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Environmental Law - Long Beach Unified School District v. Dorothy B. Godwin Living Trust, et al., And Mobil Oil Corporation, Powerine Oil Company: Determining The Scope Of Easement Holder Liability Under CERCLA

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ENVIRONMENTAL LAW

LONG BEACH UNIFIED SCHOOL DISTRICT v. DOROTHY B. GODWIN LIVING TRUST, ET AL., AND MOBIL OIL CORPORATION, POWERINE OIL COMPANY: DETERMINING THE SCOPE OF EASEMENT HOLDER LIABILITY UNDER CERCLA

I. INTRODUCTION

In *Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust,*[1] the Ninth Circuit held that the holder of an easement burdening land which contains a hazardous waste facility is not, by virtue of that interest alone, liable for cleanup costs as an "owner or operator" under the Comprehensive Environmental Response Compensation and Liability Act (hereinafter "CERCLA").[2] The court reasoned that under common principles of property law, easement holders have a limited right to use the land of another but do not own the land itself, and therefore, should not be considered owners for the purposes of CERCLA liability.[3]

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1. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364 (9th Cir. 1994) (per Kozinski, J., with whom Trott, J., and Williams, J., joined). This is a case of first impression for any federal circuit court.

2. *Long Beach*, 32 F.3d 1364. *See* 42 U.S.C. §§ 9601-75 (1988 & Supp. V 1993). This section is entitled the Comprehensive Response, Compensation and Liability Act of 1980.

3. *Long Beach*, 32 F.3d at 1364-70.

II. FACTS AND PROCEDURAL HISTORY

The property at issue in this case was bought by the Long Beach Unified School District (hereinafter "School District") from the Dorothy B. Godwin Living Trust and the Grover Godwin California Trust (hereinafter, collectively, "the Trusts") in October, 1987.[4] The land had previously been leased by the Schafer Brothers Transfer and Piano Moving Company (hereinafter "Schafer Bros."), which had built and operated a waste pit on the land for ten years.[5] The waste pit was used by Schafer Bros. for the illegal disposal of hazardous waste.[6]

The land is subject to easements held by Mobil Oil Corporation and Powerine Company (hereinafter, collectively, "M&P").[7] The Mobil easement, which was granted prior to 1971,[8] gave Mobil the rights to lay, operate, and maintain pipelines through the parcel,[9] and to request the owner of the land to remove structures or improvements that interfered with the use of the easement.[10] In April 1971, Mobil assigned a portion of the easement to Powerine for a single line of pipe.[11] The owner of the land retained the right to build on and otherwise use the land burdened by the easements, subject to M&P's use of the easements.[12]

A site assessment performed by the Trusts before the sale was consummated revealed that the property was contaminated with petroleum and chlorinated hydrocarbons from the waste pit left by Schafer Bros.[13] The waste pit was located on

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4. Appellees' Joint Brief at 2, Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364 (9th Cir. 1994) (No. 92-56562).

5. *Id.*

6. Appellant's Opening Brief at 3, Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364 (9th Cir. 1994) (No. 92-56562).

7. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364 (9th Cir. 1994).

8. Appellees' Joint Brief at 3, *Long Beach* (No. 92-56562). Mobil was granted the easement by Angelo Gaspare and A.J. Land Company, an owner of the property prior to the Trusts. *Id.*

9. *Id.*

10. *Id.* at 4.

11. *Id.* at 3.

