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# FEDERAL COURT REJECTS STATE AG/TRIAL LAWYER EFFORT TO EXPAND “PUBLIC NUISANCE” THEORY

by

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Late last fall, the United States Court of Appeals for the Tenth Circuit handed down a landmark ruling which put an end to a seven-year effort by private plaintiffs’ counsel retained by the New Mexico Attorney General (“AG”) to use “public nuisance” and other state tort law theories to collect billions of dollars in alleged natural resource damages (“NRD”). See *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223 (10<sup>th</sup> Cir. 2006). The AG’s claims arose from a Superfund groundwater site that was being successfully remediated under the supervision and approval of federal and state regulators. Plaintiffs’ counsel had indicated that the litigation was to be the first of many NRD claims they intended to pursue on behalf of state AGs, in an effort to duplicate their tobacco litigation success. Instead, the Tenth Circuit struck a powerful blow against the increasingly widespread practice of private counsel’s marketing of novel tort claims to state AGs.

***History of the New Mexico NRD Litigation.*** The New Mexico NRD litigation involved a groundwater plume in the South Valley in New Mexico that is being remediated to drinking water standards pursuant to an ongoing EPA and New Mexico Environment Department approved remediation plan. The AG brought her claim as public trustee of the State’s groundwater resources, but rather than seeking further restoration of the allegedly lost resources, she pursued a litigation damages theory whereby the private parties conducting the remediation would be required to continue remediation and to pay an additional damages award exceeding \$4 billion. The AG also insisted that the award could be used for purposes unrelated to restoration of the groundwater resource, including, for example, payment of the private plaintiff attorneys whom she had retained to prosecute her claim.

***The Tenth Circuit Limited the Scope of NRD Litigation.*** Following a lengthy pretrial hearing and multi-day *Daubert* evidentiary hearing, the federal district court in New Mexico issued three detailed opinions by which the AG’s claims were dismissed as a matter of law.<sup>1</sup> In affirming, the Tenth Circuit zeroed in on a number of fatal flaws in the AG’s scheme to use natural resource damages litigation to generate revenues for the public treasury.

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<sup>1</sup>See *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185 (D.N.M. 2004); *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1157 (D.N.M. 2004); *New Mexico v. Gen. Elec. Co.*, 322 F. Supp. 2d 1237 (D.N.M. 2004).

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**A State in its Role as Public Trustee Cannot Seek Natural Resource Damages for Private Injuries Allegedly Suffered By Its Citizens.** The AG’s claims rested on the argument that the State was entitled under the *parens patriae* doctrine to recover damages for injury to its citizens’ interests in groundwater.<sup>2</sup> The Tenth Circuit disagreed, explaining that the *parens patriae* doctrine is a standing concept and did not provide the State with greater substantive rights than those provided by the public trust doctrine. *New Mexico*, 467 F.3d at 1243 n.39. Any remedy “must be tailored to redress specific injury to the State’s role as trustee, *i.e.*, its role of making water available for appropriation and beneficial use by water rights holders. Claims of impairment of beneficial use are better left to water rights holders.” *Id.* at 1250 n.39. Likewise, the court held that the State had no cause of action for trespass to the aquifer because the State had no possessory interest in the sand, gravel, and other minerals that make up the aquifer. *Id.* at 1247 n.36. Again, to the extent that injury to the aquifer could have been established – which it was not – any claim for damages would reside in the parties who owned the land.

These holdings properly focus on the distinction between private rights and public rights and should limit the ability of state AGs to use NRD litigation to seek damages for alleged injuries to private parties.

**A State Cannot Recover Natural Resource Damages Based on Theoretical Damages Unrelated to Actual Injury to the State’s Interests.** The AG further argued that the State was entitled to damages for the *potential* lost use of contaminated groundwater for drinking water regardless whether the contamination had *in fact* resulted in any such loss. Again, the Tenth Circuit disagreed. The court noted that the use of groundwater in New Mexico is governed by the Rio Grande Compact, whereby New Mexico is required to maintain water levels in the Rio Grande for use in Texas. Because the groundwater in the South Valley (as part of the Middle Rio Grande Basin) is fully appropriated, no additional groundwater is available for use – for reasons wholly unrelated to the contamination. *Id.* at 1252. Further, the court noted that any potential impact of contamination on the availability of drinking water had been addressed as part of the EPA remediation through the installation of a replacement municipal well: “If a contaminated natural resource such as groundwater can be replaced in a timely manner pending restoration, we have difficulty envisioning any significant loss-of-use damage.” *Id.*

The court thus affirmed that the value of natural resources in NRD litigation is defined by the loss of services that the resource would have provided but for the contamination. This ruling should block NRD approaches – *e.g.*, the approach being pushed by New Jersey – that fail to link interim natural resource damages with evidence that there has been a real world loss of services. It also forecloses litigation-inspired analyses that would allow for grossly inflated natural resource valuations and potential jackpot recoveries.

