LEXSEE 2009 U.S. APP. LEXIS 16294

Analysis
As of: Jul 31, 2009

OTAY LAND COMPANY, a Delaware limited liability company; FLAT ROCK LAND COMPANY, Plaintiffs - Appellants, v. UNITED ENTERPRISES LTD., a California limited partnership; UNITED ENTERPRISES, INC., a Delaware corporation; JOHN T. KNOX; THE OTAY RANCH LP, a California limited partnership; BALDWIN BUILDERS, a California corporation; SKY COMMUNITIES, INC, a California corporation; SKY VISTA INC., a California corporation; OLIN CORPORATION, a Virginia corporation; RAY N. ENNISS; PATRICK J. PATEK; PHIL G. SCOTT; ROSE B. PATEK, in her capacity as the executrix of the Estate of Patrick J. Patek, Defendants - Appellees. OTAY LAND COMPANY, a Delaware limited liability company; FLAT ROCK LAND COMPANY, Plaintiffs - Cross-Appellees, v. UNITED ENTERPRISES LTD., a California limited partnership; UNITED ENTERPRISES, INC., a Delaware corporation; JOHN T. KNOX; THE OTAY RANCH LP, a California limited partnership; BALDWIN BUILDERS, a California corporation; SKY COMMUNITIES, INC., a California corporation; SKY VISTA INC., a California corporation; OLIN CORPORATION, a Virginia corporation; RAY N. ENNISS; PHIL G. SCOTT; PATRICK J. PATEK; ROSE B. PATEK, in her capacity as the executrix of the Estate of Patrick J. Patek, Defendants-Cross-Appellants.

Nos. 06-56132, 07-56514, 07-56515, Nos. 06-56597, 06-56618

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2009 U.S. App. LEXIS 16294

September 10, 2008, Argued and Submitted, Pasadena, California
July 22, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Southern District of California. D.C. No. CV-03-02488-RTB. Roger T. Benitez, District Judge, Presiding.
Otay Land Co. v. U.E. Ltd. LP, 440 F. Supp. 2d 1152, 2006 U.S. Dist. LEXIS 53433 (S.D. Cal., 2006)

DISPOSITION: AFFIRMED in part; VACATED and REMANDED in part. Each party shall bear its costs of appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff current owners filed an action against defendant former owners under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). The United States District Court for the Southern District of California granted the former owners summary judgment, awarded costs to the former owners, and denied the former owners attorneys' fees. The parties appealed.

OVERVIEW: The current owners alleged that the former owners of a shooting range on the property were responsible under the CERCLA and the RCRA for costs of removing lead and other pollutants deposited on the land. The court found that the current owners' asserted clean-up costs were speculative and were calculated without regard to the requirements of the National Contingency Plan. Absent a reliable basis to determine the clean-up costs, the current owners' action was premature. The current owners also had not shown that the property, which no public agency had indicated needed remediation, currently posed an imminent and substantial endangerment to health or the environment, under 42 U.S.C.S. § 6972(a)(1)(B). Thus, the case was not ripe. Where the underlying claim was dismissed for want of jurisdiction, the award of costs was governed by 28 U.S.C.S. § 1919. Finally, the district court properly denied the former owners' motion for attorneys' fees and costs pursuant to the RCRA because the current owners' action was not frivolous, unreasonable, or without foundation.

OUTCOME: The district court's judgment was vacated and remanded with direction to dismiss the current owners' complaint. The issue of an award of costs was remanded to the district court for a determination pursuant to 28 U.S.C.S. § 1919. The district court's decision denying the former owners' motion for attorneys' fees and costs pursuant to the RCRA was affirmed.

