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Recommended Citation

David M. Cessante, Gopher Oil Co. v. Bunker: Did the Eighth Circuit Make the Ripe Decision or Did It Dig Itself into a Hole When Ruling on CERCLA, 8 Vill. Envtl. L.J. 555 (1997).

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GOPHER OIL CO. v. BUNKER: DID THE EIGHTH CIRCUIT MAKE THE "RIPE" DECISION OR DID IT DIG ITSELF INTO A HOLE WHEN RULING ON CERCLA?

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^1\) in response to concerns about the danger to public health presented by hazardous waste sites and the slow reaction by the United States Environmental Protection Agency (EPA) in solving the problem.\(^2\) In order to facilitate the cleanup process under CERCLA, Congress empowered EPA first to engage in remedial and removal actions and later impose liability upon the responsible party.\(^3\) To further this goal, courts have consistently held that when judicial review will delay


2. Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 886 (3d Cir. 1985). Congress wanted the parties responsible for the hazardous conditions to perform the cleanup measures. See id. Because cooperation is often difficult or impossible to obtain, however, Congress empowered the EPA to take cleanup action when necessary. See id.; see also Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1386 (5th Cir. 1989) (stating Congress enacted CERCLA in 1980 in recognition of threat that hazardous wastes pose to human health and environment); Carter Day Indus., Inc. v. EPA (In re Combustion Equip. Assoc.), 838 F.2d 35, 37 (2d Cir. 1988) (stating goal of CERCLA is to clean up toxic waste sites promptly and hold those responsible for pollution liable).

3. See CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994). CERCLA section 107 provides, in pertinent part, that the responsible party "shall be liable for . . . all costs of removal or remedial action incurred by the United States Government . . . ." Id. For the exact text of this section see infra note 38. See also JOHN C. CRUDEN, CERCLA OVERVIEW, SABA ALL-ABA 517, 532 (1996) (stating that recoverable costs include government's past response costs, costs of any remediation paid for by government, prejudgment interest, enforcement costs, and future costs at site that government may incur).

(555)
remedial and removal cleanup activities, courts are barred from reviewing challenges to EPA actions. Thus, in 1986, Congress amended CERCLA to include section 113(h) which codified earlier case law on the pre-enforcement review of remedial and removal actions, thereby effectively precluding judicial review of such actions except in limited circumstances.

In *Gopher Oil Co. v. Bunker*, the United States Court of Appeals for the Eighth Circuit relied on section 113(h) in concluding that the appellant’s declaratory judgment action was ripe for adjudication. The *Gopher Oil* court stated that because EPA initiated a cost-recovery action pursuant to CERCLA section 107, the suit to determine liability between the parties was ripe. While the Eighth Circuit’s interpretation of section 113(h) was correct, it erroneously applied this section to the circumstances in *Gopher Oil*. Thus, although the Eighth Circuit properly ruled that the appellant’s

4. See, e.g., *Voluntary Purchasing*, 889 F.2d at 1386; *Barnes v. United States Dist. Court for W. Dist. of Wash.*, 800 F.2d 822 (9th Cir. 1986) (issuing order directing district court to dismiss case because CERCLA “does not authorize pre-enforcement review of [EPA orders]”); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir. 1986) (stating that when plaintiff sought preliminary injunction against EPA order either to cleanup site or pay penalties, district court lacked jurisdiction to consider appropriateness of plaintiff’s defense); *Wheaton Indus. v. EPA*, 781 F.2d 354, 357 (3d Cir. 1986) (holding that “CERCLA precludes judicial review of the EPA’s actions in connection with remedying and cleaning up hazardous waste sites until the EPA brings suit for the costs incurred.”); *Lone Pine*, 777 F.2d at 886-87 (stating that “[t]he statutory approach to the problem of hazardous waste is inconsistent with the delay that would accompany pre-enforcement review”).

