

IN THE DISTRICT COURT OF KAY COUNTY  
STATE OF OKLAHOMA

DEC 29 2009

BY MARY RAMSEY Court Clerk  
DEPUTY

CITY OF BLACKWELL, OKLAHOMA, and )  
BLACKWELL MUNICIPAL AUTHORITY; )

Plaintiffs, )

v. )

Case No. CJ-2009-15B

FREEPORT-MCMORAN COPPER & )  
GOLD INC.; FREEPORT-MCMORAN )  
CORPORATION f/k/a PHELPS DODGE )  
CORPORATION; CYPRUS AMAX )  
MINERALS COMPANY; and )  
BLACKWELL ZINC COMPANY, INC.; )

Defendants. )

**DEFENDANTS' MOTION TO DISMISS PURSUANT TO OKLA. STAT. TIT. 12, § 2012**

Freeport-McMoRan Copper & Gold Inc. ("FCX"), Freeport-McMoRan Corporation ("FMC") f/k/a Phelps Dodge Corporation ("Phelps Dodge"), Cyprus Amax Minerals Company ("Cyprus Amax"), and Blackwell Zinc Company, Inc. ("BZC"), Defendants in the above-entitled and captioned cause (collectively, "Defendants"), file this Motion to Dismiss Pursuant to OKLA. STAT. tit. 12, § 2012. Defendants move to dismiss the claims asserted by Plaintiffs the City of Blackwell, Oklahoma ("City of Blackwell" or "City") and Blackwell Municipal Authority, on the grounds that Plaintiffs have failed to state a claim upon which relief can be granted, § 2012(B)(6), and that this Court lacks subject matter jurisdiction, § 2012(B)(1). By agreement between counsel for Defendants and counsel for Plaintiffs, this responsive pleading is being filed on or before December 31, 2009.<sup>1</sup> In support of their Motion, the Defendants would show the Court the following:

<sup>1</sup> In light of the filing of Defendants' Motion to Dismiss, Defendants will file their answer to Plaintiffs' Original Petition within the time required by OKLA. STAT. tit. 12, § 2012(A)(5).

1. Plaintiffs allege in their Original Petition (“Petition”) that Defendants have “contaminat[ed] the air, land, and water in the vicinity of the Smelter site” in the City of Blackwell. Petition ¶ 50. Plaintiffs assert claims for nuisance, trespass, negligence, and unjust enrichment, and seek monetary damages, including punitive damages, consequential and compensatory damages, post-judgment interest, cost of suit, attorneys’ fees, and damages that Plaintiffs contend will be incurred in the future, as well as disgorgement of alleged benefit. Petition ¶¶ 50, 58, 63, 69, 76, 78, and p. 25. Plaintiffs also seek injunctive relief in the form of an order of abatement of the alleged nuisance and the assessment of costs for abating the alleged nuisance. Petition ¶¶ 49, 54.

2. ***Primary Jurisdiction and Exhaustion of Administrative Remedies.*** As set forth in Plaintiffs’ Petition and in documents referenced in Plaintiffs’ Petition, by the early 1990s, the Oklahoma Department of Environmental Quality (“ODEQ”), formerly the Oklahoma State Department of Health, and the United States Environmental Protection Agency (“EPA”), had become involved in the investigation of the environmental condition of the Blackwell Smelter site and certain areas of the City of Blackwell. Petition ¶ 20. ODEQ and EPA subsequently assumed jurisdiction over the remediation in Blackwell arising from the alleged smelter site contamination, and continue today to oversee the ongoing remediation activities in Blackwell.

3. Plaintiffs’ Petition and referenced documents demonstrate that the City of Blackwell has been involved in investigating the alleged contamination in Blackwell for more than 20 years and has been involved in evaluating and recommending remediation alternatives for implementation by certain Defendants and oversight by ODEQ and EPA. *See, e.g.*, Petition ¶¶ 21–23, 26, 31, 37–38, 40–41, 43. Furthermore, Plaintiffs’ Petition corroborates certain

instances of the City's involvement in the remediation process. *See, e.g.*, Petition ¶¶ 20–21, 30, 37, 38.