CORE TERMS: contingency plan, ripe, citations omitted, subject property, remedial, clean-up, summary judgment, attorneys' fees, public agency, quotation marks omitted, prevailing parties, cross-appeal, remediation, speculative, premature, reliable, ripeness, cleanup, former owners

LexisNexis(R) Headnotes

Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Citizen Suits > General Overview
Environmental Law > Hazardous Wastes & Toxic Substances > CERCLA & Superfund > Enforcement > Cleanup Costs
[HN1] Private parties have the burden of proving that cleanup costs associated with remedial actions are consistent with the National Contingency Plan to recover those cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The National Contingency Plan promulgated by the Environmental Protection Agency pursuant to CERCLA is designed to make the party seeking response costs choose a cost-effective course of action to protect public health and the environment. The National Contingency Plan requires that the party seeking recovery provide an opportunity for public comment and participation, conduct a remedial site investigation, and prepare a feasibility study.

Civil Procedure > Justiciability > Ripeness > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > General Overview
[HN2] An appellate court has a duty to consider sua sponte whether an issue is ripe for review.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview
[HN3] Where an underlying claim is dismissed for want of jurisdiction, the award of costs is governed by 28 U.S.C.S. § 1919. Unlike Fed. R. Civ. P. 54(d), § 1919 is permissive, allows a district court to award just costs, and does not turn on which party is the prevailing party.

COUNSEL: For OTAY LAND COMPANY, a Delaware limited liability company, FLAT ROCK LAND COMPANY (06-56132), Plaintiffs - Appellants: James A. Bruen, Esquire, Attorney, FARELLA BRAUN & MARTEL LLP, San Francisco, CA; Robert D. Shoecraft, SHOECRAFT & BURTON LLP, San Diego, CA; Derrick K. Watson, Assistant U.S. Attorney, USH - OFFICE OF THE U.S. ATTORNEY, Honolulu, HI.

For UNITED ENTERPRISES LTD., UNITED ENTERPRISES, INC., a Delaware corporation, JOHN T. KNOX, Defendants - Appellees: Francis J. MacLaughlin, Esquire, Attorney, Alice A. Seebach, Esquire, Attorney, SEEBACH & SEEBACH, Los Angeles, CA.

For THE OTAY RANCH LP, a California limited partnership, BALDWIN BUILDERS, a California corporation, SKY COMMUNITIES, INC., SKY VISTA, INC., Defendants - Appellees: Mark J. Dillon, Attorney, GATZKE DILLON & BALLANCE LLP, Carlsbad, CA.

For OLIN CORPORATION, Defendant - Appellee: Thomas L. Van Wyngarden, Esquire, Attorney, CHAPMAN AND CUTLER LLP, Salt Lake City, UT.

For [*2] RAY M. ENNISS, Defendant - Appellee: John J. Freni, Esquire, Attorney, San Diego, CA.

For PATRICK J. PATEK, ROSE B. PATEK, in her capacity as the executrix of the Estate of Patrick J. Patek, Defendants - Appellees: Barbara Suzanne Farley, Esquire, Attorney, Piedmont, CA.

For PHIL G. SCOTT, Defendant - Appellee: Walter Bradley Hill, Jr., Attorney, BOOTH, MITCHEL & STRANGE, Orange, CA; Richard Anthony Mahavier, LAW OFFICES OF R. ANTHONY MAHAVIER, San Diego, CA.

For NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, Amici Curiae: Michael E. Wall, Attorney, NATURAL RESOURCES DEFENSE COUNCIL, San Francisco, CA.

For STATE OF CALIFORNIA, Amicus Curiae: Thomas Gerald Heller, Attorney, AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (LA), Los Angeles, CA.

For OTAY LAND COMPANY, a Delaware limited liability company, FLAT ROCK LAND COMPANY (07-56514), Plaintiffs - Appellants: Michelle I. Burton, Esquire, Attorney, Robert D. Shoecraft, SHOECRAFT & BURTON LLP, San Diego, CA; Derrick K. Watson, Assistant U.S. Attorney, USH - OFFICE OF THE U.S. ATTORNEY, Honolulu, HI.

For RAY ENNISS, Defendant - Appellee: John J. Freni, Esquire, Attorney, San Diego, CA.