5. See *Voluntary Purchasing*, 889 F.2d at 1387-88. Cases since the 1986 amendments have recognized Congress’s “intent to preclude review in relation to removal and remedial actions except in the limited circumstances described in section 113(h).” *Id.; see also Karla A. Raettig, Comment, When Plain Language May Not Be Plain: Whether CERCLA’s Preclusion Of Pre-Enforcement Judicial Review Is Limited To Actions Under CERCLA, 26 ENvrL. L. 1049, 1050 (1996) (finding Congress added section 113(h) to limit federal jurisdiction over challenges to CERCLA response actions to ensure that cleanups were not needlessly delayed by court action); Cruden, *supra* note 3, at 545 (stating section 113(h) bars pre-implementation and pre-enforcement challenges to removal and remedial actions under CERCLA).

6. 84 F.3d 1047 (8th Cir. 1996).

7. See *id.* at 1051. CERCLA section 113(h) provides that federal court jurisdiction to review any challenges of remedial or removal actions is limited to five specific instances, one of which includes, “an action under section 9607 of [CERCLA] to recover of response costs or damages or contribution . . . .” *Id.* at 115(h), 42 U.S.C. § 9613(h). The Eighth Circuit also concluded that the doctrine of collateral estoppel barred the relitigation of the plaintiff’s indemnity claim, because an earlier state court judgment determined the claim adversely to plaintiff. See *Gopher Oil*, 84 F.3d at 1051-52. For the full text of this section, see *infra* notes 35-44 and accompanying text.

8. See *id.* CERCLA section 107 provides, in pertinent part, that all “covered parties” shall be liable for: (1) “all costs of removal or remedial action by the United States Government . . . .” CERCLA § 107(a), 42 U.S.C. § 9607(a).

9. See *Gopher Oil*, 84 F.3d at 1051.
claim was ripe, its analysis in making this determination was incorrect because it violated precedent and was inconsistent with the Declaratory Judgment Act (DJA).  

Part II of this Note sets forth the factual and procedural history of Gopher Oil. Part III then examines the relevant statutes and case law pertaining to Gopher Oil, focusing primarily on CERCLA section 113(h), the application of the DJA, and the doctrine of collateral estoppel. Next, Part IV sets forth the Eighth Circuit’s analysis in Gopher Oil. Subsequently, Part V discusses the Gopher Oil court’s decision in light of the relevant case law and statutory provisions, concentrating both on the court’s holding that the appellant’s claim was ripe and its ruling that appellant’s claim was barred by the doctrine of collateral estoppel. Finally, Part VI focuses on the potentially negative impact that the Gopher Oil court’s decision will have on private parties seeking a cause of action to determine CERCLA liability.  

II. FACTS

In Gopher Oil Co. v. Bunker, Gopher Oil Company (Gopher Oil) brought a declaratory judgment action seeking a declaration that the Germaine Romness Estate (Estate) was liable for a release of hazardous substances under CERCLA, the Minnesota Environmental Response and Liability Act (MERLA), and Minnesota common

10. See id. For a discussion of the Eighth Circuit’s analysis as compared to other case law, see infra notes 129-166 and accompanying text.  
11. For a discussion of the facts and procedural history of Gopher Oil, see infra notes 16-34 and accompanying text.  
12. For a discussion of these authorities and doctrines, see infra notes 36-107 and accompanying text.  
13. For a discussion of the analysis employed by the Gopher Oil court, see infra notes 108-128 and accompanying text.  
14. For a discussion of the Eighth Circuit’s holding as it compares to other case law and statutory provisions, see infra notes 130-166 and accompanying text.  
15. For the impact of the Eighth Circuit’s decision, see infra notes 167-172 and accompanying text.  
16. Minnesota Environmental Response and Liability Act (MERLA), MINN. STAT. ANN. §§ 115B.01-115B.24 (West 1987 & Supp. 1996). The Minnesota Legislature enacted MERLA in 1983 in response to the growing concern over the effects of environmental contamination. See Alan C. Williams, A Legislative History of the Minnesota “Superfund” Act, 10 WM. MITCHELL L. REV. 851, 852-53 (1984). The legislature modeled MERLA after CERCLA and stated that its primary purposes were to: (1) impose strict liability on those responsible for the harm caused by the release of hazardous substances; (2) allow the state to clean up contamination and collect costs later; and (3) fund state cleanup activity. See id. at 856-58. Moreover, MERLA was amended in 1988 to create the first state voluntary cleanup program. See Mark D. Anderson, The State Voluntary Cleanup Program Alternative, 10-NAT. RESOURCES & ENV’T 22, 23 (Winter 1996). These amendments were enacted in
law principles of tort and contract law. Gopher Oil instituted this action after EPA determined that a hazardous substance was released at the Brooklyn Park dump site and that Gopher Oil was a potentially responsible party (PRP) for such release. After making this determination, EPA demanded reimbursement for the entire cost of the cleanup at the dump site from ten PRPs, including Gopher Oil. Subsequently, Gopher Oil sought a declaration that the Estate, a predecessor corporation owned by Germaine Romness, caused the release of the hazardous substances when it owned and operated the Brooklyn Park dump site and, therefore, was liable for the monies that EPA demanded.