**The State Cannot Use NRD Litigation to Fund State Treasuries.** Despite being given repeated opportunities to do so, the AG refused to present a damages theory seeking the restoration, replacement, or substitution of the alleged loss of drinking water services. Instead, the AG – through her retained private counsel – made clear that her purpose was not restoration of the alleged injured groundwater. She wanted money.

THE COURT: Your effort here, as I understand it, isn’t to have them fix [the deep contaminant plumes], and you don’t want to fix them, apparently. You want money, and that’s it.

COUNSEL FOR NEW MEXICO: Well, in this courtroom, that is it, yes....

*New Mexico*, 322 F. Supp. 2d at 1262.

The Tenth Circuit held this pecuniary objective to be inconsistent with Congress’ intent in enacting CERCLA that any recoveries for injury to natural resources be devoted exclusively to the restoration of those resources. As Congress had explained: “sums recovered by trustees are to be used only to restore the natural

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<sup>2</sup>Under New Mexico appropriation law, no entity – including the State – may extract and use groundwater without holding a valid water right granted by the State Engineer. *See State ex. rel. Reynolds v. Mendenhall*, 68 N.M. 467, 469, 362 P.2d 993 (1961); N.M. Stat. Ann. § 72-5-1. The State did not own any water rights to groundwater in the South Valley.

resources without further appropriation. The natural resource regime is not intended to compensate public treasuries.” 132 Cong. Rec. H9561, H9612-13 (Daily ed. Oct. 8, 1986). The court explained: “CERCLA’s comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource.” 467 F.3d at 1247.

This holding should impede efforts by private attorneys to market NRD claims to state AGs. By requiring that natural resource damages be devoted to restoring natural resources, the court precluded the type of damages theories used in New Mexico to engineer billions of dollars of damages from an aquifer whose ability to supply drinking water was unimpaired. Further, the court precluded state AGs from using NRD litigation to generate funds for general treasuries. And the Tenth Circuit made clear that state AGs cannot enter into agreements whereby any portion of NRD recoveries would be diverted to pay attorneys’ fees. *See id.* at 1248.<sup>3</sup> Though not specifically discussed, this holding should also bar punitive damage awards for injuries to natural resources.

**A State Cannot Seek Natural Resource Damages Based on a Challenge to the Adequacy of an Ongoing EPA-Approved Remediation.** The AG’s claim that groundwater contamination was causing a loss of drinking water directly challenged the EPA-approved remediation plan at the site, which EPA and the NMED had repeatedly found to be fully protective of drinking water services. As the Tenth Circuit explained, in justifying her damages theory, the AG “repeatedly [took] aim at the ongoing remediation.” *Id.* at 1249.

In so doing, the Tenth Circuit held, the AG ran afoul of 42 U.S.C. § 9613(h), which provides that no federal court “shall have jurisdiction ... to review any challenges to ... a remedial action” selected pursuant to CERCLA. The court explained that the AG’s argument that the remediation system “does not address the entirety of the contamination and will not restore groundwater to beneficial use is ... a challenge to an EPA-ordered remediation” and that the courts do not have jurisdiction under 42 U.S.C. § 9613(h) to consider such a challenge until the remediation is complete. *Id.* The court reasoned that the AG’s “argument that [the State] is not seeking to alter or expand the EPA’s response plan but rather only to acquire money damages falls on deaf ears. Any relief provided the State would substitute a federal court’s judgment for the authorized judgment of both EPA and NMED ... [and] might place [defendants] in the unenviable position of being held liable for monetary damages because they are complying with an EPA-ordered remedy.” *Id.* The court thus dismissed the AG’s claims for residual damages, holding that such claims could be renewed if necessary following completion of the remediation.

The Tenth Circuit’s ruling should preclude most claims under state law for residual natural resource damages until the completion of CERCLA remediations.