12. Appellees' Joint Brief at 6, *Long Beach* (No. 92-56562).

13. Appellant's Opening Brief at 3, *Long Beach* (No. 92-56562).

the portion of the property burdened by the easements.[14] The Trusts estimated that it would cost a maximum of $249,000 to remove the hazardous waste and decontaminate the property.[15] Therefore, as a condition of sale, the Trusts put $250,000 in escrow for clean up costs.[16] However, the entire escrow fund was exhausted by the investigation and expert evaluation of the site, and no money was left for the actual cleanup.[17]

On September 5, 1991, the School District filed a complaint for recovery of the remaining response costs under CERCLA against the Trusts, Schafer Bros., and M&P.[18] The Trusts and Schafer Bros. settled with the School District and agreed to pay a substantial share of the cleanup costs.[19] The case continued against M&P.[20] The School District did not allege that M&P polluted the property or even knew or had reason to know of the waste pit.[21] Rather, the School District claimed that M&P's status as easement holders qualified them as "owners" or "operators" under 42 U.S.C. § 9607.[22] The district court granted M&P's 12(b)(6) motion[23] to dismiss for failure to state a claim upon which relief can be granted.[24]

The School District appealed to the United States Court of

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14. *Long Beach,* 32 F.3d at 1366.

15. Appellant's Opening Brief at 3, *Long Beach* (No. 92-56562).

16. *Long Beach,* 32 F.3d at 1366.

17. *Id.*

18. Appellant's Opening Brief at 4, *Long Beach* (No. 92-56562). The School District also stated claims under California nuisance law in its complaint. The School District did not appeal the district court's dismissal of the state law claims. *Long Beach,* 32 F.3d at 1366 n.1.

19. *Long Beach,* 32 F.3d at 1366. Under the settlement agreement the Trusts assumed the bulk of the past remediation and costs and Schafer Bros. agreed to assume the responsibility for future cleanup activities. Appellees' Joint Brief at 3, *Long Beach* (No. 92-56562).

20. *Long Beach,* 32 F.3d 1366.

21. *Id.*

22. *Id.* M&P's liability as "owners and operators" is discussed in section III.B. *See infra* notes 39-66 and accompanying text.

23. FED. R. CIV. P. 12(b)(6).

24. *Long Beach,* 32 F.3d at 1366. M&P asserted in their motions that (1) easement holders are not "owners" for the purposes of CERCLA and (2) the CERCLA third party defense barred the claims against M&P because the contamination was caused by a third party unconnected to Mobil or Powerine. Appellees' Joint Brief at 2, *Long Beach* (No. 92-56562). The second issue, involving the third party defense, was not addressed in the Ninth Circuit opinion.

Appeals for the Ninth Circuit.[25]

III. THE COURT'S ANALYSIS

The Ninth Circuit set the groundwork for its analysis by evaluating the scope of CERCLA liability.[26] CERCLA has been read as a strict liability statute,[27] has been applied retroactively,[28] and has been used by plaintiffs to "pierce the corporate veil."[29] However, the court concluded that although CERCLA liability is very broad, it is not unlimited.[30]

A. GENERAL REQUIREMENTS FOR CERCLA LIABILITY

The court determined that in order to recover under CERCLA, the School District must show that (1) there was a "release" or "threatened release"[31] of a hazardous substance

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25. *Long Beach,* 32 F.3d at 1366.

26. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994).

27. *Id.* (citing General Electric Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990) (holding that CERCLA is a strict liability statute, with only a limited number of statutorily defined defenses available); United States v. Monsanto Co., 858 F.2d 160, 167 n.11 (4th Cir. 1988) (agreeing with "overwhelming body of precedent" interpreting CERCLA as establishing a strict liability scheme); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d. Cir. 1985) (holding that CERCLA unequivocally imposes strict liability without regard to causation)).

28. *Long Beach,* 32 F.3d at 1366. *See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732 (8th Cir. 1986) ("Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have a retroactive effect."); *see also* United States v. Shell Oil Co., 605 F. Supp. 1064, 1073 (D.Colo. 1985) (congressional intent was to hold responsible parties liable for pre-enactment response costs).

29. *Long Beach,* 32 F.3d at 1366. *See* United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1036-38 (E.D.N.C. 1989) (corporation's former president, chairman of board, and director held jointly and severally liable as "owner/operator" of corporation's facility at which hazardous substances had been released). *But see* Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990) (refusing to pierce the corporate veil to reach the parent company).