4. The Plaintiffs' environmental contamination claims are the subject of an environmental remediation process over which ODEQ and EPA have exercised jurisdiction. The remediation that is the subject of Plaintiffs' Petition is the very remediation that is being implemented under the jurisdiction of ODEQ and EPA. The remediation, which is being conducted pursuant to the 1992 Consent Agreement and Final Order ("CAFO"), the 1994 Memorandum of Understanding ("MO U"), the Consent Orders, and the ODEQ Records of Decision for the Groundwater Remediation Unit, Soil Remediation Unit, and Ecological Unit (collectively referred to as the "RODs"), is currently ongoing and has not yet been completed.<sup>2</sup> Petition ¶¶ 22–24, 26, 37, 40–41, 43. The City is a party to the CAFO and Consent Orders. Despite Plaintiffs' supposed current dissatisfaction with certain Defendants' remediation efforts, Plaintiffs have never filed a complaint with ODEQ or EPA alleging that these Defendants are not complying with ODEQ's and EPA's directives. Petition ¶¶ 27, 30–31, 41.

5. Based on the foregoing, Plaintiffs' Petition is defective based on the doctrine of primary jurisdiction. Primary jurisdiction is an issue in this matter because ODEQ and EPA, as the two governmental entities that are overseeing this ongoing remediation, have exercised and

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<sup>2</sup> Defendants' reference to documents cited in Plaintiffs' Petition does not convert this motion to dismiss into a motion for summary judgment. *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) ("if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss") (citations omitted); *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128, 136 n.10 (Okla. 1998) (recognizing "[a] complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference" and further finding that attaching such documents to a motion to dismiss does not convert the motion to one for summary judgment) (citations omitted). Furthermore, the Oklahoma Supreme Court noted in *Gaylord Entm't Co. v. Thompson* that "where a plaintiff has actual notice of all of the information in a motion to dismiss and has relied upon the documents in framing the complaint, the dismissal [request] need not be recast into one for summary judgment." 958 P.2d at 136 n.10 (citing *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir.1991), *cert. denied sub nom. Cortec Indus. Inc. v. Westinghouse Credit Corp.*, 503 U.S. 960 (1992)). Thus, because Plaintiffs have notice of and/or relied upon all of the materials cited in this motion, the Defendants' citation to these materials does not convert this motion to dismiss into a motion for summary judgment.

continue to exercise their jurisdiction over the remediation action currently in progress. Petition ¶¶ 20–24, 26, 31, 38, 40–41, 43. The relevant factors under Oklahoma law weigh in favor of applying the doctrine of primary jurisdiction to Plaintiffs’ claims in this matter and a recent Oklahoma federal court case on point demonstrates that the primary jurisdiction doctrine should apply here. Plaintiffs’ attempt to interfere with this ongoing administrative process should be rejected, and their claims should be dismissed and/or stayed on the grounds of primary jurisdiction. OKLA. STAT. tit. 12, § 2012(B)(6).

6. Plaintiffs’ Petition is also defective because it seeks remedies from this Court when Plaintiffs have failed to exhaust the administrative remedies available to challenge the remediation action in progress under the direction of ODEQ and EPA. The remediation in progress has been approved to address the very same contamination alleged in this matter. The City is a party to the agreements that control the remediation (*i.e.*, CAFO and Consent Orders). The City should be required to resolve any disputes it has about the adequacy of the remediation under the administrative process applicable to these agreements rather than seeking unilateral relief in this separate legal action. Where, as here, exhaustion is not made mandatory by statute, the Oklahoma Supreme Court has held that the requirement to exhaust administrative remedies is a matter within the court’s discretion and may be excused—if the administrative remedy is unavailable, ineffective, or would have been futile to pursue. Here, the administrative remedy currently in progress is available, effective, and is not futile to pursue. The groundwater remedy is the same remedy that was jointly proposed by certain Defendants and the City, which belies any attempt on the part of Plaintiffs to now argue that the remedy is ineffective or that it would be futile to pursue. Plaintiffs’ claims, all of which seek relief for the same alleged contamination that is already being addressed by ODEQ and EPA, should be dismissed for failure to state a

claim pursuant to OKLA. STAT. tit. 12, § 2012(B)(6). Alternatively, Plaintiffs claims should be stayed pending the outcome of the ongoing remediation.