**Broader Implications of the Tenth Circuit’s Opinion.** In addition to its seminal importance in NRD litigation, the Tenth Circuit’s ruling addresses a number of broader problems arising from state AGs’ increasingly aggressive use of state tort law and provides legal checks that may help rein in these activities in other contexts.

**The Court’s Ruling Reflects Necessary Limitations on the Scope of Public Nuisance Claims.** The New Mexico litigation exemplifies the campaign by state AGs to use public nuisance law to avoid important evidentiary safeguards for defendants provided by traditional doctrines of common and statutory law. State AGs and private plaintiff counsel have seized upon public nuisance specifically because the claim does not have well-defined boundaries. “[D]espite attempts by appellate courts to rein in this creature, it, like the Hydra, has shown a remarkable resistance to such efforts.” *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1992). As courts have warned, if the judiciary does not properly cabin public nuisance law, it will “become a monster that would devour in one gulp the entire law of tort.” *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001).

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<sup>3</sup>For further discussion of this argument, *see* Eric G. Lasker, *Superfund Preempts Contingent Fee Arrangements in Natural Resource Damages Suits*, Washington Legal Foundation LEGAL BACKGROUNDER (July 15, 2005), available at <http://www.wlf.org/upload/071505LBLasker.pdf>.

One recurring theme in recent public nuisance litigation is the argument that a state may use public nuisance law to recover monetary damages. This argument is at odds with the government's proper role in prosecuting public nuisance claims, whereby the only proper remedy is injunction or abatement. *See* Restatement (Second) of Torts § 821B cmt a (1979). That is because the state itself has not suffered any special damages apart from those incurred by its citizens (who can sue on their own behalf) and because tort claims for costs associated with the provision of government services violates the public services doctrine.

The *New Mexico* litigation affirms this important limitation. The district court restricted the AG's public nuisance claim and prevented the AG from misusing the claim to obtain a financial windfall: "The [AG's] right to pursue public nuisance claims ... was largely illusory (at least as far as the [AG] was concerned) because ... New Mexico law limited the available remedy to injunctive relief in the form of nuisance abatement or recovery [solely] of restoration costs." 467 F.3d at 1238. While the Tenth Circuit did not specifically rule on this issue, its reasoning in holding that the AG could not recover for damages incurred by its citizens reinforces this result.

**The Court's Ruling Highlights the Conflict Inherent in Allowing Private Plaintiffs Counsel to Usurp the Role of the Government.** State AGs' increasingly common use of contingent fee arrangements to retain private attorneys has been the subject of significant controversy. As evidenced in the New Mexico litigation, vesting power in private attorneys – whose interest lies in maximizing monetary awards – distorts government priorities at the expense of legitimate state interests. Thus, in New Mexico, the AG rejected the district court's efforts to focus on restoration of the natural resource and sought, instead, "to maximize the dollar amount of [the] damages award, largely unconstrained by practical considerations." *New Mexico*, 322 F. Supp. 2d at 1261.

The Tenth Circuit opinion highlights the conflict between public interests appropriately pursued by government and pecuniary interests of private plaintiffs' counsel. In holding that a state cannot divert NRD recoveries for the payment of private attorneys' fees, the court properly recognized that the government's interest lies not in the enrichment of plaintiff attorneys but in the availability of natural resource services for its citizens.

**The Court's Ruling Underscores the Importance of Federal Preemption in Reining in Abusive State Law Litigation.** Plaintiffs' counsel and state AGs who disagree with determinations made by the federal government are increasingly pursuing a strategy of "legislation by litigation," arguing that conduct taken in compliance with federal law nonetheless violates state common law. They contend that federal law imposes only "minimum standards" and that state common law may be used to impose more stringent requirements.

This argument ignores the fact that federal determinations are based on a balancing of public objectives that cannot be replicated in tort litigation. In *New Mexico*, the AG argued that CERCLA imposed minimum standards and cited to CERCLA savings provisions that allowed states to impose more stringent requirements. But, as the Tenth Circuit recognized, these arguments do not address the fundamental conflict between the AG's pecuniary litigation objectives and Congress' public objective to restore natural resources. By holding the AG's claims preempted, the Tenth Circuit endorsed an important safeguard against improper tort litigation.

**Conclusion.** The need to limit abusive litigation by "private" attorneys general is more pressing than ever. The Tenth Circuit's ruling in *New Mexico v. General Electric Co.* is a welcome step in the right direction.