cdc.gov/. These sites have names like the "Moses Lake Wellfield Contamination Site" (Moses Lake, Washington), "Rockaway Borough Well Field" (Rockaway Township, New Jersey), and the "Verona Wellfield Contamination Site" (Calhoun, Michigan). *See* EPA, *CERCLIS Database - Search CERCLIS* (last updated Oct. 17, 2004), *at* http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm.

[7] MTBE Advance Notice of Intent, 65 Fed. Reg. 16093, 16,097 (Mar. 24, 2000) (to be codified at 40 CFR. pt. 755); Groundwater Foundation, *How Much Do We Depend on Groundwater?* (2003) (citing U.S. Geological Survey figures), *at* http://www.groundwater.org/gi/depend.html.

[8] Groundwater Foundation, *How Much Do We Depend on Groundwater?* (2003).

[9] EPA, *FACTOIDS: Drinking Water and Ground Water Statistics for 2003*, 5 (Jan. 2004), http://www.epa.gov/OGWDW/data/pdfs/factoids_2003.pdf; Ground Water Protection Council, *et al*., *Ground Water Report to Congress: Summaries of State Ground Water Conditions* 23, 25 (Oct. 1999).

[10] USGS, *Ground Water Use in the United States, at* http://ga.water.usgs.gov/edu/wugw.html (last modified Mar. 17, 2004); EPA, *Drinking Water and Groundwater Statistics*, *supra,* note 9.

[11] Janet S. Herman, David C. Culver, & James Salzman, *Groundwater Ecosystems and the Service of Water Purification,* 20 STAN. ENVTL. L.J. 479, 483 (May 2001) (citing NATIONAL RESEARCH COUNCIL, INNOVATIONS IN GROUND WATER AND SOIL CLEANUP: FROM CONCEPT TO COMMERCIALIZATION 18 (1997)).

[12] Pump-and-treat methods are used in 90 percent of groundwater cleanups. *Id.* at 484. However, contaminants that do not dissolve in water cannot be pumped or treated; many sites cannot be treated by available technology, and others "may never be restored." *Id.*

2.3 The EPA Does Not Hold the DOD to the Same Standards it Does Non-Federal Entities

Yet for all the aggressive enforcement efforts directed at everyone else, when it comes to cleaning up contamination caused by the federal government itself, EPA is far less likely to be aggressive. This is particularly the case with regard to the Defense Department, and EPA's approach to DOD and its efforts to obtain cleanup of contaminated defense sites.

Typically, DOD does not actually clean up the drinking water supplies it contaminates and, typically, EPA does not require it to do so. The presumptive remedy for groundwater contamination by private parties, including local governments, is a "pump and treat" remedy; yet at military installations, the typical remedy is institutional controls – a fancy way of saying that use of the contaminated groundwater is legally prohibited by EPA by either fencing or deed restrictions.

Water supply systems and individual well owners are generally not compensated by EPA for the loss of their water resources or their water rights. Instead, EPA generally requires DOD to provide the affected residents with an alternative source of drinking water (such as bottled water) or to hook up to a municipal water supply system with access to clean water (often at higher cost).

Even at Superfund sites where EPA has ordered DOD to pay the costs of obtaining alternative sources of clean water, it has not required DOD to compensate the water supply system or well owner whose water was contaminated for the loss of its right to use that water. This is because the federal Superfund law is remedial in nature. It does not provide a right of action, either to EPA or for private parties, to pursue recovery of damages for property losses or for personal liability.

Foreclosed from using CERCLA to obtain compensation for lost groundwater resources, water supply systems and individual well owners have been forced to rely on federal and state statutory environmental law and common law tort theories to recover their remediation costs and the consequential damages arising from contamination to their drinking water supplies, including loss of their water rights. Municipal water purveyors and individual well owners have sometimes initiated litigation in an attempt to obtain restitution for the loss of groundwater resources and remedies to secure clean water supplies in perpetuity. Based on a review of the recent cases, there appears to be a groundswell of this type of litigation.

3. CERCLA'S SHORTCOMINGS AS A TOOL FOR RECOVERING DAMAGES TO GROUNDWATER RESOURCES

The starting point for most plaintiffs seeking redress for contamination of their property by hazardous substances is the CERCLA statute. Consistent with this notion, many municipal water purveyors have brought claims for damages to groundwater resources under CERCLA. Yet when groundwater resources have been impacted by

hazardous chemicals or hydrocarbons, CERCLA often falls short as a tool for recovery. There are two primary reasons for this: (1) the focus of the CERCLA statute is remedial, not compensatory; and (2) assessment and cleanup under CERCLA can take years, if not decades, to complete.

3.1 CERCLA's Focus is Remediation

CERCLA requires that, where the water was used for drinking water in the past,[13] the remedial action selected under 42 U.S.C. § 9604 or secured under 42 U.S.C. § 9606 must clean the water to the Maximum Contaminant Level ("MCL") Goals established by the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq*. The National Oil and Hazardous Substances Contingency Plan provides that, when developing appropriate remedial alternatives for groundwater cleanup, EPA should "return usable ground waters to their beneficial uses wherever practicable."[14] However, when restoration of groundwater to beneficial uses is not practicable, the NCP provides that EPA should strive "to prevent further migration of the plume, prevent exposure to the contaminated ground water, and evaluate further risk reduction."[15]

3.2 Even CERCLA's Remedial Remedies Can Take Decades to Implement

It is not uncommon for more than 15 years to elapse between the time of initial discovery of contamination at a Superfund site and implementation of remedial measures.[16] Many of the contamination plumes at these sites are so large that normal remediation is not readily available or cost-effective, even by CERCLA standards (i.e., mile-long plumes). As noted above, while the presumptive remedy for most groundwater contamination is normally a pump-and-treat remedy, in some of these cases, the size of plumes means that remediation focuses on "institutional controls," i.e., zoning or deed restrictions, rather than active remediation to restore groundwater resources. However, as explained more fully below, such remedies not only leave many externalized costs in place for water purveyors to address, but they are also inconsistent with the common law, particularly nuisance law.

The EPA has established presumptive remedies to accelerate site-specific remedy analysis through a focus on feasibility study efforts.[17] However, such remedies

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[13] 42 U.S.C. § 9621(d)(2)(A)(i) (2000).

[14] 40 C.F.R. § 300.430(a)(1)(iii)(F) (2000).

[15] *Id*.

[16] *See* Wegman & Bailey, *supra,* note 5, at 876, n.60 (citations omitted); *see also* CBO, *Cleaning Up Defense Installations: Issues and Options* 21 (1995) (indicating that the average DOD cleanup requires 14 years and the average nondefense NPL cleanup takes 13 to 15 years).

[17] Federal Remediation Technologies Roundtable, *Presumptive Remedies* 2.1, *at* http://www.frtr.gov/matrix2/section2/2_1.html (last visited Oct. 18, 2004). *See also* EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, PRESUMPTIVE RESPONSE STRATEGY AND EX-SITU TREATMENT

may prove to be either too expensive to pursue, or implementation may be so time consuming that cities and other water purveyors are forced to take interim measures during cleanup to provide clean water to their customers.[18] In some of the cases discussed below (Moses Lake, Washington, and Portland, Oregon, for example), municipal water purveyors determined that it was necessary to act preemptively in order to maintain a clean supply of water for their customers, and were not able to wait for the lengthy process of a remedial investigation, feasibility study, and the allocation of fault before remedial action could be undertaken. In other instances, towns and cities have had to find alternate drinking water sources rather than bring suit to require that those who contaminated the area clean it up to safe levels meeting Safe Drinking Water Act standards.[19]

When EPA decides to allow contamination to be left in place (such as when it elects to use “institutional controls” rather than actively cleanup a site), costs are externalized and imposed on the municipal water purveyor, its customers and citizens. These parties are forced to bear the expenses associated with the transformation of aquifers into underground waste dumps. In such circumstances, the municipal water purveyor is often forced (sometimes under threat of violating the Clean Water Act itself) to:

a) complete a voluntary clean up,

b) find an alternative source of water,

c) build new storage facilities, or

d) perform all of these acts.

The externalized costs of each of these remedies are ultimately visited on the municipal water purveyor and its rate-payers. Unless and until the water utility is able to recoup its costs, it is the ratepayers who must foot the bill for any remediation undertaken by the utility. Furthermore, based on the normal timing of an investigation and cost-recovery action under either CERCLA or state environmental statutory law, municipal and private water purveyors are frequently not able to wait for the many years such actions take to run their course, at least if they are taking their obligation to supply clean water to their customers seriously.

In the face of these realities, some water purveyors have gone forward with litigation to recover costs and other damages associated with the need to obtain and assure a supply of clean drinking water in the face of third-party contamination of the

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TECHNOLOGIES FOR CONTAMINATED GROUND WATER AT CERCLA SITES, FINAL GUIDANCE (Oct. 1996) (providing presumptive response strategies).

[18] *See, e.g., City of Portland v. Boeing Co.*, No. 99-1761, 2002 WL 220938 at *1 (D. Or. Jan 15, 2002) (explaining that the City of Portland had to obtain alternative water supplies and impose water restrictions due to TCE contamination of groundwater supplying municipal drinking water).

[19] 42 U.S.C. § 300f to 300j-26, *et seq*.

City's groundwater supply. Recent trends in such lawsuits demonstrate that Cities are employing a variety of new litigation strategies in order to achieve a more balanced distribution of the burdens that third-party contamination places on their water supply.

3.3 The Supreme Court's Recent Decision in *Aviall Services* Presents Additional Difficulties for Groundwater Purveyors Who Want to Pursue Cost Recovery Under CERCLA

On December 13, 2004, in the case of *Cooper Industries, Inc., v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L.Ed.2d 548 (2004), the United States Supreme Court held that private parties may not seek contribution toward cleanup costs they have incurred under CERCLA § 113(f)(1) unless a lawsuit has been filed against them under CERCLA §§ 106 or 107(a). The Court ruled that § 113(f)(1) was strictly limited by its terms, and only authorized contribution actions "during or following any civil action" under CERCLA § 106 or 107(a). The decision creates significant disincentives for private parties to cooperate with environmental authorities in the absence of a lawsuit, or to commence their own voluntary cleanup actions.

The case arose from a fairly typical fact pattern: During the mid-1980's, Aviall Services discovered that its operations and those of the prior owner of its property, Cooper Industries, had contributed to contamination of the property. Aviall notified the state of Texas of the contamination and was directed to cleanup the site and threatened with an enforcement action if it failed to do so. No suit was filed, however, and Aviall Services cleaned up the property under the State's supervision at a cost of about $5 million. Aviall then filed suit against Cooper Industries, seeking contribution from Cooper under CERCLA § 113.[20]

After losing in the district court and on appeal to the Fifth Circuit, Aviall eventually prevailed on rehearing before an *en banc* panel of the Fifth Circuit, which ruled that contribution was available after such voluntary cleanups, consistent with the state of the settled law in all of the Circuit Courts. However, the Supreme Court rejected the logic of the Fifth Circuit's opinion, which had engaged in an extended policy discussion and relied on the current state of CERCLA practice.