7. ***Failure to Timely Seek Judicial Review of the CAFO.*** If the Court finds that the exhaustion of administrative remedies doctrine does not bar Plaintiffs' claims, then the Court should still dismiss this case because Plaintiffs failed to comply timely with the required process under the Administrative Procedures Act ("APA") for seeking judicial review of a final administrative order. Specifically, when court review of a final order is sought, the APA requires an aggrieved party to appeal a final order to a court within 30 days of the order becoming final. Plaintiffs' Petition challenges the adequacy of the remediation ordered by ODEQ and EPA as set forth in the CAFO and MOU. *See, e.g.*, Petition ¶¶ 30, 41, 43. Here, the alleged contamination was not only the subject of the administrative proceeding resulting in the CAFO, but the City also signed the CAFO as an intervenor party and represented that the City had "no objection to the terms and conditions imposed" by the CAFO. Plaintiffs now express dissatisfaction with the Defendants' remediation efforts, but Plaintiffs have never filed a complaint with ODEQ or EPA alleging that Defendants are not complying with ODEQ's or EPA's directives. Petition ¶¶ 27, 30-31, 41. Because Plaintiffs failed to seek timely judicial review of the CAFO or any of the administrative orders issued by ODEQ that are governed by the procedural requirements of the APA, to the extent that Plaintiffs now seek to challenge the remediation process at issue in these orders this Court lacks jurisdiction and must dismiss this case. OKLA. STAT. tit. 12, § 2012(B)(1).

8. ***Waiver, Equitable Estoppel, and Quasi-Estoppel.*** The City has been involved in investigating the alleged contamination, in evaluating potential remedies, and in proposing certain remedial actions to ODEQ. Petition ¶¶ 21, 22, 26, 28, 30, 37-43. For example, the

groundwater remedy that was ultimately accepted and ordered by ODEQ in the 2003 Groundwater Remediation Unit Record of Decision (“GRU ROD”), and which is currently being overseen by ODEQ and EPA, was proposed jointly to ODEQ by the City of Blackwell and Phelps Dodge Corporation. Petition ¶¶ 40–41. The City attempts to distance itself from the remediation plan in its Petition—referring to a December 2002 report “prepared by Defendants for ODEQ,” Petition ¶ 38, referring to “Defendants’ data” relating to potential groundwater contamination, Petition ¶ 38, and referring to the 2003 GRU ROD and alleging that “[i]n the 2003 Groundwater ROD, ODEQ outlined its plan” for treating groundwater contamination, Petition ¶ 41. In fact, a review of the Groundwater ROD referred to in Plaintiffs’ Petition reflects that the City participated with Phelps Dodge Corporation in investigating the alleged groundwater contamination and analyzing data relating to alleged groundwater contamination. The proposed groundwater remedy recommended jointly by the City and Phelps Dodge was ultimately adopted by ODEQ and is the very remedy that is now being implemented by certain Defendants under the supervision of ODEQ and EPA.

9. The City’s new “for-litigation” argument that the groundwater remediation plan will not work is contrary to the City’s statements and actions throughout the investigation and proposal process. For instance, the City now argues that the allegedly contaminated soil will not be remediated, Petition ¶ 27, that the proposed groundwater remedy in progress will not eliminate the alleged contaminated groundwater, Petition ¶¶ 29–30, and that “the Groundwater ROD did not contemplate a remedy that would abate the [alleged] nuisance.” Petition ¶ 41. However, the City was integral to the evaluation and recommendation of remediation alternatives, such as the City consulting with ODEQ and EPA on the groundwater investigation of the Smelter site, Petition ¶ 21, entering into the June 2000 Consent Order to address

“outstanding remediation issues,” Petition ¶ 37, and helping create, propose, and, ultimately, implement the groundwater remediation plan set forth in the GRU ROD. Petition ¶¶ 40–41. The Plaintiffs’ new “for-litigation” argument is also contrary to the City’s written submission to ODEQ advocating for the adoption of the groundwater remedy. Because of the City’s actions in participating in the investigation, evaluation, and proposal processes, Plaintiffs’ claims for relief resulting from the alleged contamination are defective and should be dismissed because they are barred under the doctrines of waiver, equitable estoppel, and quasi-estoppel. OKLA. STAT. tit. 12, § 2012 (B)(6).