Prior to this action, Bellaire Sanitation, Inc. (Bellaire) commenced an action in a Minnesota state court against Gopher Oil under MERLA and the Minnesota Environmental Rights Act (MERA) claiming that Gopher Oil was liable as a successor corporation for the hazardous wastes that Gopher State Oil Company (Gopher State) deposited at a site that Bellaire occupied. The response to the backlog of contaminated sites that developed since the passage of MERLA in the mid-1980s. See id. Furthermore, MERLA is broader than CERCLA in that it provides a cause of action for the recovery of damages for both personal injury and economic losses caused by the release of hazardous chemicals into the environment. See Williams, supra, at 852-53.

17. See Gopher Oil v. Bunker, 84 F.3d 1047, 1048 (8th Cir. 1996).

18. See id. at 1049. In January 1994, EPA notified the PRPs that it expended over $1,373,000 in response costs to cleanup the hazardous substances at the Brooklyn Park site. See id.

19. See id. A representative from EPA informed Gopher Oil that EPA anticipated referring this matter to the Department of Justice and expected a CERCLA lawsuit to be brought in the first quarter of 1995. See id.

20. See id. In September 1994, Gopher Oil brought this action, alleging that the release of hazardous substances occurred in the 1960s when the Brooklyn Park dump site was owned by Gopher State Oil Company (Gopher State) whose sole shareholders were Charles and Germaine Romness. See id. In 1973, Bame Oil, which later became Gopher Oil, acquired Gopher State from the Romnesses through a stock acquisition. See id. As part of the stock acquisition, the Romnesses agreed to indemnify Bame Oil for any of Gopher State’s liabilities existing at closing. See id. Bame Oil then distributed Gopher State’s assets to itself, assuming all liabilities, known or unknown and changed its name to Gopher Oil. See id. Sometimes after the acquisition, the Romnesses both died and the Germaine Romness estate remained open pending the outcome of Gopher Oil’s claim against the Estate. See id.


22. See Gopher Oil, 84 F.3d at 1049. See State v. Gopher Oil Co., Nos. CI-95-758, C2-95-733, 1995 WL 687688 (Minn. Ct. App. Nov. 21, 1995). Bellaire operated a landfill in Stillwater, Minnesota beginning in the 1950s. See id. at *1. In the mid 1960s, Gopher State disposed of hazardous wastes on property now owned by Shirley Johnson and leased to Bellaire. See id. Under MERLA, both Bellaire and Gopher State were “responsible parties” in that they were strictly and jointly and severally liable, for cleanup costs. See id. As a result of this holding, Bellaire com-
Minnesota Court of Appeals affirmed the trial court’s decision granting Bellaire’s motion for partial summary judgment, concluding that Gopher Oil was liable as a successor corporation for the acts of Gopher State. In the same cause of action, Gopher Oil brought a third-party complaint against the Estate, one of Gopher State’s prior owners, alleging that Gopher State must indemnify Gopher Oil for any environmental liability. The Minnesota Court of Appeals affirmed the trial court’s dismissal of Gopher Oil’s complaint on the grounds that the Estate’s agreement to indemnify Gopher Oil did not contemplate liability under environmental statutes.

When one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.

The court of appeals stated that successor corporations may be held liable for actions of a transferor corporation in the following situations:

- where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.