The Supreme Court viewed the question as a narrow issue of statutory construction. Since the statutory text was clear that a party may seek contribution "during or following any civil action," the Court stated that the enacted language would have been superfluous if Congress had intended contribution to be available at other times or in other circumstances. The Court viewed the savings clause as simply clarifying that § 113 did not eliminate other possible sources of a right to contribution, but did not itself establish one in the absence of a lawsuit being filed. The Court also ruled that, because of the "clarity" of the enacted language, there was no need for the Court to consider the "purposes" of CERCLA, or consult legislative history, or worry

[20] 125 S. Ct. at 582-583.

about how its interpretation fit with the rest of the statute. The Court offered no discussion of the practical ramifications of its decision.[21]

The Supreme Court refused to decide whether a responsible party who conducts a voluntary cleanup still has a CERCLA remedy under § 107 (if not § 113) for cost recovery, or an implied right of contribution against other responsible parties under § 107.[22] There is a long string of federal decisions, however, including the Ninth Circuit Court of Appeals' decision in *Pinal Creek Group v. Newmont Mining Corp.*,[23] that private parties that are themselves responsible parties under CERCLA may *not* pursue a § 107(a) action against other PRPs for cost recovery. (Some of those cases, including the Ninth Circuit's *Pinal Creek* decision, assumed that a § 113 contribution remedy *was* available.)[24]

The *Aviall* decision greatly reduces any incentive that a private party would have to undertake a voluntary cleanup of contamination on its property. The decision creates significant uncertainty as to whether private parties can ultimately force other PRPs to share in response costs or force them to pay an equitable share of those costs. For the purposes of this paper, after *Aviall* there is now no incentive for groundwater purveyors to undertake a cleanup or remediation of contaminated groundwater resources if their only avenue of recovering or sharing the burden of the remediation costs is a contribution action under § 113. Such action should only be undertaken where enforcement agencies have either initiated suit, or will agree to an "administrative or judicially approved settlement" under § 113(f)(3)(b).[25]

In the year subsequent to the issuance of *Aviall*, district courts within the Ninth Circuit have split on the issue of whether an implied right of action under § 107 will allow contribution claims to go forward, with some courts denying such claim (including the court in the City of Rialto case discussed below), relying on the Ninth Circuit's earlier

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[21] *Id.* at 583.

[22] *Id.* at 585.

[23] *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997).

[24] The Supreme Court stated in a footnote that, since Aviall Services had not received a § 106 administrative order, it was not deciding the question whether an administrative order qualified as a "civil action" under § 106 so that contribution would be available under § 113(f)(1).

[25] Presumably, an "administrative . . . settlement" refers to a § 106 consent order, and not to a unilateral § 106 enforcement order, which EPA often uses for enforcement purposes. As was already noted above, the Supreme Court left open the question whether a § 106 administrative order qualified as a "civil action under section 106" thereby allowing contribution, and it is unclear how that issue will be resolved in the Courts of Appeals, though lower courts presented with the issue subsequent to the *Cooper* decision have been hostile towards allowing plaintiffs to rely simply on administrative orders. *See, e.g., See, e.g., W.R. Grace & Co. v. Zotos Int'l.*, 2005 WL 1076117 (W.D.N.Y. May 3, 2005) (administrative consent orders insufficient to show an existing civil action sufficient to support contribution or cost recovery claim under § 113); *Pharmacia Corp. v. Clayton Chemical Acquisition, LLC*, 2005 WL 615755 (S.D. Ill. Mar. 8, 2005) (administrative orders on consent and unilateral administrative orders do not qualify as a "civil action" and therefore do not create a right of contribution under § 113).

decision in *Pinal Creek*, and others allowing the claims notwithstanding that earlier ruling.[26] At least one of these cases has been certified for appeal to the Ninth Circuit.[27] The Second Circuit has issued an opinion allowing the claims to go forward, and while the Second Circuit maintained that it was not overruling its prior decision in *Bedford Affiliates*, it certainly modified the result of that case. *See Consolidated Edison of New York v. UGI Utilities, Inc*.[28]

Until there is a definitive ruling by the Ninth Circuit or a clear trend develops amongst the Circuit Courts, one of the immediate effects of *Aviall* is to heighten the consideration that should be given to other possible claims for reimbursement under traditional common law theories such as nuisance, trespass, negligence, waste, strict liability for ultra-hazardous activity, common law contribution and equitable indemnity, and other remedies recognized within particular jurisdictions. The remainder of this paper focuses on the use of these theories of recovery by groundwater purveyors in recent cases initiated for recovery of damages and remediation costs for contamination of groundwater sources.

4. CURRENT LITIGATION ARISING FROM CONTAMINATED GROUNDWATER

The remainder of this paper outlines the background, procedural and legal issues presented by a number of recent cases brought by municipalities seeking recovery of damages and remediation costs imposed by the contamination of their groundwater supplies as a result of military activity.

The earliest of these types of suits were brought in the 1980's, but particularly in the later half of the 1990's there has been a small groundswell of lawsuits brought by municipalities attempting to use common law theories of nuisance, trespass and inverse

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[26] Decisions by district courts within the Ninth Circuit that allowing claims to go forward under § 107 include *Aggio v. Aggio*, 2005 WL 2277037 (N.D. Cal. Sept. 19, 2005) (holding PRP has implied right of action to contribution under section 107, certified for appeal); *Ferguson v. Arcata Redwood Co., LLC*, 2005 WL 1869445 (N.D. Cal. Aug. 5, 2005) (holding PRP could maintain a contribution action under section 107 (implied right)); *Koutrous v. Goss-Jewett Co. of No. Cal., Inc.*, 2005 WL 1417152 (E.D. Cal. June 16, 2005) (holding PRP may maintain a claim for contribution under § 107 without meeting § 113(f) requirements based on Ninth Circuit precedent recognizing an implied right of contribution in § 107, certified for appeal); and *Adobe Lumber Inc. v. Taecker*, 2005 WL 1367065 (E.D. Cal. May 24, 2005) (holding a PRP had an implied right of contribution under section 107). The following decisions have rejected PRP's arguments that a right exists under § 107 or is implied under § 107: *City of Rialto v. United States Dep't of Defense*, No. 04-00079 (C.D. Cal. Aug. 16, 2005) (holding PRPs cannot bring action for contribution under section 107); and *Goodrich Corp. v, Emhart Indus., Inc.*, No. 04-0759 (C.D. Cal. May 5, 2005) ("adhering to pre-*Aviall* Ninth Circuit precedent which forbids an implied right to contribution" per *Viacom* court). (This case was consolidated with *City of Rialto*).

[27] *Aggio v. Aggio*, 2005 WL 2277037 (N.D. Cal. Sept. 19, 2005) was certified for appeal to the Ninth Circuit.

[28] 423 F.3d 90 (2nd Cir., Sept. 9, 2005).

condemnation and other property rights claims as an adjunct to the more traditional claims brought for remediation of such contamination under CERCLA and RCRA.

4.1 The Plaintiffs: Resolution and Status of Ongoing Cases

4.1.1 San Bernardino, California

In 1980, the City of San Bernardino discovered chlorinated solvents, tetrachloroethylene ("PCE") and trichloroethylene ("TCE"), in its groundwater and in four of the City's water supply wells.[29] The contamination plume eventually spread to over twelve of the city's wells and covered an eight-mile area. In 1996, the City of San Bernardino and the California Department of Toxic Substances Control ("CDTSC") both alleged, in separate complaints, that the U.S. Army was responsible for the contamination – a product of operations at Camp Ono, a World War II ("WWII") facility that cleaned tents and other army supplies from 1942 to 1947.[30]

The EPA placed the Camp Ono site on the superfund National Priorities List ("NPL") in 1989 as part of the Newmark Groundwater Contamination Site.[31] In taking that action, EPA agreed with San Bernadino's allegation that the contamination resulted from Camp Ono operations. Since 1998, the City and EPA have pumped and treated the contaminated water. The EPA estimates that the contamination has impacted over 25 percent of the municipal water supply for the City's 175,000 residents.[32] On August 13, 2004, the EPA announced a consent agreement that resolved claims brought by both the City of San Bernardino and the State of California, on behalf of the CDTSC, against the United States for groundwater contamination.[33]

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[29] BNA, *Superfund: San Bernardino Will Receive $69 Million to Remediate Contaminated Groundwater*, 35 BNA ENVTL. REP. No. 34, 1781 (Aug. 20, 2004).

[30] *Id.; San Bernardino Municipal Water Dept. v. United States* (C.D. Cal. filed Dec. 18, 1996), (No. 96-8867); *Cal. v. United States* (C.D. Cal. filed July 26, 1996), (No. 96-5205).

[31] EPA, *Newmark Groundwater Contamination, available at* http://yosemite.epa.gov/r9/sfund/overview.nsf/ef81e03b0f6bcdb28825650f005dc4c1/5a50a68ada6060e58825660b007ee691?OpenDocument (last updated Aug. 26, 2004).

[32] BNA, *Superfund: San Bernardino Will Receive $69 Million,* 35 BNA ENVTL. REP. No. 34, 1781.

[33] *Id.; see* Consent Decree, *City of San Bernadino v. United States*; *State of California, on behalf of Dept. of Toxic Substances Control v. United States* (C.D. Cal. filed Aug. 11, 2004), (Nos. 96-8867 and 96-5205 (consolidated)). Under the consent decree, San Bernardino will receive $69 million to remove the contamination at the Superfund Site and to operate and maintain EPA's groundwater extraction and treatment remedies at the site for up to 50 years. San Bernardino will provide replacement water for area residents and prevent contamination from reaching downstream production wells. The City will be allowed to use the funds to expand its water supply capacity and build additional drinking water treatment plants, while the EPA will receive $6.5 million for past and future water monitoring. BNA, *Superfund: San Bernardino Will Receive $69 Million*, 35 BNA ENVTL. REP. 34, 1781.