For PHIL G. SCOTT, Defendant - Appellee: Walter Bradley [*3] Hill, Jr., Attorney, BOOTH, MITCHEL & STRANGE, Orange, CA; Richard Anthony Mahavier, LAW OFFICES OF R. ANTHONY MAHAVIER, San Diego, CA.

For OTAY LAND COMPANY, a Delaware limited liability company, FLAT ROCK LAND COMPANY (07-56515), Plaintiffs - Appellants: Michelle I. Burton, Esquire, Attorney, Robert D. Shoecraft, SHOECRAFT & BURTON LLP, San Diego, CA; Derrick K. Watson, Assistant U.S. Attorney, USH - OFFICE OF THE U.S. ATTORNEY, Honolulu, HI.

For UNITED ENTERPRISES LTD., U.E. LIMITED, L.P., JOHN T. KNOX, PATRICK J. PATEK, UNITED

ENTERPRISES, INC., Defendants - Appellees: Alice A. Seebach, Esquire, Attorney, SEEBACH & SEEBACH, Los Angeles, CA.

For THE OTAY RANCH L.P., a California limited partnership, BALDWIN BUILDERS, a California corporation, SKY COMMUNITIES, INC., OLIN CORPORATION, SKY VISTA, INC., Defendants - Appellees: Mark J. Dillon, Attorney, GATZKE DILLON & BALLANCE LLP, Carlsbad, CA.

For OTAY LAND COMPANY, a Delaware limited liability company, FLAT ROCK LAND COMPANY (06-56597), Plaintiffs - Appellees: James A. Bruen, Esquire, Attorney, FARELLA BRAUN & MARTEL LLP, San Francisco, CA; Robert D. Shoecraft, SHOECRAFT & BURTON LLP, San Diego, CA; Derrick K. Watson, Assistant U.S. [*4] Attorney, USH - OFFICE OF THE U.S. ATTORNEY, Honolulu, HI.

For UNITED ENTERPRISES LTD., UNITED ENTERPRISES, INC., a Delaware corporation, JOHN T. KNOX, Defendants: Alice A. Seebach, Esquire, Attorney, SEEBACH & SEEBACH, Los Angeles, CA.

For THE OTAY RANCH LP, a California limited partnership, BALDWIN BUILDERS, a California corporation, SKY COMMUNITIES, INC., SKY VISTA, INC., Defendants: Mark J. Dillon, Attorney, GATZKE DILLON & BALLANCE LLP, Carlsbad, CA.

For OLIN CORPORATION, Defendant: Deanne L. Miller, Esquire, Attorney, MORGAN LEWIS & BOCKIUS, LLP, Los Angeles, CA; Thomas L. Van Wyngarden, Esquire, Attorney, CHAPMAN AND CUTLER LLP, Salt Lake City, UT.

For RAY M. ENNISS, Defendant: John J. Freni, Esquire, Attorney, San Diego, CA.

For PATRICK J. PATEK, ROSE B. PATEK, in her capacity as the executrix of the Estate of Patrick J. Patek, Defendants: Barbara Suzanne Farley, Esquire, Attorney, Piedmont, CA.

For PHIL G. SCOTT, Defendant - Appellant: Walter Bradley Hill, Jr., Attorney, BOOTH, MITCHEL & STRANGE, Orange, CA; Richard Anthony Mahavier, LAW OFFICES OF R. ANTHONY MAHAVIER, San Diego, CA.

For STATE OF CALIFORNIA, Amicus Curiae: Thomas Gerald Heller, Attorney, AGCA - OFFICE OF THE CALIFORNIA [*5] ATTORNEY GENERAL (LA), Los Angeles, CA.

For OTAY LAND COMPANY, a Delaware limited liability company, FLAT ROCK LAND COMPANY (06-56618), Plaintiffs - Appellees: James A. Bruen, Esquire, Attorney, FARELLA BRAUN & MARTEL LLP, San Francisco, CA; Robert D. Shoecraft, SHOECRAFT & BURTON LLP, San Diego, CA; Derrick K. Watson, Assistant U.S. Attorney, USH - OFFICE OF THE U.S. ATTORNEY, Honolulu, HI.