30. *Long Beach,* 32 F.3d at 1366.

31. Under CERCLA, "[t]he term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles contain-

from the site; (2) the site is a "facility;"[32] (3) the release caused the School District to incur cleanup costs;[33] and (4) M&P fall within one of four classes of responsible parties under 42 U.S.C. § 9607(a).[34] There was no dispute that the site

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ing any hazardous substance or pollutant or contaminant) . . . ." 42 U.S.C. § 9601(22) (1988).

The language of section 107(a) requires only that there be a threat, not an actual release. *See* Alfred R. Light, CERCLA Law and Procedure § 4.2.1 69 (Bureau of National Affairs 1991). Plaintiff must at least allege such a threat in order to state a claim. *Id.* (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985)). Evidence of the presence of hazardous substances at the facility when combined with the unwillingness of any party to assert control over the substance amounts to a threat of release. United States v. Northernaire Plating Co., 670 F. Supp. 742, 746-47 (W.D. Mich. 1987), *aff'd sub nom.* United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S.1057 (1990).

32. 42 U.S.C. § 9601(9) defines the term "facility" as:

> (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise came to be located.

42 U.S.C. § 9601(9).

33. Long Beach, 32 F.3d at 1367. A person who pays for the cleanup of a hazardous waste facility is entitled to recover from liable parties "any . . . necessary costs of response . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

The National Contingency Plan [hereinafter "NCP"], 40 C.F.R. § 300 (1994) was originally prepared to implement section 311 of the Federal Water Pollution Control Act. 33 U.S.C. § 1321(d) (Supp. V 1993). Section 105 of CERCLA directed the revision of the NCP to establish more comprehensive procedures for responding to releases of hazardous substances pollutants and contaminants. 42 U.S.C. § 9605.

34. 42 U.S.C. § 9607(a). Section 9607(a) provides that:

> (1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . or arranged . . . for transport for disposal or treatment of hazardous substances . . . (4) any person who accepts or accepted any hazardous waste for transport to disposal or treatment facilities . . . *from which there is a release or threatened release which causes the incurrence of response costs, of a hazardous substance shall be liable* . . . .

42 U.S.C. § 9607(a) (emphasis added).

was a "facility," that there was a release of a hazardous substance, or that this release caused M&P to incur cleanup costs.[35] The School District did not allege that M&P were involved in generating, arranging, or transporting the hazardous waste.[36] The sole issue was whether M&P, as easement holders, could be liable as "owners and operators" of a hazardous waste facility.[37]

B. LIABILITY AS "OWNER AND OPERATOR"

The Ninth Circuit followed the reasoning of other courts and read the terms "owner and operator" in the disjunctive.[38] A party may be liable as either an "owner" or an "operator," or both.[39] The School District argued that as easement holders, M&P were liable as both owners and operators of the facility.[40] The School District reasoned that the term "owner" as used in CERCLA is not limited to persons who hold title in fee simple, but rather refers to any person holding "indicia of ownership."[41]

The italicized phrase appears in only one of the four paragraphs identifying potentially liable persons in the statute, but courts consider the unusual sectioning of the provision a "printer's error" and apply the liability threshold to all four categories. *See, e.g.,* Bryant v. Colonial Pipeline Co., 699 F. Supp. 546, 548 (W.D. Va. 1987) (holding that the liability threshold is applicable to all four categories).

35. Long Beach Unified Sch. Dist. v. Dorothy B. Goodwin Cal. Living Trust, 32 F.3d 1364, 1366-67.

36. *Id.* at 1367.

37. *Id.*

38. *Id.* (citing United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988); Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989); Artesian Water Co. v. Government of New Castle County, 659 F. Supp. 1269, 1280-81 (D.Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D.Md. 1986)).