4.1.2 Denver, Colorado

On September 10, 1998, the City and County of Denver, Colorado, filed suit against, *inter alia,* the United States and its federal agencies, the DOD and the Department of the Air Force ("USAF").[34] The complaint sought damages and injunctive relief under statutory and tort claims based on releases of hazardous substances at the Lowry Air Force Base ("Lowry AFB") that entered the groundwater and migrated onto municipally-owned property at Stapleton International Airport ("SIA").[35] The United States operated Lowry AFB between the 1940s and September 1994.[36] This operation included disposal of TCE and other toxic chemicals, and releases created toxic plumes extending several miles beyond Lowry AFB. The Denver case resulted in a consent decree in favor of Denver and against the United States.[37]

4.1.3 Rialto, California

On January 21, 2004, the City of Rialto filed suit against the DOD and 42 other public and corporate defendants, alleging that the defendants had contaminated 20 wells in the Rialto-Colton groundwater basin with perchlorate.[38] Rialto alleges that the DOD contaminated a 2,800-acre area through military operations occurring between 1941 and 1946.[39] In addition to the federal defendants, Rialto places blame on numerous commercial and industrial defendants.[40]

Rialto relies almost entirely on local aquifers to meet the needs of its approximately 100,000-person population, and alleges that at least one of these aquifers and five of its wells have been contaminated by perchlorate. Rialto and two other local water purveyors installed treatment equipment and resumed pumping water

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[34] *See* Complaint, *Denver v. United States* (D. Colo. Filed Sept. 10, 1998), (No. 98-1959).

[35] *Id.* at 1-2.

[36] *Hoery v. United States*, 324 F.3d 1220, 1221 (10th Cir. 2003). For more information on the *Hoery* case (holding that, for limitations purposes, landowner's cause of action continued to accrue until toxic chemicals were removed, although condition causing the contamination had ceased), see Dana L. Eismeier, *Continuing Trespass and Nuisance for Toxic Chemicals,* 32 COLO. LAW. 107, 107–110 (2003).

[37] Consent Decree Judgment, *Denver v. United States* (D. Colo. Filed Oct. 29, 1999), (No. 98-1959).

[38] Second Amended and Supplemental Complaint at 9, *City of Rialto v. DOD, et al.* (C.D. Cal. filed July 26, 2004), (No. 04-00079) (citations omitted). TCE, MTBE, and all other contaminants discussed in this article are also hazardous substances and hazardous solid waste within CERCLA and RCRA definitions.

[39] Rialto Amended Complaint at 5, Rialto (No. 04-00079). Counsel for Rialto do not anticipate that the DOD will assert a discretionary defense to tort claims because policies codified in DOD manuals obligated it to perform disposal on site in a specified manner, thus imposing a mandatory duty. Telephone Interview with Chris Carrigan, Miller Starr & Regalia, counsel for City of Rialto (Aug. 13, 2004).

[40] Rialto Amended Complaint at 1, *Rialto* (No. 04-00079).

from some wells in ongoing efforts to mitigate the perchlorate damage. Still, several of the wells remain inoperative, and Rialto has spent over $2 million as a result of perchlorate contamination in the aquifer. Although Rialto reached a settlement with one corporation in December 2002,[41] only one potentially responsible party ("PRP") has expressed willingness to settle, and the suit was ongoing at the time of this writing.[42]

4.1.4 Moses Lake, Washington

On June 19, 2004, the City of Moses Lake filed its initial suit against the United States, the DOD, the USAF, the U.S. Army, and the Corps, alleging that the defendants contaminated drinking water supplies for the City of Moses Lake.[43] Moses Lake amended its complaint in September 2004, adding additional PRPs Boeing and Lockheed Martin as defendants.[44] In October 2004, in response to a request by the United States, the City dismissed and re-filed its complaint in order to take account of the notice requirements under its FTCA claims.[45]

During WWII, the United States chose Moses Lake as the site for Larson Air Force Base ("LAFB"). The DOD assembled, outfitted and maintained hundreds of B-52 bombers, KC-135s, and Titan ICBM's at LAFB during the 1950s and 1960s. In the mid-1960s, the United States shut down LAFB and left Moses Lake. Moses Lake purchased drinking wells drilled by the government when the base was originally constructed and operated those wells for 20 years, thereby supplying a substantial portion of the water for Moses Lake's water customer base of over 15,000 people. However, in the late 1980s, Moses Lake learned that its wellfield was contaminated by TCE – a remnant of 25 years of activity by the United States and its defense contractors. As a result, the wellfield became known as the Moses Lake Wellfield Contamination Superfund Site ("the Site") after the EPA listed it on the NPL in 1992.[46]

TCE levels as high as 210,000 parts per billion ("ppb") have been discovered at the Site, and a plume of TCE over one mile wide and four miles long now extends from LAFB. The plume completely engulfs Moses Lake's wellfield. This contamination

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[41] This PRP loaned Rialto $4 million interest-free as an offset against its future liability. Telephone Interview with Chris Carrigan, Miller Starr & Regalia, counsel for City of Rialto (Aug. 13, 2004).

[42] Phase I discovery regarding liability to commence in July 2005. Amended Case Management Order, *Rialto v. DOD, et al.,* at 3 (E.D. Cal. Aug. 17, 2004), (No. 04-00079).

[43] *See* Complaint for Damages, *City of Moses Lake v. U.S. Dep't of Def.* (E.D. Wn. filed June 18, 2004), (No. 04-0210).

[44] First Amended Complaint, *Moses Lake v. United States, U.S. Dep't of Defense, U.S. Dep't of the Air Force, U.S. Dep't of the Army, U.S. Corps of Engineers, Boeing Co., & Lockheed Martin Corp.* (E.D. Wn. filed Sept. 14, 2004), (No. 04-0210).

[45] *See* Complaint for Damages Declaratory and Injunctive Relief, *City of Moses Lake v. U.S. Dep't of Def.* (E.D. Wn. Filed October 18, 2004), (No. 04-0376).

[46] EPA, *Moses Lake Wellfield Contamination Site Summary, at* http://yosemite.epa.gov/r10/nplpad.nsf/88d393e4946e3c478825631200672c95/89166d899366f0a685256595004d3729?OpenDocument (last updated Nov. 2003).

rendered the entire aquifer from which Moses Lake drew drinking water for its citizens, useless. TCE has been discovered in Moses Lake's drinking water wells at levels in excess of the Maximum Contaminant Level ("MCL") for TCE of five ppb.

Rather than force its citizens to wait for the federal government and its contractors to try and determine who among them was responsible for cleaning up the TCE, the City took the initiative and drilled new wells, constructed a new reservoir, cased its existing wells, and tapped into a new aquifer located beneath the Columbia basalts that underlay much of the region. While this effort has provided Moses Lake with a current supply of clean water, Moses Lake and its ratepayers have been forced to bear the millions of dollars of costs associated with this work. Meanwhile, Moses Lake's demands that the United States and its contractors compensate the City for the damages it has incurred because of TCE contamination have gone unanswered.

In addition to the millions of dollars in damages already suffered by the City, it now faces the prospect of having to undertake the same sort of effort a second time in the event the aquifer from which it currently draws water becomes contaminated. In addition, the basalts do not extend indefinitely, and TCE can flow laterally along and around the basalts.

Moses Lake sought recovery from the United States and its contractors not only for the damages they caused, but also assurance that the City and its citizens will have access to the same clean water they had before LAFB was constructed and the aquifer from which the City draws its water supply was contaminated. The City also sought a declaration that the parties who destroyed the aquifer from which the City drew its drinking water are responsible for their actions, as well as an injunction requiring the defendants to restore a perpetual supply of clean drinking water to Moses Lake.[47]

4.1.5 Pasadena, California

In January 2004, the City of Pasadena, California, filed a $2 million claim against NASA and the U.S. Army Air Corps related to perchlorate contamination of its water wells.[48] Beginning in 1936, the U.S. Army Air Corps tested some of its first rockets at the Jet Propulsion Laboratory ("JPL"). Employing standard practices for the time, corpsmen dumped the chemicals down the drain into pits, where they seeped slowly into the soil. Over the years, the plume of contamination drifted several thousand feet below the Hahamongna Watershed Park toward Altadena, triggering the closure of nine water wells in Pasadena. Pasadena seeks to recoup costs for shutting down the nine wells.[49]

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[47] *See* First Amended Complaint for Damages, Declaratory and Injunctive Relief at 1.2–1.13*, City of Moses Lake v. U.S. Dep't of Def.* (E.D. Wn. filed Sept. 14, 2004), (No. 04-0376).

[48] Telephone interview with Catherine Stites, Bingham McCutcheon, counsel for City of Pasadena (Aug. 16, 2004).

[49] *Id.*

NASA started construction on its first treatment plant to clean groundwater contaminated with chemicals left over from testing rockets at JPL, and pledged to clean up the contamination to drinking water standards. However, questions remain over the extent of the pollution. Until further tests pinpoint the scope of the contamination, NASA is focusing on cleaning up the worst of the mess beneath JPL. Construction on the first of two water treatment plants to be built at the JPL campus kicked off in early February 2004. Plans for a second water treatment plant to clean drinking water in the Pasadena water wells are expected to be finalized in coming months.

Pasadena worked with NASA for seven years, and sent claim letters to both the U.S. Army and NASA, though neither responded.

4.2 Theories of Liability

The cities of Denver, Moses Lake, Rialto, and San Bernadino all asserted tort claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq*., as part of their lawsuits. Although statute governs most modern environmental law, common law torts still play a role in redress of environmental damage. In fact, in many instances, common law theories can provide a more comprehensive basis for cities to assert claims or fashion complete remedies to address their damages. Recent cases show that common law tort theories are not only applicable, but capable of successfully compensating municipalities injured by groundwater contamination.[50] They can enable cities to recover and receive remediation from the party that caused the damage beyond the requirements of statutory regulatory standards. All of these cities also brought federal and state statutory claims.

4.2.1 CERCLA Claims

Every City in the municipal groundwater contamination cases described above brought CERCLA claims. Each City alleged that, as a direct and proximate cause of defendants' releases or threatened releases of hazardous wastes and substances, the City had incurred and continued to incur response costs within the meaning of the statute. The Cities argued that they were entitled to recover all past, present, and future response costs with interest, pursuant to 42 U.S.C. § 9607(a) (under which defendants are strictly, jointly and severally liable) from defendants. In the alternative, should the courts find plaintiffs PRPs, the plaintiffs sought recovery of contribution through equitable allocation under 42 U.S.C. § 9613(f) (this claim appears at risk after the *Aviall* decision).

4.2.2 State Tort Law Claims

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[50] *See, e.g., City of Portland v. Boeing Co.*, 179 F. Supp.2d 1190, 1195 (D. Or. 2001) (holding that, even if plaintiff could not pursue a private action to enforce a regulatory order it may pursue a common law public nuisance claim). As a result of this suit, Portland received $6.2 million from Boeing and Cascade Corporation in November 2003, both of which had caused some of the contamination. Ben Jacklet, *City Comes up with a Plan to Safeguard Well Water*, PORTLAND TRIBUNE (Feb. 3, 2003).