10. ***Collateral Estoppel.*** If the Court determines that the doctrine of exhaustion of administrative remedies does not bar the City’s claims in this case, Defendants urge in the alternative that the Plaintiffs’ claims are barred by the doctrine of collateral estoppel. The City chose to join in and sign the CAFO, which set in motion ODEQ’s detailed administrative process by which the remediation in Blackwell would be conducted under ODEQ’s and EPA’s supervision. Having been a voluntary party to the CAFO, the City cannot now change its position and argue that this Court, rather than ODEQ, should resolve the alleged contamination issues by awarding Plaintiffs damages and ordering abatement and remediation. The doctrine of collateral estoppel bars Plaintiffs from relitigating the claims raised regarding the very same alleged contamination that is currently being addressed pursuant to the CAFO and MOU. Therefore, Plaintiffs’ claims should be dismissed. OKLA. STAT. tit. 12, § 2012 (B)(6).

11. ***Speculative and Contingent Damages.*** If Plaintiffs’ claims are not barred or stayed in their entirety, then certain claims should nevertheless be dismissed. In large part, Plaintiffs seek speculative, contingent future damages that are based on Plaintiffs’ assumption that, in the future, the groundwater remedy that the City helped to propose will fail. *See, e.g.,*

Petition ¶¶ 44, 50. There is no basis for this assumption, and even if the groundwater remedy is not successful, ODEQ has required that additional steps be taken to remediate the alleged contamination. Plaintiffs' Petition is defective because it seeks damages for future injuries resulting from alleged contamination to "air, land, and water in the vicinity of the Smelter site." *See, e.g.*, Petition ¶ 50. But the alleged contamination is currently in the process of being abated, pursuant to the CAFO, the MOU, Consent Orders, and RODs. Petition ¶¶ 22–23, 26, 37, 41, 43. Plaintiffs' newly-articulated fear that the groundwater remedy may not ultimately work is pure speculation. Under Oklahoma law, it is well established that a party cannot recover damages if the party's injury is speculative, remote, uncertain, or contingent. Therefore, Plaintiffs' Petition is defective to the extent that it includes claims that Plaintiffs will incur damages in the future based on the City's new position that the remediation in progress will not succeed. Such damages are, by definition, speculative and contingent in nature and, as such, barred under Oklahoma law. OKLA. STAT. tit. 12, § 2012 (B)(6).

12. ***No Future Damages for Abatable Nuisance.*** Additionally, where, as here, an alleged nuisance is capable of being abated (as is alleged by Defendants), Oklahoma law will not allow a plaintiff to presume that the alleged nuisance will continue. To the extent that Plaintiffs' Petition contains claims for future damages, it is defective because such damages are barred as a matter of law. OKLA. STAT. tit. 12, § 2012 (B)(6).

13. ***No Duplicative or Double Recovery.*** In addition, the relief sought by Plaintiffs in the Petition may be barred because Plaintiffs improperly attempt to obtain duplicative recovery or double recovery. For example, Plaintiffs are asking the Court to issue an injunction ordering Defendants to abate the alleged contamination, Petition ¶¶ 49, 54. However, ODEQ has already done the equivalent in the CAFO, MOU, Consent Orders, and RODs, all of which mandate that

any alleged contamination be abated and remediated and contain specific plans and guidelines for the abatement and remediation of the alleged contamination. Petition ¶¶ 22–23, 26, 37, 41. Plaintiffs' Petition acknowledges that: certain Defendants signed a CAFO in 1992 in which they committed to investigate and remediate the alleged contamination at the Smelter property, Petition ¶ 22; the MOU entered into between ODEQ and EPA required a remediation that met CERCLA standards, Petition ¶ 23; the Soil ROD requires certain Defendants to remediate the allegedly contaminated soil, Petition ¶ 26; the Groundwater ROD requires certain Defendants to treat the allegedly contaminated groundwater, Petition ¶¶ 40–41; and the June 2000 Consent Order requires the Defendants to address any outstanding remediation issues. Petition ¶ 37. Furthermore, Defendants have been remediating the alleged contamination pursuant to EPA and ODEQ guidelines for a number of years. Most recently, certain Defendants are constructing a costly groundwater treatment system as part of the groundwater remediation plan. Petition ¶ 43.