For UNITED ENTERPRISES LTD., UNITED ENTERPRISES, INC., a Delaware corporation, JOHN T. KNOX, Defendants - Appellants: Mark J. Dillon, Attorney, Michael P. Masterson, Attorney, Stephen A. Sunseri, Attorney, Stephen F. Tee, Attorney, GATZKE DILLON & BALLANCE LLP, Carlsbad, CA; Alice A. Seebach, Esquire, Attorney, SEEBACH & SEEBACH, Los Angeles, CA.

For THE OTAY RANCH LP, a California limited partnership, BALDWIN BUILDERS, a California corporation, SKY VISTA, INC., OLIN CORPORATION, PATRICK J. PATEK, Defendants - Appellants: Mark J. Dillon, Attorney, Michael P. Masterson, Attorney, Stephen A. Sunseri, Attorney, Stephen F. Tee, Attorney, GATZKE DILLON & BALLANCE LLP, Carlsbad, CA.

For SKY COMMUNITIES, INC., Defendant - Appellant: Mark J. Dillon, Attorney, Michael P. Masterson, Attorney, Stephen A. Sunseri, [*6] Attorney, GATZKE DILLON & BALLANCE LLP, Carlsbad, CA.

For RAY M. ENNISS, Defendant: John J. Freni, Esquire, Attorney, San Diego, CA.

For PHIL G. SCOTT, Defendant: Walter Bradley Hill, Jr., Attorney, BOOTH, MITCHEL & STRANGE, Orange, CA; Richard Anthony Mahavier, LAW OFFICES OF R. ANTHONY MAHAVIER, San Diego, CA.

For ROSE B. PATEK, in her capacity as the executrix of the Estate of Patrick J. Patek, Defendant - Appellant: Barbara Suzanne Farley, Esquire, Attorney, Piedmont, CA.

For STATE OF CALIFORNIA, Amicus Curiae: Thomas Gerald Heller, Attorney, [Dep State Aty Gen], AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (LA), Los Angeles, CA.

JUDGES: Before: KOZINSKI, Chief Judge, KLEINFELD and RAWLINSON, Circuit Judges. KOZINSKI, Chief Judge, dissenting.

OPINION

MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: KOZINSKI, Chief Judge, KLEINFELD and RAWLINSON, Circuit Judges.

Plaintiffs/Appellants Otay Land Co. and Flat Rock Land Co. (collectively, Otay), current owners of the subject property, challenge the district court's grant of summary judgment in favor of Defendants/Appellees, former owners/operators of the subject property. [*7] Otay alleged that the former owners/operators of a shooting range on the subject property were responsible under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) for costs of removing lead and other pollutants deposited on the land. Otay also appeals the award of costs to Defendants/Appellees.

Defendants/Appellees United Enterprises, Ltd., United Enterprises, Inc., John T. Knox, Otay Ranch L.P., Baldwin Builders, Sky Communities, Inc., Sky Vista, Inc., Olin Corporation, Ray Ennis, Phil Scott, and Patrick Patek cross-appeal the district court's denial of attorneys' fees. Because no public agency has indicated the need for remediation of the subject property and Otay has not demonstrated a reliable basis for its claimed remedial costs, this case is not ripe for judicial review.

[HN1] "Private parties have the burden of proving that cleanup costs associated with remedial actions are consistent with the National Contingency Plan to recover those cleanup costs under CERCLA." *Carson Harbor Vill., Ltd. v. County of L.A.*, 433 F.3d 1260, 1265 (9th Cir. 2006) (citations omitted). "The National Contingency Plan [[*8]] promulgated by the Environmental Protection Agency pursuant to CERCLA . . . is designed to make the party seeking response costs choose a *cost-effective* course of action to protect public health and the environment." *Id.* (citations and internal quotation marks omitted) (emphasis added). "[T]he National Contingency Plan requires that the party seeking recovery provide an opportunity for public comment and participation, conduct a remedial site investigation, and prepare a feasibility study." *Id.* at 1266 (citation omitted).