In addition to standard CERCLA claims, every municipal plaintiff also brought state tort law claims; where the defendants are federal, Cities brought these claims by virtue of the FTCA, under which the United States has waived its immunity from suit and may be held liable in tort for the acts and/or omissions of its employees, agencies, and contractors.

4.2.2.1 Nuisance

All Cities either asserted public or private nuisance claims or both. Typically, a plaintiff in a nuisance claim must prove the following five elements: (1) interference with use and enjoyment of land; (2) a possessory interest in the impacted land; (3) that the defendant created the nuisance; (4) substantial harm resulted from the nuisance; and (5) that the defendant meets the state's liability standard (this standard includes conduct determined to be intentional and unreasonable, negligent, reckless, abnormally dangerous, or based on strict liability).[51] Plaintiffs often bring claims in trespass along with the nuisance action, but these claims enjoy a lesser likelihood of success than nuisance claims, as trespass requires an intentional invasion of property.

The Cities frame the damages sought under nuisance differently. Most cities, however, describe the damages sought with a rather high degree of specificity. Past, present, and future damages sought by Rialto, for example, include the following specific expenses and losses:

a) costs of water conservation;

b) loss of free use and enjoyment of property rights (including lost recharge and storage capacity); and

c) loss of proprietary interest in groundwater and all other losses.

Moses Lake seeks the following costs:

d) to determine the extent of the contamination;

e) to protect the wells from further contamination; and

f) other costs that may accrue until nuisance abatement.

Denver sought similarly specific damages, including the following:

g) the loss of present and future economic value of the contaminated property;

h) stigma damages;

i) loss of business opportunity;

[51] Gregory M. Romano, *"Shovels First and Lawyers Later:" A Collision Course for CERCLA Cleanups and Environmental Tort Claims*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 421, 429–30 (Spr. 1997) (citations omitted).

j) economic loss from Denver's continued maintenance of the contaminated property;

k) the loss of use of the contaminated property; and

l) future costs of restoring the contaminated property to a marketable condition that is in compliance with applicable laws.

San Bernadino sought, *inter alia,* reimbursement of response costs, accrued interest, and natural resource damages for resources under the trusteeship of the CDTSC.[52] Future municipal plaintiffs can likely pick and choose from these damage calculations, depending upon their particular circumstance. But as these Cities' varying assessments demonstrate, groundwater contamination encompasses a range of past, present, and future damages, and plaintiffs must consider a broad array of factors when requesting relief based on nuisance claims.

4.2.2.2 Nuisance May Provide a Possible Damage Remedy That Extends Beyond That Offered by Statutory Environmental Law

For a City faced with contamination of its groundwater drinking water sources, nuisance claims can provide a significant benefit in terms of remedies over statutory environmental statutes such as CERCLA or its state-law equivalents.

As noted above, under CERCLA (and derivatively under most state hazardous waste cleanup statutes) the cleanup of a contaminated site is required to meet applicable statutory guidelines – but no more.[53] This remedy is often insufficient for a municipal water purveyor who must still look to a contaminated aquifer as a source of its drinking water. Since the contamination of drinking water sources is almost immediately the subject of press coverage, a remedy that only requires cleanup of drinking water supplies up to, but not beyond, the MCL is rarely hailed as a victory by those who must drink the water.

Under a common law nuisance theory, however, if a plaintiff can show that it was using its property for a particularized use, then the defendant in a nuisance claim takes

[52] Consent Decree, *City of San Bernadino v. United States*; State of California, on behalf of *Dept. of Toxic Substances Control v. United States 2* (C.D. Cal. filed Aug. 11, 2004), (Nos. 96-8867 and 96-5205 (consolidated)).

[53] *Franklin County Convention Facilities Auth. v. Amer. Premier Underwriters, Inc.*, 240 F.3d 534, 544 (6th Cir. 2001) (citing CERCLA, 42 U.S.C. § 9621(d)(2)(A)).

that plaintiff as he finds it. Under this theory, the municipality points to the fact that, prior to the contamination of its drinking water sources by third-parties, it was able to purvey clean water to its customers and then argue that, but for the contamination, its property interest would still be intact. Under this theory of liability, the remedy for such a loss is restoration of the property to the state it was in prior to the contamination, not to a set statutory standard.[54] For groundwater supplies, this usually means either well-head treatment or construction of some other type of treatment plant so that the contaminated aquifer can be used to supply water of the same purity that existed prior to contamination.

Tort theories such as nuisance also justify the imposition of injunctive relief to require the implementation of such remedies, rather than simply the recovery of the costs incurred by the municipality in responding to the contamination.

4.2.2.3 Nuisance/Negligence Per Se

An interesting twist to the nuisance argument that has been asserted in some groundwater contamination cases is the allegation of nuisance or negligence per se. Under this theory of liability, the plaintiff must assert that the defendants' conduct violated some statutory requirement and, therefore, constituted a nuisance per se or was per se negligent.

While some plaintiffs have relied on state or federal Clean Water Act violations or violations of attendant regulations, others (particularly Cities) have relied on violations of their own municipal statutes as a basis for per se liability. For potential plaintiffs who have statutory legislative authority, this may be fruitful ground, as it makes the liability case that much easier to bring. But even for those plaintiffs who lack the capacity to adopt their own clean water ordinances, most state clean water laws provide enough coverage to allege a statutory violation, and the federal law may be relied upon as another basis for *per se* liability.

4.2.2.4 Trespass and Continuing Trespass to Land

All Cities also brought the nuisance companion theory of trespass or continuing trespass in their complaints. While courts historically distinguished trespass from nuisance by differentiating direct and indirect invasions, modern courts increasingly blur

[54] If the injury caused by the nuisance is permanent, the measure of damages is the difference between the fair market value of the property prior to the injury and the fair market value after the injury. *See, e.g., Miller v. Cudahy Co.*, 858 F.2d 1449 (10th Cir. 1988). For temporary injury, the measure of damages is the reasonable cost of repairing the property, including the value of the loss of use of the property or the diminution of the rental value of the property. *See, e.g.*, *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 701 P.2d 518 (1985). Parties may demonstrate the permanency of a nuisance resulting from water pollution through evidence that abatement of the pollution source is impracticable or impossible. *Miller*, 858 F.2d 1449; *Wilson*, 40 Wn. App. 80.

that distinction. Instead, courts require proof of intent under trespass, and "substantial and unreasonable interference with the use and enjoyment of property" under nuisance.[55] Remedies available for trespass and nuisance are similar, and the Cities' damages reflect this reality: Denver, Moses Lake, and Rialto sought the same damages under both theories.

4.2.2.5 Negligence

The final tort claim the Cities asserted was negligence, and they sought damages close to those under nuisance and trespass. Moses Lake sought to recover costs to determine the extent of contamination; to protect wells from further contamination; to compensate for loss of use, enjoyment, value of property; and further damages to be determined at trial. Rialto sought damages similar to those under nuisance, wording the economic and property interest slightly differently to include water conservation programs; diminution in value of property, proprietary, and other interests, including loss of recharge and storage capacity rights and interests; and loss of free use and enjoyment of its property and proprietary interests. Denver sought the exact same damages under negligence and negligence per se theories as under its other tort claims.

4.2.2.6 Treble Damages and Punitive Damages

In addition to remedial damages, tort theories also allow Cities to seek punitive or other exemplary damages based on the contamination of their drinking water supplies. For example, the City of Rialto sought special, treble, and punitive damages under its public nuisance, negligence, and trespass theories.

Whether the Cities brought their claims as contingent fee cases or used hourly fee arrangements (both were used), in order for the Cities to recoup the full amount of their remedies, they had to assert claims for attorney's fees either through punitive or other exemplary damages or else through fee-recovery provisions under state environmental laws. Since attorney's fees are not recoverable under CERCLA, Cities had to use either RCRA or other state law bases for fee recovery.[56]

4.2.2.7 RCRA Claims

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[55] *Bradley v. Amer. Smelting & Refining Co.,* 104 Wn.2d 677, 709 P.2d 782, (1985).

[56] The City of Moses Lake asserted its claim for fees under Washington's Model Toxic Control Act, Wash. Rev. Code Ann. § 70-105D. San Bernadino sought punitive damages and other exemplary damages. Rialto sought recovery of attorney's fees and costs of suit under, *inter alia*, its RCRA and inverse condemnation claims. *See* Second Amended and Supplemental Complaint at 68–70, *City of Rialto v. DOD, et al.* (C.D. Cal. filed July 26, 2004), (No. 04-00079). Denver also sought attorney's fees under its RCRA claim, 42 U.S.C. § 6972(e). Amended Complaint at 19, *Denver v. United States* (D. Colo. Filed Sept. 10, 1998), (No. 98-1959).

All Cities also sought declaratory relief under state or federal law, but some pursued strategies beyond basic statutory and tort hazardous waste cleanup claims. For example, both Denver and Rialto brought claims under RCRA.

RCRA § 7002(a)(1)(B) provides a private right of action against any person whose handling of a solid or hazardous waste contributes or contributed to an imminent and substantial endangerment to human health or the environment. Both Denver and Rialto used this provision to seek injunctive relief and restitution of abatement costs.

RCRA § 7002(a)(1)(B) affords injunctive relief, allows suits to be brought on the basis of purely past activity, and makes attorney's fees available to a substantially prevailing plaintiff under the same rules as in a compliance suit under § 7002(a)(1)(A). This claim also has its limitations, though, in the form of notice requirements.[57] Probably the most significant of these limitations is that a RCRA claim is normally precluded if EPA or state involvement in cleanup predates the RCRA lawsuit.[58] Because the Rialto and Denver sites were not active federal Superfund sites, the RCRA claim was available to those cities.

A citizen suit under RCRA § 7002(a)(1)(A) invokes the full equitable powers of a court. This means that the suit could lead to the adoption of a judicially-supervised plan which brings a disposal facility into compliance with groundwater protection requirements. A citizen suit seeking abatement of groundwater pollution resembles common law nuisance and public nuisance actions, yet avoids a number of common law limitations. And, notwithstanding the fact that RCRA suits are normally precluded where a state or EPA has an active cleanup action, some courts have held that this prohibition is only applicable where the state or EPA is actively prosecuting a lawsuit, i.e., in those instances where an investigation or even a cleanup was underway, but no lawsuit had been filed, a purveyor might still be able to maintain a RCRA claim.[59]

While plaintiffs in common law nuisance actions must allege interference with the use and enjoyment of some property right, RCRA citizen suit plaintiffs bear no such

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[57] *See* RCRA § 7002(b)(1)(A); -7002(c).