23. See id. The Minnesota Court of Appeals stated that successor corporations may be held liable for actions of a transferor corporation in the following situations:

Id. at *2-3 (quoting J.F. Anderson Lumber Co. v. Myers, 206 N.W.2d 365, 368-69 (Minn. 1973)).

The court of appeals concluded that Gopher Oil was a successor corporation to Gopher State. See id. at *3. Moreover, the court of appeals noted that Bame Oil retained Gopher State Oil Company’s employees and continued its business of distributing oils, greases, and allied products which indicated that Bame Oil and Gopher State Oil Company had effected a de facto merger. See id.


[a]ll liabilities of the Company of any nature, whether accrued, absolute, contingent, or otherwise, existing at closing, to the extent not reflected or reserved against in full in the Company’s financial statements or otherwise mentioned or expected herein, . . . arising out of transactions entered into, or any state of facts existing prior to such date.

Id. (emphasis added). After reviewing this language, the trial court granted summary judgment in favor of Gopher Oil’s third-party complaint from which Gopher Oil appealed. See id. On appeal, the Minnesota Court of Appeals stated that the parties agreed that the indemnity agreement’s language was plain, however, they disagreed as to its interpretation. See id. Thus, the appellate court stated that determining the issue of whether a contract is ambiguous is a legal question that requires a court to make an independent review of the record in light of relevant law. See id.
subsequently enacted, thus precluding Gopher Oil’s indemnification claim.25

After the Court of Appeals of Minnesota dismissed Gopher Oil’s complaint in the Bellaire-Gopher Oil case, Gopher Oil brought the aforementioned declaratory judgment action against the Estate in federal court.26 Gopher Oil’s complaint consisted of four claims: (1) a declaration that the Estate was a responsible party under CERCLA to the extent of Gopher Oil’s CERCLA liability; (2) a declaration that the Estate was a responsible party under MERLA to the extent of Gopher Oil’s MERLA liability; (3) a declaration that the Estate had primary tort liability to the extent of Gopher Oil’s liability to EPA or any other party because the Romnesses were the owners of the dump site at the time of the violation; and (4) a declaration that Gopher Oil was entitled to indemnity based on the indemnity agreement executed by the Estate in 1973 when Bame Oil acquired Gopher State.27

The District Court for the District of Minnesota granted the Estate’s motion to dismiss all four counts of Gopher Oil’s complaint for lack of subject matter jurisdiction on the grounds that the claims were not ripe because there was no “actual controversy” as required by the DJA.28 Alternatively, the district court granted partial summary judgment in favor of the Estate on the grounds that the doctrine of collateral estoppel barred the MERLA claim, the tort claim, and the indemnity claim due to the prior litigation in

25. Id. The court of appeals concluded that when Gopher Oil and Gopher State Oil Company entered into the agreement in 1973, neither party contemplated liability arising under environmental laws enacted ten years after the agreement was executed. Id. Prior to the appellate court decision, the trial court dismissed Gopher Oil's complaint due to the limitation periods set forth in the probate code. Gopher Oil, 84 F.3d at 1049.

26. See id. The state court litigation involved a dump site near Stillwater, Minnesota, while the federal court litigation involved a dump site in Brooklyn Park, Minnesota. Id.

27. See id. This declaratory judgment action involved the same parties, the same indemnification agreement, and most of the same claims as the third-party complaint litigated in the Minnesota state court. Id. For the exact language of the indemnity provision, see supra note 25.

28. See Gopher Oil, 84 F.3d at 1049-50. The district court held that “the mere possibility of being named a defendant as responsible party does not constitute the actual controversy which is required.” Id. at 1050. The district court further noted that the EPA may decline to sue Gopher Oil or any other of the PRPs for any number of reasons, thereby making the case too speculative. See id. The district court also stated that had Gopher Oil been sued it would be a different issue, but at present time there was no requisite immediacy, nor was there any hardship to Gopher Oil in withholding consideration. See id.
the state court. From this judgment, Gopher Oil appealed the dismissal of its complaint for lack of subject matter jurisdiction. The Estate then cross appealed on the grounds that the complaint should also have been dismissed for two reasons: (1) because Gopher Oil's assumption of Gopher State's liabilities barred the claims, and (2) the complaint failed to state a cause of action under CERCLA, MERLA or principles of contractual indemnity.