14. Plaintiffs' Petition presents a scenario where (1) Plaintiffs have benefitted from and continue to benefit from the administrative remedies being implemented, and yet (2) Plaintiffs seek recovery that would be duplicative of this benefit already received. Oklahoma law does not allow a plaintiff to receive a double recovery for the same injury. Plaintiffs' environmental contamination claims are the subject of an environmental remediation process over which ODEQ and EPA have exercised jurisdiction. Further, payments have been made by certain Defendants to the City to reimburse the City for its own remediation-related expenditures. Additionally, certain of the Defendants have incurred costs in connection with efforts to clean up public places in the City. These remediation-related efforts and other expenditures directly benefit Plaintiffs and afford Plaintiffs some of the very same remedies that they are seeking in the matter before this Court. Plaintiffs cannot be allowed to recover for the same abatement

costs and other damages that are currently being addressed in the pending administrative proceeding. Plaintiffs' Petition is defective because any remediation expenditures that Defendants have made or may make in the future would be duplicative of any recovery obtained by Plaintiffs in this case related to the same alleged contamination. Accordingly, Plaintiffs' claims that would afford them duplicative or double recovery are barred under Oklahoma law and should be dismissed. OKLA. STAT. tit. 12, § 2012 (B)(6).

15. In support of this Motion, Defendants are concurrently filing their Brief in Support of the Motion to Dismiss. DISTRICT COURT RULE 4, OKLA. STAT. tit. 12, Ch. 2.

16. Defendants seek the following relief in their Motion to Dismiss: (1) that the Court dismiss, stay, or abate all of Plaintiffs' claims under the doctrine of primary jurisdiction; (2) that the Court dismiss all of Plaintiffs' claims under the doctrine of failure to exhaust administrative remedies; (3) in the alternative, that the Court dismiss this case for lack of jurisdiction because Plaintiffs failed to comply timely with the required process under the Administrative Procedures Act for seeking judicial review of a final administrative order (4) that the Court dismiss Plaintiffs' claims on the grounds of waiver, equitable estoppel, quasi-estoppel, and/or collateral estoppel; (5) that the Court dismiss all of Plaintiffs' claims for speculative and/or contingent future damages on grounds that such damages are barred as a matter of law; (6) that the Court dismiss Plaintiffs' claims for future damages on the grounds that such damages are barred as a matter of law where, as here, an alleged nuisance is capable of being abated; and (7) that the Court dismiss Plaintiffs' claims to the extent that they seek or would result in Plaintiffs' duplicative or double recovery and, therefore, are barred under Oklahoma law.

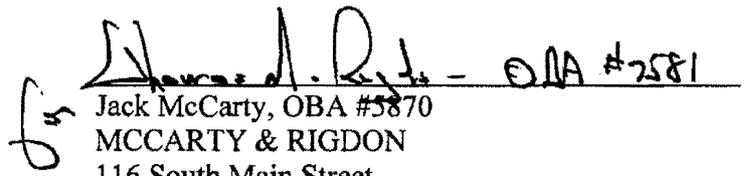
**DEFENDANTS' REQUEST FOR ORAL ARGUMENT AND REPORTER**

17. Pursuant to Kay County Administrative Order 99-3, Defendants respectfully request oral argument on their Motion to Dismiss Pursuant to OKLA. STAT. tit. 12, § 2012. Defendants also request that a court reporter be present to transcribe the oral arguments.

WHEREFORE, Defendants pray for relief and judgment against Plaintiffs as follows:

- A. That Plaintiffs take nothing by reason of the Petition;
- B. That this action be dismissed with prejudice or, alternatively, dismissed without prejudice or, alternatively, stayed or abated pending completion of the ongoing remediation action at issue in this matter; and
- C. For such other relief as is proper.

Respectfully submitted,

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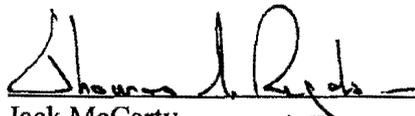
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CYPRUS AMAX MINERALS COMPANY; AND  
BLACKWELL ZINC COMPANY, INC.**

**CERTIFICATE OF SERVICE**

I certify that on this, the 29th day of December, 2009, a true and correct copy of the foregoing instrument was sent via third-party commercial carrier for delivery within three calendar days, to the following:

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