[58] An action under RCRA § 7002(a)(1)(B) will be precluded if the EPA or a state (1) is diligently prosecuting its own imminent and substantial endangerment action at the site, (2) is engaged in a removal action under § 104 of CERCLA, or (3) has incurred costs to initiate a Remedial Investigation and Feasibility Study (RI/FS) and is diligently proceeding with a remedial action under CERCLA. Suit will also be precluded if the EPA has obtained a court order or issued an administrative order under § 106 of CERCLA or § 7003 of RCRA, and the party subject to the order is diligently conducting a removal action, RI/FS, or proceeding with a remedial action). However, preclusion does not extend beyond the scope and duration of the order itself. Thus, an administrative order limited to cleanup of the surface of a site would not preclude an action alleging that groundwater contamination at the same site presents an imminent and substantial endangerment. RCRA § 7002(b)(2)(B)(iv), 42 U.S.C. § 6972(b)(2)(B)(iv) (1982 & Supp. IV 1986).

[59] See, e.g., *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498 (ED Wis. 1992). In addition, there are reported decisions where a private suit was allowed even where EPA has filed suit or obtained an order. E.g., *Hoosier Environmental Council v. Northern Indiana Public Service Company*, 2004 U.S. Dist. LEXIS 10805 (N.D. Ind. May 21, 2004).

burden.[60] A RCRA citizen suit under § 7002(a)(1)(A) can be brought by any person who can establish standing. Thus, persons whose health, economic, recreational, or aesthetic interests have been adversely affected may have standing, even though they do not own land which has been polluted. Still, limitations under RCRA § 7002(a)(1)(A) claims arise in terms of damages: RCRA plaintiffs are not entitled to the damages that they might be in a nuisance action.

4.2.2.8 Inverse Condemnation

In *Rialto v. Department of Defense,* Rialto included the County of San Bernadino as one of many defendants.[62] The county owns and operates the unlined Mid-Valley Sanitary Landfill, which Rialto alleges leaked perchlorate which caused the City to suffer damage to its groundwater resources and its investment-backed expectations. Where a municipal plaintiff includes another government entity as a defendant, a takings claim like that in Rialto may prove a useful starting point for framing liability and damages theories.

4.2.2.9 Product Liability

Plaintiffs in other groundwater contamination cases that have been brought against oil companies and chemical companies (including agri-chemical companies) have found success pursuing a products liability theory against the manufacturers of chemicals or petroleum derivatives that have shown up as contaminants in groundwater. Under this theory, the plaintiffs have asserted liability against the upstream producers of the chemicals or the manufacturers of petroleum products, whether or not those defendants actually were present or used the chemicals themselves. The product liability theory of liability asserts that these manufacturers (1) either knew or should have known that their products were inherently dangerous; (2) that those products were likely to get into the ground and cause contamination of groundwater; and (3) that they failed to warn or give adequate instructions or precautions to the end users of those products (who are almost always also named as defendants in these cases).

The advantages of the products liability theories are that the manufacturers are usually deep-pocket defendants who are able to pay significant damage awards or undertake costly remediation efforts as part of the settlement of these cases. Another advantage to these theories of liability is that it is not necessary to show privity between the plaintiff and the defendant in order to establish liability.

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[60] Shilton, *Groundwater Pollution Litigation*, 3 J. Envtl. L. & Litig. at 120.

[62] *See* Second Amended and Supplemental Complaint at 1–2, *City of Rialto v. DOD, et al.* (C.D. Cal. filed July 26, 2004), (No. 04-00079) (listing defendants).

The disadvantage of this theory is that it is directed at upstream producers of chemical products or other hazardous substances. As a result, a plaintiff asserting this theory will face causation defenses, both of attenuated causation and of intervening causation, because the defendant who produced the product is usually not the one who used or applied the product.

4.3 Defenses

4.3.1 State Tort Claim Preclusion Under CERCLA

After the Court dismissed Rialto's state tort claims as preempted by CERCLA, Rialto amended its complaint, clarifying that the remedies it sought under state law were not available under CERCLA and do not conflict or interfere with CERCLA's objectives. Still, defendants sought dismissal of the state tort claims on the following grounds: (1) That the "law of the case" precludes Rialto from seeking the same tort relief it sought in its original complaint. The Court rejected the first argument, pointing to Rialto's added limiting language and explaining that Rialto did not seek the same relief. In addition, no "law of the case" precluded Rialto's state tort claims; and (2) that conflict preemption prevents Rialto from seeking CERCLA-type damages under state tort claims. The court accepted this argument, holding that, to the extent that CERCLA response and remediation costs encompassed the damages that Rialto sought, the City's tort claims were barred. The court limited its grant of defendants' motion to dismiss and strike only to those damages covered by both state tort and federal law.

4.3.2 Prohibition on Recovery of Prospective Damages Under Continuing Trespass and Nuisance Theories

The *Rialto* Court granted defendants' motion to strike Rialto's requests for prospective relief under continuing nuisance and trespass claims because California law prohibits such recovery under those theories. Rialto argued that, due to the unclear nature of the abatability of perchlorate, they should be allowed to seek prospective damages. The court characterized this argument as seeking an exception from the general prohibition of recovery because Rialto may suffer post-abatement damages. Rialto further argued that they should be allowed to recover damages incurred between initiation and conclusion of the lawsuit. The court rejected both arguments and granted the defendants' motion to strike those parts of Rialto's amended complaint requesting prospective damages under continuing trespass and nuisance theories.

4.3.3 Defenses Available Under State and Federal Tort Claims Acts

4.3.3.1 Notice and Procedural Requirements

Under the FTCA, a tort against the United States or state is barred unless it is presented in writing for a "sum certain" to the appropriate "agency within two years after such claim accrues or unless the action is begun within six months after the date of

mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."[63]

Once a claim is filed, defendants have six months from the date of filing to investigate and reach an administrative settlement of the claim.[64] If the government is investigating and/or negotiating in good faith, the administrative time period will be automatically extended until the government takes final administrative action on the claim.[65] If, after the initial six month administrative time period has expired, the government has not taken final administrative action, and the time period has not been extended, or if the government takes final administrative action, then plaintiffs have six months to file a lawsuit in the federal district court.[66]

4.3.3.2 Discretionary Function Defenses to FTCA Claims

The FTCA does not apply to any claim based upon the performance or exercise, or the failure to perform or exercise, a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved has been abused.[67] The government will frequently attempt to rely on this defense by arguing that the choice as to methods of disposal of hazardous substances was a discretionary decision.

Plaintiffs can prepare for this defense by establishing that a mandatory duty existed and bound defendants' personnel. In the case of groundwater contamination allegedly caused by the U.S. military, for example, FTCA plaintiffs can undermine a potential discretionary function defense by obtaining operational manuals in use at the time of the contamination obligating military personnel to dispose of contaminants according to policies codified in those manuals, or consistent with regulations adopted by the manuals.

4.4 Miscellaneous Affirmative Defenses

In the *San Bernadino* and *CDTSC* cases, the U.S. Department of Justice answered the City's and state's complaints by denying most allegations, claiming the actions were barred by applicable statutes of limitations, and that the releases alleged were caused by acts of God or acts or omissions of an independent third party. More specific statutory defenses did not arise in these cases until briefing on motions for summary judgment and/or settlement negotiations commenced.

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[63] 28 U.S.C. § 2401(a); § 2675(a).

[64] 28 C.F.R. § 14.2 (2000).

[65] *Id*.

[66] 28 C.F.R. § 14.9.

[67] 28 U.S.C. § 2680(a).

5. USING CERCLA §120(f) TO ALLOW LOCAL PUBLIC OFFICIALS TO PARTICIPATE IN THE DEVELOPMENT AND SELECTION OF REMEDIES AT FEDERAL FACILITIES

At the end of 2005, Judge Alan McDonald issued a ruling in the Moses Lake case that may have implications that extend well beyond that case. On December 30, 2005, Judge McDonald issued a preliminary injunction barring the EPA and the Corps from going forward with publication of a Proposed Plan for the Moses Lake Wellfield Contamination Superfund Site ("Moses Lake Site") until the City of Moses Lake received all relevant data and was allowed to participate in the development and selection of the remedy at the Moses Lake Site. In entering the injunction, Judge McDonald rejected the United States' contention that the City's participation was barred under CERCLA section 113(h), and also held that EPA's action at the Moses Lake Site constituted a remedial action, rather than a removal action.

EPA and the Corps have been investigating the Moses Lake Site since 1988, and were prepared to issue the Proposed Plan outlining a cleanup remedy for the Site in late November 2005. When the City learned of the pending publication of the Proposed Plan, it objected to publication until it had an opportunity to review data supporting the Plan and provide input on the development and selection of the remedy based on CERCLA section 120(f). After the City formally requested to participate in the process, EPA responded that the City would have an opportunity to comment on the Proposed Plan, but only after its publication.

In response to EPA's position, the City sought leave to amend its existing complaint to assert a citizen's suit under CERCLA section 159 (42 U.S.C. § 9659), maintaining that under CERCLA section 120(f) (42 U.S.C. § 9620(f)), local public officials are entitled to receive data and reports on a Superfund site as they become available, as well as to participate in the development and selection of the remedy at cleanups conducted at the Site. The Ninth Circuit Court of Appeals had previously held that the language of section 120 indicated that Congress intended to create differing procedures at federal facilities. *See Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*, 189 F.3d 828 (9th Cir. 1999).[68]

In its motion for a preliminary injunction, the City of Moses Lake argued that it was entitled to receive the data and studies supporting the remedy at the Moses Lake Site, and also to participate in the development and selection of the remedy. In response, the United States contended that the City's request was barred because: (1) CERCLA Section 113(h) precludes any challenge to the remedy at a Superfund site until it has been completed; and (2) Section 120(f) applies only to "remedial" actions and EPA and the Corps' efforts at the Moses Lake Site constituted a "removal" action.

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[68] The Fort Ord opinion can be viewed at: http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/9th/9816160.html

The court rejected the United States' reliance on section 113(h) in light of the Ninth Circuit's holding in Fort Ord that § 113(h) would not bar claims made pursuant to § 120, if they arose at a current or former federal facility. The Court entered an injunction which required EPA to deliver its proposed plan to the City for review. Subsequently, the City has filed a response outlining a proposal for response, and the United States response is to be filed this week.

The implications of this decision could range well beyond the Moses Lake decision and allow local municipalities to petition for a seat at the table in order to "participate in the planning and selection of the remedial action" at federal facilities. The full implications of this decision on other federal facilities around the country remain to be seen.

6. THE FUTURE OF GROUNDWATER CLEANUP SUITS BROUGHT BY MUNICIPAL WATER PURVEYORS.

In pursuing new theories, plaintiffs must make strategic decisions at various stages of litigation that have ramifications that will vary with the facts of each case. For example, plaintiffs must decide whether to include all potentially responsible parties; whether to use state tort reform laws to facilitate early settlement; when to actually file a lawsuit, particularly in relation to the status of the Remedial Investigation and Feasibility Study at the site; when to present the liability or damages case; whether water rights are relevant; and how to seek attorney's fees and exemplary damages.