39. *Id.*

40. Appellant's Opening Brief at 6, *Long Beach* (No. 92-56562). The School District did not distinguish between liability as an owner and as an operator in its brief. *Id.* at 6-18.

41. *Id.* at 6.

1. *Although An Easement Holder Can Be Liable As An "Operator" Under CERCLA, M&P Do Not Qualify As Operators*

The Ninth Circuit found that while an easement holder can sometimes be the "operator" of a hazardous waste facility, M&P did not fit within this definition.[42] The court stated that to be an "operator" of a hazardous waste facility a party must play an active role in running the facility, usually involving day to day participation in the facility's management.[43] Since pipelines are expressly included in the definition "facility,"[44] an easement holder would be liable for owning a pipeline from which a hazardous substance was leaking, if all of the other elements were met.[45] The School District, however, did not allege that M&P's pipelines leaked.[46] The School District merely alleged that since M&P's pipelines crossed the property, M&P were in a position to prevent the contamination.[47] The court noted that an easement holder would be hard presses to stop any pollution she might discover since she would have no control over the property beyond preventing interference with the easement.[48] Therefore, the court concluded that

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42. *Long Beach,* 32 F.3d at 1367.

43. *Id. See, e.g.,* Edward Hines Lumber v. Vulcan Material Co., 861 F.2d 155, 157-58 (7th Cir. 1988) (Supplier is not operator because he cannot control work at plant, choose employees, direct their activities or set prices. A limited veto, in and of itself is not enough to make him an operator); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (defendant "is in charge of the operation of the facility in question, and as such is an operator within the meaning of CERCLA"). *Cf.* In re Bergsoe Metal Corp., 910 F.2d 668, 672 (9th Cir. 1990) (secured creditor not liable under section 9601(20)(A) unless he engages in "some actual management"); 40 C.F.R. § 300.1100 (EPA rule indicating that secured lenders are only liable if they actually participate in facility's management).

44. 42 U.S.C. § 9601(9) (1988). *See supra* note 33 for text of 42 U.S.C. § 9601(9).

45. *Long Beach,* 32 F.3d at 1367. In this situation the easement holder might also be liable as an arranger or transporter under sections 9607(a)(3) and (a)(4). *See supra* note 35 for text of 42 U.S.C. § 9607(a). The court did not reach the closer question of an easement holder's potential liability as an operator when he leases his right to lease the land to someone else, who then operates a leaking pipe. *Long Beach,* 32 F.3d at 1367 n.3.

46. *Id.* at 1367.

47. *Id.* The School District alleged that M&P had the ability to monitor and control the facility and to notify the authorities of the disposal. Appellant's Opening Brief at 8, *Long Beach* (No. 92-56562).

48. *Long Beach,* 32 F.3d at 1369 n.6.

M&P could not be liable as operators under CERCLA because M&P did not have any control over the facility or the ability to prevent the release.[49]

2. *Holding An Easement Is An Insufficient Basis For Liability As An "Owner" Under CERCLA*

The School District argued that as easement holders M&P were liable as "owners" of the facility.[50] The statutory definition of "owner or operator" merely repeats the operative terms,[51] defining "owner and operator" as "any person owning or operating" a facility.[52] The court found that the circularity of this definition "strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings."[53] Therefore, the court read the statute as incorporating the ordinary common law definitions of its terms.[54]

The court found that under the common law, an easement holder is not viewed as the owner of the land burdened by the easement.[55] Although an easement is an interest in land, it is

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49. *Id.* at 1368.

50. *Id.*

51. Appellees Joint Brief at 5, *Long Beach* (No. 92-56562).

52. 42 U.S.C. § 9601(20)(a).