After oral argument before the United States Court of Appeals for the Eighth Circuit, the court received notice that on March 25, 1996, EPA had filed a CERCLA cost-recovery suit against Gopher Oil and four other PRPs. Pursuant to EPA's lawsuit, the Eighth Circuit reversed the dismissal of Gopher Oil's CERCLA claim and remanded it for further consideration. The Eighth Circuit also affirmed the district court's dismissal of the MERLA claim and the tort claims for lack of subject matter jurisdiction and affirmed the district court's grant of summary judgment on the indemnity agreement claim.

III. BACKGROUND

A. The Statute—The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

In 1986, Congress amended CERCLA to preclude pre-enforcement judicial review of lawsuits challenging EPA response actions by adding section 113(h). Under this section, federal court juris-
diction to review any challenges of remedial or removal actions is limited to the following five specific instances:

(1) an action under section 9607 of [CERCLA] for recovery of response costs or damages or contribution;
(2) an action to enforce an order issued under section 9606(a) of [CERCLA] or to recover a penalty for violation of such order;
(3) an action for reimbursement under section


37. CERCLA section 107 defines, in part, that “covered persons” for the purposes of liability under CERCLA are as follows:

(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 with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

Id. § 107(a), 42 U.S.C. § 9607(a).

This section continues, stating that the “covered parties” shall be liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs or response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(1) of [CERCLA] . . . .

Id. § 107, 42 U.S.C. § 9607.

For CERCLA purposes, the term “owner” or “operator” means:

(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

Id. § 101, 42 U.S.C. § 9601.

38. CERCLA section 106(a), entitled “Abatement actions,” states that: [J]n addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and
an action under section 9606(b)(2) of [CERCLA]; 39 (4) an action under section 9659(b) of [CERCLA] (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 of [CERCLA] or secured under section 9606 of [CERCLA] was in violation of any requirement of [chapter 9613 of CERCLA]. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site; 5 an action under section 9606 the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA § 106(a), 42 U.S.C. § 9606(a).

39. Under CERCLA section 106(b)(2)(A), "[a]ny person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest . . . ." Id. § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). Under section 9606(b)(2)(B), "[i]f the President refused to grant all or part of a petition made under [section 9606], the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund." CERCLA § 106(b)(2)(B), 42 U.S.C. § 9606(b)(2)(B).

40. Section 310 provides, in pertinent part, as follows: [e]xcept as provided in subsections (d) and (e) of this section and in section 113(h) [42 U.S.C.S. § 9613(h)] . . . any person may commence a civil action on his own behalf—(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Act . . . ; or (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency . . . ) where there is alleged a failure of the President or of such other officer to perform any act or duty under this Act . . . .

Id. § 310, 42 U.S.C. § 9659.

41. Section 104 provides that the President may direct removal or remedial actions to be taken whenever any hazardous substances are released or there is a substantial threat of a release. Id. § 104, 42 U.S.C. § 9604. Under this section, the President's authority allows him to: remove or arrange for the removal of [hazardous substances], and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . , or take any other response measure consistent with the national contingency plan which the President deems necessary to protect public health or welfare of the environment.

Id. § 104(a)(1), 42 U.S.C. § 9604(a)(1).

42. For the language of this section, see supra notes 39-40.

43. CERCLA section 101(23) defines "removal" as:
of [CERCLA] in which the United States has moved to compel a remedial action.

Furthermore, CERCLA section 113(f) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under 9607(a) of [CERCLA], during or following any civil action under section 9606 of [CERCLA] or under section 9607(a) of [CERCLA].”

The legislative history of CERCLA indicates that “delay will often exacerbate an already serious situation [and that] it is preferable to err on the side of protecting public health, welfare and the environment in administering the response authority of the fund.” Senator Thurmond also stated that “citizens, including potentially responsible parties, cannot seek review of the response action or their potential liability for a response action—unless the suit falls within one of the categories provided in section [113].” In a similar report, Representative Glickman stated that “[section 113] also covers all issues that could be construed as a challenge to the response and limits those challenges to the opportunities specifically set forth in this section.”