Such decisions illustrate the complexity of litigation brought under the FTCA. In addition, recent Supreme Court precedent interpreting federal hazardous waste law in a particularly defendant-friendly manner necessitates creative lawyering on the part of municipalities seeking clean water in perpetuity for their constituents. Tort claims brought under the FTCA are one avenue available to seek this remedy, and current litigation may help provide a roadmap for future plaintiffs. These strategies will hopefully also serve to hold DOD responsible for severe and widespread impacts resulting from decades of improper disposal of toxic contaminants – a responsibility that the federal government has enabled DOD to evade for much too long.

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Washington.
CITY OF MOSES LAKE, a Washington municipal corporation, Plaintiff,
v.
THE UNITED STATES OF AMERICA, et al., Defendants.
No. CV-04-0376-AAM.

Dec. 30, 2005.

Jennifer E. Merrick, Steven Gary Jones, Deborah K. Espinosa, Marten Law Group PLLC, Seattle, WA, for Plaintiff.

Christina Falk, Mary Anne Zivnuska, Quynh Bain, U.S. Department of Justice, Washington, DC, Michael James Zevenbergen, U.S. Attorney's Office, Eric S. Merrifield, Mark William Schneider, Perkins Coie, Seattle, WA, Frank A. Wilson, William Herbert Beatty, U.S. Attorney's Office, Spokane, WA, Alan N. Bick, Christeon J. Costanzo, Robert W. Loewen, Gibson Dunn & Crutcher LLP, Sarah M. Schlosser, Irvine, CA, J. Patrick Aylward, Jeffers Danielson Sonn & Aylward PS, Wenatchee, WA, for Defendants.

ORDER GRANTING MOTIONS TO AMEND COMPLAINT AND FOR PRELIMINARY INJUNCTION

MCDONALD, Senior J.

***1** BEFORE THE COURT are plaintiff's Motion To Amend Complaint (Ct.Rec.141) and Motion For Preliminary Injunction (Ct.Rec.150). These motions were heard with oral argument on December 22, 2005. Steven G. Jones, Esq., argued on behalf of plaintiff City of Moses Lake ("Moses Lake"), Mary Anne Zivnuska, Esq., and Michael J. Zevenbergen, Esq., argued on behalf of the United States.

I. BACKGROUND

Moses Lake brought this action against Lockheed Martin Corporation, Boeing Company, and the United States of America, and various agencies of the United States of America (Department of Defense, Department of the Air Force, Department of the Army, and Army Corps of Engineers), seeking damages, declaratory relief, and injunctive relief for the contamination of certain wells it obtained from the United States when the former Larson Air Force Base (LAFB) was sold to Moses Lake. Moses Lake asserts claims against all of the defendants under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), against Boeing and Lockheed under Washington's Model Toxics Control Act (MTCA), and against the United States defendants under the Federal Tort Claims Act (FTCA).

Moses Lake now seeks to amend its complaint to add a claim under CERCLA against the United States Army Corps of Engineers (USACE) and the United States Environmental Protection Agency (EPA) for violation of 42 U.S.C. § 9620 (§ 120). Moses Lake proposes to bring this claim pursuant to the citizen suit provisions of CERCLA, 42 U.S .C. § 9659(a)(1) and (2). [FN1] In addition, based on that proposed claim, Moses Lake seeks a preliminary injunction enjoining the USACE and EPA "from issuing any Proposed Plan or other document identifying or selecting a remedial action at the [Moses Lake Wellfield Contamination] Site until such time as they have complied with the provisions of 42 U.S.C. § 9620(f) by providing the City with all information required under that statute, and until they have allowed the City to participate in the planning and selection of the remedy at the Site."

> FN1. Moses Lake also seeks to amend its complaint to clarify that its CERCLA claim against defendant Boeing Company includes an allegation of liability based on Boeing's current ownership of a facility at the former LAFB. Boeing has consented to this proposed amendment.

II. DISCUSSION

A. Preliminary Injunction Standard

In order to obtain a preliminary injunction, a moving party must demonstrate either (1) a probability of success on the merits and the possibility of irreparable injury or (2) serious legal questions are raised and the balance of hardships tips sharply in the moving party's favor. *Roe v. Anderson,* 134 F.3d 1400, 1401-02 (9th Cir.1998). These standards are not inconsistent, but represent a single continuum of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success must be shown. *State of Alaska v. Native Village of Venetie,* 856 F.2d 1384, 1389 (9th Cir.1988).

"Serious questions" are substantial, difficult and

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doubtful so as to make them a fair ground for litigation. "Serious questions" need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits. *Gilder v. PGA Tour, Inc.,* 936 F.2d 417, 422 (9th Cir.1991) (citations omitted).

***2** Where the public interest is involved, the court must examine whether the public interest favors the party moving for an injunction. *Sammartano v. First Judicial District Court,* 303 F.3d 959, 965 (9th Cir.2002). While this inquiry is sometimes subsumed into the balancing of hardships, it is better seen as an element that deserves separate attention in cases where the public interest may be affected. *Id.* at 974.

B. Jurisdictional Bar

42 U.S.C. § 9620(f) (§ 120(f)) provides:

> The Administrator [of the EPA] and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 9621 of this title.

In a letter dated September 16, 2005, counsel for Moses Lake asked that, pursuant to § 9620(f), the USACE provide Moses Lake with certain specific items (i.e., the draft Soils Feasibility Study). (Ex. 6 to Jones Declaration In Support of Motion To Amend Complaint, Ct. Rec. 144). The letter also asked that:

> Consistent with the Corps' statutory duties, please notify the City of all upcoming meetings with federal agencies in which the Corps will be discussing the planning and selection of the remedy for the Site. To date, the City has not been invited to] participate in any of the Corps' meetings with the EPA, although we understand from your discovery responses that such meetings have occurred regularly, dating back to at least 1990. We expect the City to be extended an invitation to future Corps' meetings with EPA regarding remedy selection.

Id. [FN2]

FN2. Counsel for Moses Lake previously sent a letter to counsel for the USACE on August 24, 2005, and followed up with an e-mail on September 13, complaining about violation of § 9620(f) rights. (Exs. 3 and 4 to Jones Declaration in Support of Motion to Amend Complaint, Ct. Rec. 144).

In a letter dated September 26, 2005, counsel for the USACE responded as follows:

> We are working with EPA and there will be time for notice and comment. To date the City has been provided numerous opportunities to participate in public meetings and to provide comments on documents, as well as to review and comment upon anything in the Administrative Record for the NPL Site response actions. The City will continue to be provided an opportunity to participate in the remedy selection process by participating in public meetings and offering comments on documents concerning response actions. Please note the public repository is updated and you should periodically check it for new information.

(Ex. 7 to Jones Declaration in Support of Motion to Amend Complaint, Ct. Rec. 144).

This response was not to Moses Lake's satisfaction and so in a letter dated September 29, 2005, Moses Lake notified the United States that it intended to file a civil action against the USACE and the EPA under 42 U.S.C. § 9659(a) "for failure to perform their mandatory duties and comply with certain statutory requirements, as set forth in 42 U.S.C. § 9620(f)." The letter advised that pursuant to 42 U.S.C. § 9659(d), the City would file suit within 60 days after the government's receipt of the letter. (Ex. 8 to Jones Declaration in Support of Motion to Amend Complaint, Ct. Rec. 144). On or about the last full week of November 2005, counsel for Moses Lake found out through a third-party (counsel for the State of Washington), that EPA intended to issue its Draft Proposed Plan on Monday, November 28, exactly 60 days after the September 29 notice of suit. Upon learning this, Moses Lake promptly filed its motions to amend complaint and for preliminary injunction.

***3** The United States contends that Moses Lake's proposed citizen suit alleging a claim under § 9620(f) is jurisdictionally barred by another provision of CERCLA, 42 U.S.C. § 9613(h) (§ 113(h)), which states in relevant part:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (related to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, [with certain exceptions not applicable here].

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§ 9613(h) was passed in order to "protect[ ] the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort." *McClellan Ecological Seepage Situation v. Perry,* 47 F.3d 325, 329 (9th Cir.1995). (Emphasis in original). It does not, however, preclude all lawsuits, only those that are "directly related to the goals of the cleanup itself." *Id.* at 330. For example, a lawsuit brought to enforce minimum wage requirements would be insufficiently related to the goals of the cleanup to qualify as a "challenge" to the cleanup and therefore, would not implicate § 9613(h). *Id.*

Relying on *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency,* 189 F.3d 828 (9th Cir.1999), Moses Lake contends the cleanup at the Moses Lake Wellfield Contamination Site is a § 120 (§ 9620) cleanup, as opposed to a § 104 (§ 9604) cleanup, and therefore, not subject to the jurisdictional bar of § 113(h)(§ 9613(h)). In *Fort Ord,* there was no dispute that the cleanup of the military installation at Fort Ord was pursuant to § 120 and that it was a "remedial action." The Ninth Circuit Court of Appeals found that as such, the jurisdictional bar of § 113(h) did not apply. *Id.* at 834. The court's reasoning was as follows:

> If § 120 creates a grant of authority separate from § 104, then the plain language of § 113(h) would exempt § 120 cleanups from its jurisdictional bar. Determining which provision governs a particular cleanup requires a close look at the different types of CERCLA cleanups and at the specific grants of authority in § 120. CERCLA distinguishes between two types of cleanups: removal actions and remedial actions. *See* 42 U.S.C. § 9601(23) and (24). In short, removal actions are temporary measures taken to protect against the threat of an immediate release of hazardous substances into the environment, whereas remedial actions are intended as permanent solutions. Under § 120(e)(2), the Administrator of the EPA is granted authority to conduct remedial actions on federal property. *See* 42 U.S.C. § 9620(e)(2). There is no analogous authority under § 120 for the commencement of removal actions. Thus, removal actions on federal property must fall under the general provisions of § 104. *See* 42 U.S.C. § 9604(a).
>
> ***4** The text of § 113(h), then, would preclude challenges to a CERCLA *removal* action on federal property, because such actions are conducted under § 104's grant of authority. But § 113(h) would not preclude challenges to a CERCLA *remedial* action because such actions are conducted under § 120's grant of authority. Whether the legislators who voted for § 113(h) subjectively intended this distinction is unclear to us.... But we are not concerned with the wisdom of Congress' policy choice, and we lack the luxury to entertain the subjective intentions of various legislators. Our job is to effectuate Congressional intent as expressed in the statutory text. Thus, despite any misgivings we may have, we adopt this distinction between removal and remedial actions at federal facilities because the statutory language seems to require it.