53. *Long Beach,* 32 F.3d at 1368 (citing *Edward Hines Lumber Co.,* 861 F.2d at 156) (Congress intended courts to turn to common law analogies to define CERCLA's terms). *See* Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966-68 (1994) (construing statutory term "enforcement activities" according to its plain meaning); Pennsylvania v. Union Gas Co., 491 U.S. 1, 9-11 (1989) (relying on a "cascade of plain language"); Cadillac Fairview/California v. Dow Chem. Co., 840 F.2d 691, 697 (9th Cir. 1988) (refusing to imply private right of injunctive relief based on plain language of CERCLA).

54. *Long Beach,* 32 F.3d at 1368. An "owner" is the "person in whom is vested the ownership, dominion, or title of property; proprietor." BLACK'S LAW DICTIONARY 764 (6th ed. 1990). "Ownership" is the "collection of rights to use and enjoy property, including right to transmit it to others. The complete dominion, title or proprietary right in a thing or claim. The entirety of the powers of use and disposal allowed by law." *Id.* at 765.

55. *Long Beach,* 32 F.3d at 1368. For other cases supporting this holding, *see* Robinson v. Cuneo, 290 P.2d 656, 658 (Cal. Dist. Ct. App. 1955) (refusing to construe easement to prohibit owner of land from using area of easement because, unlike owner, easement holder "owns no part of the land itself and has no right to exclude the owner from the use of any of the land, except insofar as a use interferes with his easement rights"); Henry Bickel Co. v. Texas Gas Transmission Corp., 336 S.W.2d 345, 347-48 (Ky. 1960)

only "a limited use or enjoyment of the land in which the interest exists, . . . it is not itself either land or an estate in land."[56] The court found the distinction between ownership of an easement and ownership of the burdened land to be well established.[57] Therefore, the court found no common law basis for finding that easement holders are owners for purposes of CERCLA liability.[58]

The court also found that public policy supported this reading of the statute.[59] Numerous types of easements encumber land titles throughout the United States.[60] Easements establish a variety of rights ranging from the running of utility poles to overflight, use of a swimming pool and scenic easements.[61] The court held that to subject all easement holders to CERCLA liability would be contrary to the policy behind the statute, which strives to impose the costs of cleanup on those responsible for the contamination.[62] The court further noted that finding easement holders to be owners for the purposes of CERCLA liability would unjustifiably expand the number of potential CERCLA defendants to include "many non-polluting actors with no greater responsibility for the nation's toxic waste problem than the general public."[63] The court also con-

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(easement holder is not an "owner" of land); Weeks v. Texas Illinois Natural Gas Pipeline Co., 276 S.W.2d 321, 323 (Tex. 1955) (easement holder did not have possessory interest or any right in property beyond the limits of right to lay and maintain pipeline and therefore could not be held liable for waste).

56. *Long Beach,* 32 F.3d at 1368 (quoting City of Hayward v. Mohr, 325 P.2d 209, 214 (Cal. Dist. Ct. App. 1958)).

57. *Id.*

58. *Id.* at 1368-69. Although the court deemed a defendant's status as an "owner" under the common law as necessary to being an "owner" under CERCLA, they did not consider whether it is sufficient. *Id.* at 1369 n.5.

59. *Id.* at 1369.

60. *Id.*

61. *Id.* (citing OLIN BROWDER ET AL., BASIC PROPERTY LAW 514-95 (5th ed. 1989)).

62. *Long Beach,* 32 F.3d at 1369 (citing Pennsylvania v. Union Gas, 491 U.S. 1, 7 (1989)). *See also* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D.Minn. 1982) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful condition they created.").