Otay's asserted clean-up costs are speculative and were calculated without regard to the requirements of the National Contingency Plan. Absent a reliable basis to determine the clean-up costs, Otay's action was premature. *See id.; see also Natural Res. Def. Council (NRDC) v. Abraham*, 388 F.3d 701, 705-07 (9th Cir. 2004) (concluding that case was not ripe where the parties advanced "abtruse and abstract arguments" regarding whether certain nuclear waste should be characterized as high-level or low-level waste); *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997) ([HN2] "An appellate court has a duty to consider *sua sponte* whether an issue is ripe for review . . .") (citation [*9] omitted). The plaintiffs also have not shown that the property, which no public agency has indicated needs remediation, currently poses "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B); *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996). Because this case is not ripe, we must vacate the district court's judgment and remand with direction to dismiss Otay's complaint. *See*

NRDC, 388 F.3d at 703.

Otay challenges the district court's award of costs to Defendants/Appellees primarily on the basis that Defendants/Appellees were not prevailing parties pursuant to Fed. R. Civ. P. 54(d). [HN3] "Where the underlying claim is dismissed for want of jurisdiction, the award of costs is governed by 28 U.S.C. § 1919. Unlike Rule 54(d), § 1919 is permissive, allows the district court to award just costs, and does not turn on which party is the prevailing party." *Miles v. California*, 320 F.3d 986, 988 n.2 (9th Cir. 2003), *as amended* (internal quotation marks omitted). Accordingly, we remand this issue to the district court for determination pursuant to 28 U.S.C. § 1919. *See Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 852 (9th Cir. 2007) [*10] ("[A] court may award attorneys' fees and costs even after dismissing for lack of jurisdiction.") (citations omitted). [1]

1 Otay also contends that the district court improperly rejected as untimely its motion to re-tax certain bills of costs. A party's challenge to cost awards may be forfeited if not properly filed in the district court. *See Walker v. California*, 200 F.3d 624, 625-26 (9th Cir. 1999). Because we remand the award of costs for determination pursuant to 28 U.S.C. § 1919, we do not address this challenge.

On cross-appeal, Defendants/Appellees challenge the district court's denial of their motion for attorneys' fees and costs pursuant to the RCRA. The district court properly denied the motion, as Otay's action was not "frivolous, unreasonable, or without foundation . . ." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 240 (9th Cir. 1995) (citation omitted). We affirm that portion of the district court's decision.

AFFIRMED in part; VACATED and REMANDED in part. Each party shall bear its costs of appeal.

DISSENT BY: KOZINSKI

DISSENT

KOZINSKI, Chief Judge, dissenting:

The majority holds that Otay's case isn't ripe because it failed to show that its clean-up actions are consistent with the National Contingency [*11] Plan. In the majority's view, this failure makes Otay's claims "speculative" and "premature." But we held in Cadillac Fairview/California, Inc. v. Dow Chemical Co. that the question of "whether a response action is necessary and consistent with the criteria set forth in the contingency plan is a factual one to be determined at the damages stage of a section 107(a) action . . . ." 840 F.2d 691, 695 (9th Cir. 1988). Defendants must therefore wait until "trial to express their concern that the costs incurred by" the plaintiffs "were unnecessary or inconsistent with the national contingency plan." Id.

None of the defendants moved for summary judgment on ripeness, nor does the district court's order rest on it. See Otay Land Co. v. United Enterprises, Ltd., 440 F.Supp. 2d 1152, 1174 (S.D. Cal. 2006) ("[T]he CERCLA action may not yet be ripe for determination, and therefore, subject to dismissal.") (emphasis added). Consequently, Otay never had the chance to produce evidence on the issue. It strikes me as unfair and inappropriate to dismiss plaintiff's case for failing to present proof when it had no notice proof was needed.

We should remand and give the plaintiff a chance to present evidence [*12] as to ripeness. If it has no such evidence, the case will be dismissed soon enough.