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed materials, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release . . . .

Id. § 101(23), 42 U.S.C. § 9601(23). CERCLA section 101 defines “remedial action” as:

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment . . . .

Id. at § 101(24), 42 U.S.C. § 9601(24). This section also goes on to list several specific methods that the EPA may use to effectuate the removal action. See id.

44. Id. § 113(f), 42 U.S.C. § 9613(f). For the textual language of CERCLA section 106, see supra note 39. For the textual language of CERCLA section 107(a), see supra note 37.


46. 132 Cong. Rec. § 14929 (daily ed. Oct. 3, 1986) (emphasis added). Senator Thurmond further stated that section 113(h) “is designed to preclude piecemeal review and excessive delay of cleanup.” Id. at 14928.

B. The Case Law—Ripeness and Subject Matter Jurisdiction under CERCLA and the DJA

Under the DJA, there must be an "actual controversy" in order for the court to exercise jurisdiction. An actual controversy exists when "there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Once an actual controversy exists, the court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Moreover, in *Carter Day Industries v. EPA (In re Combustion Equipment Associates)*, the Second Circuit held that there are two factors to consider when determining whether a declaratory judgment action exists: (1) the fitness of the matter for judicial decision; and (2) the hardship to the parties

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48. 28 U.S.C. § 2201 (1994). This section of the DJA states that, "[i]n a case of actual controversy... any court of the United States... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.*

49. *See* Caldwell v. Gurley Ref. Co., 755 F.2d 645, 649 (8th Cir. 1985) (quoting *Maryland Cas. Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941), quoting *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 506 (1972)). In *Caldwell*, the EPA notified both the lessor and lessee that there was an oil spill for which one or both of the parties would be liable for cleanup costs. *See id.* at 650. Subsequently, EPA cleaned up the contaminated site and the lessor filed a declaratory judgment against the lessee seeking a determination that the lessee was liable for the cleanup costs. *See id.* at 649-50. After the suit was filed, but before trial, the Coast Guard notified both parties that it would hold a hearing to assess the penalties and costs of the cleanup and that one or both of the parties would be liable for such costs. *See id.* at 650. Based on these facts, the Eighth Circuit determined that there was "a live dispute" between the parties at the time the suit was filed thereby creating an "actual controversy." *See id.* The *Caldwell* court stated that an analogous situation is presented in those cases in which the government threatens to enforce their rules and challenges are made to the government's authority. *See id.* In these cases, the plaintiff does not always have to wait for the actual commencement of enforcement proceedings to challenge the questioned authority under which the proceedings would be brought. *See id.* The Eighth Circuit noted, however, that "for such an action to present a justiciable controversy, the threat of enforcement must have immediate coercive consequences of some sort upon the plaintiff." *Id.*

50. 28 U.S.C. § 2201. The specific language of this section provides that "[i]n the case of an actual controversy within its jurisdiction... a court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.*

51. 838 F.2d 35 (2d Cir. 1988).
of withholding court consideration. Several cases illustrate how the courts have applied these rules to various factual situations.

In *Wickland Oil Terminals v. Asarco, Inc.*, the Ninth Circuit held that a successor owner's claim against a previous owner to determine liability under CERCLA was ripe even though EPA had not filed an action against either party. In reaching this conclusion,

52. See id. at 38. (citing Abbott Lab. v. Gardner, 387 U.S. 136, 149 (1967)). Among the factors used to determine whether a matter is fit for judicial decision are: (1) whether the agency action is “final;” and (2) whether the issue is purely legal or whether “consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations.” Id. at 37-38 (quoting Gardner v. Toilet Goods Assoc., 387 U.S. 167, 171 (1967)). The Second Circuit further stated that these factors are to be analyzed in conjunction with the premise that “the purpose of the [Declaratory Judgment] Act is to enable parties to adjudicate disputes before either side suffers great damage.” Id. at 37.