Id. at 833-34. (Emphasis in original).

The United States contends *Fort Ord* is distinguishable from the case at bar because: (1) the Moses Lake Wellfield Contamination Site is not a "federal facility;" and (2) EPA's Draft Proposed Plan is a "removal" action under § 104, instead of a "remedial action" under § 120.

The Moses Lake Wellfield Contamination Site is not currently owned an/or operated by the United States, but part of it was used at one time as a federal facility (Larson Air Force Base) and hence, the United States Department of Defense (DOD) has been named by EPA as a "potentially responsible party" (PRP). Beyond merely pointing out that *Fort Ord* involved a facility currently owned and/or operated by the United States, the United States defendants in the case at bar do not explain why that distinction is significant. Indeed, in *Shea Homes Limited Partnership v. United States of America,* 397 F.Supp.2d 1194, 2005 WL 3020123 (N.D.Cal. Nov.10, 2005), the district court apparently did not consider it significant.

Shea Homes Limited Partnership purchased a 10 acre parcel of property which was previously part of the Hamilton Air Force Base prior to its closure in 1974. Shea subsequently acquired an adjoining 18 acre parcel. The combined 28 acre property adjoined a part of the former air force base which used to be the primary repository for garbage generated at the base, known as Landfill (LF) 26. Shea developed the 28 acres and transferred ownership of some or all of the property to third parties. It contended, however, that the United States failed to meet its obligations to address the contamination at LF 26, causing Shea to suffer damages. Since 1986, the USACE had been engaged in efforts to investigate, remedy, and monitor the waste in LF 26 pursuant to the Defense Environmental Restoration Program-Formerly Used Defense Sites ("DERP-FUDS"). Shea did not challenge the remedy selected by the USACE, but asserted the Corps has failed to properly and timely implement its remedy and to satisfactorily abate the contamination.

A threshold issue was whether the CERCLA cleanup

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was proceeding pursuant to § 104 or § 120. The district court stated: "Section 120 contains provisions applicable to clean ups on federal facilities, such as the former Hamilton Air Force Base." *Id.* at *6. (Emphasis added). Nevertheless, the district court concluded this was not a § 120 clean up:

> ***5** Importantly, it was undisputed in *Fort Ord* that the clean up at issue was a remedial action being conducted by EPA pursuant to the grant of authority created by § 120. [Citation omitted]. The site at Fort Ord was placed by the EPA on its National Priorities List and the clean up was being conducted pursuant to EPA's delegated authority through an interagency agreement between the EPA, the Army, and California state agencies. [Citation omitted]. Indeed, the EPA administrator has been delegated much of the authority for administering CERCLA. [Citation omitted].
>
> In this case, however, the site at issue is not included on the National Priorities List and the EPA is not involved. As a result, authority to undertake the clean up has been delegated to the Secretary of Defense [pursuant to Section 104 of CERCLA].
>
> Thus the rationale underlying the holding in *Fort Ord* the creation of a separate authority in § 120 for the Administrator to conduct remedial actions at federal facilitiesis simply not applicable here ..... [T]he response actions in this case were authorized by § 104 and are thus governed by § 113(h).

Id. at *7 and *8.

In the case at bar, the USACE began investigating contamination at the former LAFB in 1987 pursuant to the Defense Environmental Restoration Program (DERP) because LAFB is a formerly used defense site (FUDS). The Department of Defense is required to investigate and remedy contamination at FUDS sites under 10 U.S.C. § 2701. Pursuant to that statute, cleanup activities are to be "carried out subject to, and in a manner consistent with, section 120 (relating to Federal facilities) of CERCLA (42 U.S.C. § 9620)." 10 U.S.C. § 2701(a)(2). In October 1992, the EPA placed the former LAFB on the National Priorities List (NPL). And in 1999, the Department of the Army entered into an interagency agreement (IAG) with the EPA concerning the preparation and performance of the RI/FS (Remedial Investigation/Feasibility Study) for the Moses Lake Wellfield Contamination Site. The IAG specifically states that the EPA and the Army enter into "this Agreement pursuant to their respective authorities contained in Sections 101, 104, 107, 120 and 122" of CERCLA. (Ex. 10 to Jones Declaration in Support of Motion for Preliminary Injunction, Ct. Rec. 152). (Emphasis added).

While there are some clear factual similarities between *Fort Ord* and the case at bar, and while there is a reference to § 120 in the IAG, the critical issue here is whether EPA's Draft Proposed Plan constitutes a "removal" action, or a "remedial action." [FN3] If it is a "removal" action, it has to be pursuant to § 104 as explained by *Fort Ord,* and therefore, the jurisdictional bar of § 113(h) applies. If, however, it is a "remedial action," it is pursuant to § 120 and § 113(h) does not apply. A proposed plan was not at issue in *Fort Ord,* and it appears no case has ever dealt with the precise issue of whether a proposed plan is a "removal" action or a "remedial action" under CERCLA.

FN3. Whether a response action is a "removal" action or a "remedial action" is a question of law for the court. *Carson Harbor Village, Ltd. v. Unocal Corporation,* 287 F.Supp.2d 1118, 1157 (C.D.Cal.2003).

***6** "Remedial action" is defined in 42 U.S.C. § 9601(24):

> The terms "remedy" or "remedial action" means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

"Removal" is defined in 42 U.S.C. § 9601(23) as:

> The terms "remove" or "removal" means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other

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actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, [and] temporary evacuation and housing of threatened individuals not otherwise provided for....

In *United States v. W.R. Grace & Co.,* 429 F.3d 1224, 2005 WL 3216827 at *2 and *3 (9th Cir. Dec.1, 2005), the Ninth Circuit Court of Appeals was "unable to discern Congress's intent through the normal tools of statutory interpretation" and so it declared the meanings of "removal" and "remedial action" under CERCLA to be "inescapably vague." *Id.* at *14. The court observed that "[t]he tangled language of CERCLA hardly lends itself to clearcut distinctions between the two types of actions." *Id.* at *6. *Grace* was a CERCLA cost recovery action by the United States against the operator/owner of an asbestos mine. The court held that EPA's characterization of a cleanup as a "removal" action was supported by the administrative record and withstood scrutiny under the modified level of deference afforded by the Supreme Court's decision in *United States v. Mead Corp.,* 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). *Id.* at *10. According to the court:

***7** The administrative posture of CERCLA presents two types of agency interpretations. One is the National Contingency Plan [NCP] which carries the force of law. The second relates to informal agency interpretations, which at a minimum receive respect, and depending on the interplay of *Mead* and *Brand X,* [FN4] may even deserve *Chevron* [FN5] deference. Whichever of these applies, we reach the same result: We hold that the EPA has rationally construed CERCLA and that construction deserves our respect. [Citation omitted]. As interpreted by the EPA, the removal/remedial distinction boils down to whether the exigencies of the situation were such that the EPA did not have time to undertake the procedural steps required for a remedial action, and, in responding to a time-sensitive threat, the EPA sought to minimize and stabilize imminent harms to human health and the environment. The EPA did so here.

FN4. *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* --- U.S. ----, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

FN5. *Chevron U.S.A. Inc. v. National Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Id. (Emphasis added).

The one consistent thread in the decisions dealing with whether an action is "remedial" or "removal" in nature is that "removal actions generally are immediate or interim responses, and remedial actions generally are permanent responses." *California v. Neville,* 358 F.3d 661, 667 (9th Cir.2004), quoting *Geraghty & Miller, Inc. v. Conoco, Inc.,* 234 F.3d 917, 926 (5th Cir.2000). *See also Carson Harbor Village, Ltd. v. Unocal Corporation,* 287 F.Supp.2d 1118, 1158 (C.D.Cal.2003) (property owner's cleanup of tar-like and slag materials was "remedial action" because there was no evidence that the materials posed the type of threat to human health and welfare that required immediate action); *Advanced Micro Devices, Inc. v. National Semiconductor Corp.,* 38 F.Supp.2d 802, 810 (N.D.Cal.1999)(removal actions are "short-term action[s] taken to halt the immediate risks posed by hazardous wastes"); *Channel Master Satellite Systems, Inc. v. JFD,* 748 F.Supp. 373, 385 (E.D.N.C.1990) ("The courts have consistently found that the removal category was to be used in that limited set of circumstances involving a need for rapid action, while non-urgent situations are to be addressed as remedial actions").

Citing *Neville,* the United States asserts the proposed plan is part of the " 'removal' since it involves continuation of the process begun with the RI/FS (Remedial Investigation/Feasibility Study), of identifying and selecting the permanent remedy." "Simply put," says the United States, "the proposed plan is not the permanent remedy; it is an interim step in the process of defining the permanent remedy." As such, the United States contends that a proposed plan could never be anything other than a "removal" action because it is not "consistent with permanent remedy taken." It is true that in *Neville,* the Ninth Circuit Court of Appeals declared that for an action to be " 'consistent with permanent remedy,' a permanent remedy must already have been adopted" and that "[n]either party can know for sure whether a given action is consistent with permanent remedy until that permanent remedy is determined." 358 F.3d at 667. In *Neville,* "as in most cases, the permanent remedy was selected when the final RAP [remedial action plan] was approved." *Id.* Accordingly, the court of appeals held that "initiation of physical on-site construction of the remedial action can only occur after the remedial action" is adopted. *Id.* at 671.

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***8** The RI/FS is what is used to prepare the proposed plan. The proposed plan is the culmination of the RI/FS. The purpose of the remedial investigation (RI) is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives. 40 C.F.R. § 300.430(d). The primary objective of the feasibility study (FS) is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. 40 C.F.R. § 300.430(e). Once a remedy is selected, the EPA issues a ROD (Record of Decision) notifying the public of the selection. Case law recognizes that an RI/FS may constitute either "removal" or "remedial action." *Razore v. Tulalip Tribes of Washington,* 66 F.3d 236 (9th Cir.1995). In *Razore,* the Ninth Circuit Court of Appeals specifically held that an RI/FS satisfied the statutory definition of a "removal" action under 42 U.S.C. § 9601(23), in particular "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." *Id.* at 239, citing *South Macomb Disposal Auth. v. EPA,* 681 F.Supp. 1244, 1246 (E.D.Mich.1998) ("[i]t is clear ... that a RI/FS taken by the EPA is a 'removal action' within the meaning of the statute"). In *Razore,* however, the court did not expressly or impliedly preclude an RI/FS from being a "remedial action" in an appropriate circumstance (in addition to being a "removal" action, or to the exclusion of a "removal" action). *See also Acme Printing Ink Co. v. Menard,* 812 F.Supp. 1498, 1509 (E.D.Wis.1992)("RI/FS in this action constitutes remedial as well as removal activity"). The EPA's NCP (National Contingency Plan) regulations also appear to recognize as much. 40 C.F.R. § 300.425(b)(1) refers to "removal" actions as "including remedial planning activities, RI/FSs, and other actions taken pursuant to CERCLA section 104(b)." Another regulation, 40 C.F.R. § 300.505(d)(2)(iii), includes RI/FSs among "remedial phase activities."

