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D.C. DISTRICT COURT DISMISSES GERONIMO SUIT FOR LACK OF STANDING

LTC David Howlett

The United States District Court for the District of Columbia dismissed a suit¹ by *pro se* individual and organization plaintiffs to compel repatriation of the remains of Geronimo, an Apache leader who is buried at Fort Sill, Oklahoma. Plaintiffs also demanded that Geronimo be given full military honors and that his prisoner-of-war status be removed. The court concluded that the plaintiffs lacked standing to maintain such a suit.

Plaintiffs based their claim on the Native American Graves Protection and Repatriation Act (NAGPRA),² which was enacted to protect Native American burial sites and the removal of human remains on Federal, Indian, and Native Hawaiian lands. The Act requires federal agencies to return human remains upon request from a lineal descendant or Native American tribe.³

The court found that the plaintiffs did not fall into the class given repatriation rights under NAGPRA. The individual plaintiff did not allege that he was a descendant of Geronimo, and the organizational plaintiff was not a Native American tribe. The court concluded that the plaintiffs could not claim injury even if it were proven that the Army is somehow violating NAGPRA by harboring Geronimo's remains at Fort Sill.

Although it was not cited by plaintiffs, the court considered a provision of NAGPRA which gives district courts jurisdiction over "any action brought by any person alleging a violation of this chapter."⁴ Although this provision would seem to grant standing to the plaintiffs, they must also satisfy Constitutional standing requirements for an injury-in-fact necessary to establish an Article III case or controversy. The court relied on the decision in *Lujan v. Defenders of Wildlife*,⁵ in which the Supreme Court reviewed a similarly broad

¹ *Idrogo and Americans for Repatriation of Geronimo v. United States Army and William Clinton*, No. 97-2430, slip op. (D.D.C. Aug.6, 1998).

² Pub. L. No. 101-877, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001-3013).

³ 25 U.S.C. § 3005(a).

⁴ 25 U.S.C. § 3013.

⁵ 504 U.S. 555 (1992).

grant of jurisdiction in the Endangered Species Act. In *Lujan*, the Supreme Court held that although Congress could grant broad substantive rights to plaintiffs, it could not do away with the requirement that "the party seeking review must himself have suffered an injury."⁶

The district court found that the plaintiffs had only the "generalized interest of all citizens" in seeing that the Army complies with NAGPRA. Because they had suffered no injury, plaintiffs did not have standing and the court accordingly dismissed their suit. (LTC Dave Howlett/LIT)

DISTINGUISHING YOUR USTs FROM YOUR ASTs

Mr. Bernard Schafer

To most reasonable people, the terms "underground storage tank" (UST) and "aboveground storage tank" (AST) would seem separate and distinct. For the most part, they are right. USTs are regulated under the Solid Waste Disposal Act.⁷ ASTs are regulated under the Clean Water Act (CWA).⁸ The definitions are also distinct. A UST is a tank (including connected underground piping) used to contain "regulated substances" (i.e., CERCLA hazardous substances and petroleum products), the volume of which is 10% or more beneath the ground's surface.⁹ Regulations governing USTs are found at 40 C.F.R. § 280. In contrast, an AST is basically a storage tank that is not buried and is regulated under 40 C.F.R. § 112. Both USTs and ASTs that store hazardous wastes are regulated under 40 C.F.R. §§ 264; 265.

ASTs are sometimes regulated by the UST program and vice versa. For example, a given tank system could appear to be completely above ground and yet have an extensive underground piping system. For example, if 10% or more of the combined volume of tank and pipe are underground, the apparent AST can be considered a UST. Also, certain USTs are regulated by the AST program. For example, a tank that has a buried storage capacity of more than 42,000 gallons of oil is regulated under 40 C.F.R. § 112. (This means you need a Spill Prevention Control and Countermeasures Plan).

These distinctions between USTs and ASTs can come into play when state regulators attempt to deal with ASTs through their UST program. Because of the limited waiver of federal sovereign immunity under the UST statute,¹⁰ state laws that attempt to regulate tanks beyond the reach of the UST statute are not merely "more stringent" but are in fact "broader in scope." Thus, serious sovereign immunity questions are raised when regulators cite UST provisions with regard to our ASTs. However, when ASTs are regulated under state CWA authority, the efforts of state regulators may likely be upheld. This is because the waiver of sovereign immunity extends to any requirements related to the

⁶ *Id.* at 578, quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

⁷ 42 U.S.C. § 6901, *et. seq.*

⁸ Also known as the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et. seq.*

⁹ USTs storing hazardous wastes, however, are regulated by 40 C.F.R. §§ 264; 265.

¹⁰ 42 U.S.C. § 6991(1).

prevention of releases into "waters of the U.S."¹¹ The CWA waiver is, in a sense, broader than that for USTs, but it still does not extend to fines or penalties -- whether the penalty is imposed by federal, state, or local regulators. (In contrast, as noted by last month's *ELD Bulletin*, the federal EPA has unilaterally asserted that its UST penalties can be paid. This is a determination that DoD is working to appeal.) So again, if a state regulator attempts to apply its UST rules against your AST, it is important to remember that they may not have the authority to do so. (Mr. Bernard Schafer/Guest Contributor, Navy. An earlier version of this article appeared in the Washington Environmental Newsletter, July, 1998.)

CIRCUIT COURT DECISION ON ATTORNEY FEES

Ms. Carrie Greco

In an issue of first impression, the Ninth Circuit Court of Appeals ruled that the EPA's assessment of CERCLA response costs could include reasonable attorney's fees incurred in enforcement activities.¹² In the facts of this case, Harold Chapman refused to comply with the EPA's order to remove hazardous substances that presented an imminent and substantial endangerment. The Court found that the EPA's claim for attorney's fees was warranted because the government is not limited to the reasoning of earlier cases concerning attorney's fees in private actions.¹³ Rather, the Ninth Circuit was persuaded by the Second Circuit holding in *B.F. Goodrich v. Betkoski*,¹⁴ which stated that in Superfund cost recovery actions, the government's ability to recover attorney's fees is broader than that of private parties. Specifically, the Ninth Circuit noted that CERCLA Section 107(a)(4)(A)'s definition for the government's response costs was broader than a parallel definition for private parties' response costs.¹⁵ Policy considerations also supported the Court's ruling. If responsible parties were charged with reasonable attorney fees, they may be encouraged to perform a remedial action on their own. The Court then remanded the case to determine which fees were "reasonable." (Ms. Carrie Greco/LIT).

¹¹ See, the CWA definition for the term "navigable waters" at 33 U.S.C. § 1362(7).

¹² *U.S. v. Chapman*, No. 97-15215 (9th Cir. 1998).

¹³ For example, see, *Key Tronic v. U.S.*, 511 U.S. 809 (1994).

¹⁴ 99 F.3d 505 (2d Cir. 1996).

¹⁵ 42 U.S.C. § 9607(a)(4)(A). The CERCLA section relating recovery of attorney costs among private parties is 42 U.S.C. § 9607(a)(4)(B).