63. *Long Beach,* 32 F.3d at 1369. Among these non-polluting actors are utilities with easements to run pipelines and cables. The court found that a non-polluting utility should not be liable simply because it has deep pockets. *Id.*

cluded that to expand liability to include easement holders would serve no purpose beyond providing a deep pocket from which to recover response costs.[64] Therefore, in the absence of a clearer expression from the legislature imposing liability on easement holders, the court refused to construe the term "owner" to include easement holders.[65]

3. *The Lender Liability Provision Of CERCLA Does Not Expand The Definition Of Owner To Encompass Easement Holders*

The School District also asked the court to interpret the term "owner" to include any person holding "indicia of ownership."[66] Section 9601(20)(a) of CERCLA excludes from the definition of owner "a person who without participating in the management of a vessel or facility holds indicia of ownership to protect his security interest in the vessel or facility."[67] The School District reasoned that anyone who holds "indicia of ownership" for any reason other than to protect a security interest is therefore an "owner."[68] They further argued that M&P's easement constituted "indicia of ownership" held for reasons other than protection of a security interest and that therefore M&P should be liable under CERCLA.[69]

The court reasoned that this clause was included in CERCLA to resolve only the narrow issue of non-managing

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64. *Id.* at 1369 n.6. One commentator has advocated ownership liability for easement holders, suggesting that they could provide useful monitoring of hazardous waste disposal. *See* Jill D. Neiman, Note, *Easement Holder Liability Under CERCLA: The Right Way to Deal with Rights-of-Way,* 89 MICH. L. REV. 1233 (1991). *But see* Melissa A. McGonigal, Comment, *Extended Liability Under CERCLA: Easement Holders and the Scope of Control,* 87 NW. U. L. REV. 992, 1022 (1993) ("easement holders would not make efficient or competent monitors").

65. *Long Beach,* 32 F.3d at 1369.

66. *Id.*

67. 42 U.S.C. § 9601(20)(a).

68. *Long Beach,* 32 F.3d at 1369.

69. *Id.* In its brief, the School District ignored the regulatory definition of the term "indicia of ownership." The definition includes a long list of security interests such as mortgages and deeds of trust, but does not include interests such as easements, which have nothing to do with financing real estate transactions. Appellees' Joint Brief at 12, *Long Beach* (No.92-56562) (citing 40 C.F.R. § 3001.1100(a)).

lenders' liability.[70] The court also noted that the Environmental Protection Agency, in issuing a rule construing the clause, did not draw the broad negative inference urged by the School District.[71] The court therefore refused to find that this clause was intended by Congress to impose liability on easement holders and anyone else holding an interest in land containing a toxic waste facility, without an examination of the nature and extent of the interest.[72]

IV. CONCLUSION

In order to be liable as an "owner" of a hazardous waste facility under CERCLA, the defendant must be an owner under the common law. Under the common law an easement holder is not viewed as the owner of the land burdened by the easement. Therefore, the Ninth Circuit found that M&P could not be liable based on their status as easement holders alone.[73]

Although an easement holder can be held liable as an "operator" of a hazardous waste facility, M&P did not qualify because they did not have any active control over nor participate in the management of the facility. Easement holder liability in the absence of common law ownership therefore hinges on the degree of participation in the facility's management.

As non-participating holders of easements burdening land containing a hazardous waste facility, M&P cannot be held

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70. *Long Beach,* 32 F.3d at 1369. This narrow issue has prompted disagreement among the United States Circuit Courts of Appeal. *Compare* United States v. Fleet Factors Corp., 901 F.2d 668 (11th Cir. 1990) ("actual management unnecessary for secured creditor liability") *with* In re Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990) (some actual management is necessary for a secured creditor to be liable).

71. *Id.* at 1369-70. *See* 40 C.F.R. § 300.1100 (Environmental Protection Agency rule indicating that secured creditors are liable only if they engage in actual participation in the facility's management).

72. *Long Beach,* 32 F.3d at 1369-70.

73. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1369 (9th Cir. 1994). This holding was followed in Grand Trunk Western Railroad Co. v. Acme Belt Recoating, Inc., 859 F. Supp. 1125 (W.D. Mich. 1994) (owner or operator of a loading dock on land not belonging to it, but over which it holds an easement for ingress and egress, cannot be found liable on that basis alone).

liable for cleanup costs as either "owners" or "operators" under CERCLA.

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