The issue in *Neville* was not whether an RI/FS or a proposed plan constitutes a "removal" or a "remedial action." Moreover, in *Grace,* the court of appeals limited its discussion of *Neville* to a footnote in which it stated:

> Although we have touched on the interplay between removal and remedial actions under CERCLA in prior decisions, the specific contexts in which those cases arose render them of limited use in our decision here. *See California v. Neville Chem. Co.,* 358 F.3d 661, 667, 670 (9th Cir.2004)(concluding that for the purposes of the "onset of the limitations period for recovery of remedial action costs under CERCLA, no action can be "remedial" until adoption of a final action plan....

(Pg. *24 at fn. 17). And while in *Grace,* the EPA had specifically characterized its action as "removal" in nature, there is nothing in the case at bar to indicate that at any point, prior to the filing of Moses Lake's motions to amend and for preliminary injunction, EPA specifically characterized the cleanup at the Moses Lake site to be either "removal" or "remedial," or specifically designated a point at which the cleanup evolved from "removal" to "remedial." As pointed out by Moses Lake, the EPA and the Corps have referred to "remedial action" in several documents spanning a 13 year period. (Exs. 1-3 to Jones Declaration in Support of Reply Memorandum on Motion for Preliminary Injunction, Ct. Rec. 173). They have done so in a generic sense, however. These documents do not constitute an admission, nor do they allow for a definite conclusion, that this cleanup is now in its "remedial" phase as opposed to a "removal" phase, and that the proposed plan is a "remedial action" as opposed to a "removal" action. There is no question that "removal" actions are part of an overall remediation of a site.

***9** Nevertheless, the court is ultimately persuaded that the proposed plan is a "remedial action." For approximately the past 18 years, the United States has concerned itself with cleaning up the Moses Lake site. It was over 13 years ago that the site was placed on the NPL by the EPA. The TCE (trichloroethylene) contamination discovered in 1988 in certain of the city's wells was abated by approximately 1992, remedying that immediate problem. Moses Lake asserts there is now a threat of contamination to its new wells, as revealed by sampling results from late 2004 and early 2005, but the EPA has not characterized this as an "immediate" threat necessitating "immediate" action by way of the proposed plan. The proposed plan does not represent a "short-term action taken to halt [an] immediate risk." The EPA makes no claim the proposed plan is "rapid action" intended to address an urgent situation. [FN6] Indeed, it would be difficult for EPA to make such a claim considering the RI/FS process began in March 1999 pursuant to the IAG entered into by EPA and the USACE. (Reid Declaration, Ct. Rec. 161 at Paragraph 4, p. 2). The RI lasted until 2003, and the FS from August 2004 to February 2005. (Martin Declaration, Ct. Rec. 162 at Paragraph 4, p. 3). Obviously, the proposed plan has been a work in progress for a considerable period of time.

FN6. This should be compared with USACE's July 1999 delivery of bottled water to the Skyline Community, described

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as a "removal" action to reduce the risk of human exposure to TCE contaminated water. (Roper Declaration, Ct. Rec. 165 at Paragraph 5, p. 4).

Certainly, the proposed plan is, by definition, "interim" and "temporary," pending selection of a permanent remedy through EPA's issuance of a ROD. It is necessary, however, to view the proposed plan in a broader context. In this particular case, the proposed plan is part and parcel of the selection of a permanent remedy for the Moses Lake Wellfield Contamination Site. The proposed plan is a pending "remedial action" intended to effect a comprehensive resolution of the TCE contamination problem. *Grace* at *20. The proposed plan is in response to a "non-urgent" threat which is not "time-sensitive," at least as perceived by EPA. Unlike the situation in *Grace,* the proposed plan indicates that EPA did have time to undertake the procedural steps required for a remedial action. The proposed plan is one of those procedural steps. It is not intended to "minimize and stabilize imminent harms to human health and the environment."

Since the proposed plan is not a § 104 "removal" action, but a § 120 "remedial action," Moses Lake is not jurisdictionally barred from seeking relief.

C. Non-Discretionary Duty

The United States contends § 9659(a)(1) (Section 310(a)(1)), [FN7] authorizes only actions to enforce substantive provisions of CERCLA and does not authorize suits against the head of an administrative agency based on administration of CERCLA. Since § 9620(f) pertains to "administration of CERCLA," the United States asserts that a citizen suit under § 9659(a)(1) is not possible. Instead, the United States says the only possible avenue of relief is the citizen suit provision in § 9659(a)(2), referring to non-discretionary duties. [FN8] Citing the rationale from the United States Supreme Court's decision in *Bennett v. Spear,* 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997), a case involving citizen suit provisions under the Endangered Species Act ("ESA"), similar to § 9659(a)(1) and (a)(2), the United States says that if it were subject to suit under § 9659(a)(1), then the separate cause of action authorized by § 9659(a)(2) would be rendered superfluous because any suit actionable under (a)(2) would also be encompassed by (a)(1).

FN7. 42 U.S.C. § 9659(a)(1) (Section 310(a)(1)) authorizes suits:
against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter.

FN8. 42 U.S.C. § 9659(a)(2) (Section 310(a)(2)) authorizes suits:
against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged failure of the President or of such other officer to perform any act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

***10** Moses Lakes offers no argument or authority to the contrary. Accordingly, the question is whether its citizen suit can proceed pursuant to § 9659(a)(2) (alleged failure to perform any act or duty under section 9620 which is not discretionary). Notwithstanding the use of the word "shall" in § 9620(f), the United States contends the provision is nevertheless "discretionary" in the sense that it affords the EPA discretion in how the duty is implemented. According to the United States:

> Nothing in Section 120(f) contains a requirementmuch less a "specific" and "clear-cut" requirementstating that EPA must share its *proposed* actions with State or local officials before it makes its proposals public. Section 120(f) requires inclusion of State and local officials in the development of "studies, reports, and action plans." However, nothing in Section 120(f) specifies how this must be done. The essence of the City's argument is that this requirement is met only if the Proposed Plan is shared with local officials prior to being made public. But reading such a specific requirementor, for that matter, other specific requirements that other municipalities might desire for other stages of CERCLA cleanups around the country-into this general language would contradict the discretionary nature of the President's cleanup authority under CERCLA.

§ 120(f) does not specifically state the EPA must share a proposed plan with state and local officials before issuing it to the public at large. It does, however, specifically and plainly state that relevant local officials shall be afforded the opportunity "to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available

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and the development of studies, reports, and action plans." It is reasonable to conclude that a proposed plan constitutes "planning" and/or an "action plan." Once the proposed plan is issued to the public at large, the "planning" stage is over and the remedy selection phase begins. And Moses Lake notes that under 42 U.S.C. § 9617(a) of CERCLA (§ 117(a)), it is already entitled, along with the rest of the public, to notice of formal issuance of the proposed plan and the right to tender comment regarding the proposed plan. The plain terms of § 120(f) require something more than the rights already afforded by § 117(a) and that something more has to include review of the proposed plan. Without reviewing the proposed plan and its alternative remedies (including EPA's preferred remedy), there is simply no way for the City of Moses Lake to meaningfully and intelligently "participate in the planning and selection of the remedial action ... and the development of ... action plans."

D. Irreparable Harm and Public Interest

Based on the discussion *supra,* it should be apparent that if EPA were to issue its proposed plan immediately without allowing review by Moses Lake, Moses Lake's § 120(f) rights would be violated and the city would be irreparably harmed. In turn, there is no doubt that the "public interest" is served by enforcement of § 120(f) rights. These are rights which belong to the "public," specifically in this case, the citizens of Moses Lake.

***11** The court fails to see how the United States is harmed by divulging the proposed plan to Moses Lake prior to formal issuance of the same. The fact this may not be the "usual" procedure is unpersuasive. The fact that municipalities across the nation may henceforth similarly demand such access is also unpersuasive, provided the municipality is simply enforcing § 120(f) rights in conjunction with a "remedial action" taken by the United States.

III. CONCLUSION

Moses Lake's Motion To Amend (Ct.Rec.141) and Motion For Preliminary Injunction (Ct.Rec.150) are GRANTED.

Within ten (10) days of the date of this order, Moses Lake shall serve and file its First Amended Complaint.

The EPA and the USACE are hereby PRELIMINARILY ENJOINED from formally issuing the proposed plan pending further order of this court. Within ten (10) days of the date of this order, EPA and the USACE shall make the proposed plan available to counsel for Moses Lake and all "relevant" Moses Lake officials involved in decision-making with regard to the Moses Lake Wellfield Contamination Site. Moses Lake is strictly prohibited from sharing the proposed plan with any third-party, including Boeing and Lockheed.

Within fifteen (15) days thereafter, Moses Lake shall request of EPA and USACE what it specifically believes is further necessary to satisfy its § 120(f) rights (i.e., what specific data it needs to review). [FN9] Within fifteen (15) days thereafter, the EPA and USACE shall respond. It is, of course, the court's hope that Moses Lake's request can be satisfied without dispute, but as that may not be entirely realistic, the court stands ready to adjudicate any such dispute. While it would certainly not be appropriate to leave it entirely to EPA and USACE to determine whether they have satisfied their obligations under § 9620(f), it would be equally inappropriate to leave it entirely to Moses Lake to determine how EPA and USACE are to satisfy their obligations. Let there be no doubt, however, that it is the United States who ultimately selects the remedy, subject of course to the ROD being challenged on the appropriate legal grounds. And for reasons stated by the court during oral argument, let there also be no doubt that Moses Lake's CERCLA cost recovery action is potentially subject to being delayed depending on when EPA's administrative process is completed.

FN9. Moses Lake requests the court enjoin EPA from issuing the proposed plan until Moses Lake "is allowed to participate in the development and selection of a remedy for the Site, consistent with 42 U.S.C. § 9620(f)." That is much too broad. Fed.R.Civ.P. 65(d) provides that "[e]very order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in its terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained...." The primary purpose of Rule 65(d) is "to assure adequate notice to parties faced with the possibility of contempt." *Davis v. City & County of San Francisco,* 890 F.2d 1438, 1450 (9th Cir.1989). Language that merely enjoins a party to "obey the law" or "to comply with an agreement" is not sufficient. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1201 (11th Cir.1991).

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No bond for the injunction will be required based on the court's finding that the United States will not be harmed by the injunction and issuance of the same is in the best interests of the public.

IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.

Slip Copy, 2005 WL 3724919 (E.D.Wash.)

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