In *Carter Day*, the plaintiff, in 1980, filed for voluntary reorganization under Chapter 11 of the Bankruptcy Code. See id. at 36. In 1981, one of the plaintiff's subsidiaries filed for liquidation under Chapter 7 of the Bankruptcy Code. See id. At the liquidation proceedings, the New Jersey Department of Environmental Protection (NJDEP) filed a claim against the subsidiary to recover costs and penalties related to the contamination of two landfills by the subsidiary. See id.

In 1983, EPA notified the plaintiff that it was a PRP for the cleanup of both of the sites that its subsidiary contaminated. See id. Subsequently, EPA, pursuant to CERCLA, funded a Remedial Investigation and Feasibility Study to develop a cleanup strategy at the sites. See id. EPA did not file any claims against plaintiff at this time. See id.

In 1986, however, EPA filed a claim against the plaintiff's subsidiary at the bankruptcy proceedings. See id. Shortly thereafter, the plaintiff began an adversary proceeding in United States Bankruptcy Court, seeking a declaration that any CERCLA liability it may have had for the contaminated sites was discharged by its Chapter 11 bankruptcy reorganization. See id. The trial court dismissed the complaint on the grounds that the suit was not ripe and plaintiff appealed. See id. On appeal, the Second Circuit held that the plaintiff's request for declaratory judgment was not ripe for review because the plaintiff was only named as a PRP and because EPA did not file a claim against the plaintiff. See id. The Second Circuit also stated that “the potentially responsible party letter was not a final, definitive ruling with the status of a law demanding immediate compliance since it imposed no liability on plaintiff.” Id. at 38.

53. For a discussion of these decisions, see infra notes 55-94 and accompanying text.

54. 792 F.2d 887 (9th Cir. 1986).

55. See id. at 893. In *Wickland Oil*, Asarco Inc. (Asarco) operated a smelting operation from 1886 to 1970 on a parcel of land (Parcel) that was later purchased by Wickland Oil Terminals (Wickland) in 1977. See id. at 889. In 1980, the California Department of Health Services (Department) notified Wickland that the Parcel was contaminated by hazardous waste and that Wickland was responsible for the cleanup of the Parcel. See id. Consequently, Wickland expended approximately $150,000 in cleanup efforts and tests. See id. Subsequently, Wickland brought suit in district court against Asarco under CERCLA. See id. Wickland's complaint requested the following: (1) damages under CERCLA section 107(a) for testing costs incurred; (2) a declaration that Asarco, rather than Wickland, was solely and entirely liable under CERCLA for any release of hazardous substances at the Parcel; and (3) an order requiring Asarco to initiate clean-up of the Parcel. See
the Ninth Circuit followed the proposition that "a case is ripe where the essential facts establishing the right to declaratory relief have already occurred." In *NL Industries, Inc. v. Kaplan,* the Ninth Circuit followed *Wickland Oil* in holding that CERCLA creates a private cause of action for damages. Thus, the *NL Industries* court allowed the plaintiff to sue the defendant for reimbursement of the

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**id.** The district court granted Asarco's motion to dismiss for failure to state a claim upon which relief could be granted. *See id.* Specifically, the district court ruled that "an authorized governmental cleanup program, initiated by the EPA or by state authorities pursuant to a cooperative agreement, must commence before a private party can state a claim for damages under CERCLA." *Id.* at 890 (quoting *Wickland Oil Terminals v. Asarco, Inc.*, 590 F. Supp. 72, 77 (N.D. Cal. 1984)).

The Ninth Circuit reversed the district court's ruling, stating that the absence of EPA enforcement actions did not render *Wickland's* CERCLA claim "remote or hypothetical." *Id.* at 893. Thus, the Ninth Circuit ruled that the "essential fact establishing Wickland's right to declaratory relief—the alleged disposal of hazardous substances at the [Parcel] at the time Asarco owned and operated the smelting facility—ha[d] already occurred." *Id.*

56. *Id.* In *Arawana Mills Co. v. United Technologies Corp.*, 795 F. Supp. 1238, 1245-46 (D. Conn. 1992), the United States District Court for the District of Connecticut held that a private plaintiff's motion for declaratory judgment that the defendant was liable for cleanup and future costs was ripe. The *Arawana* court stated that ripeness "controls only those cases in which the EPA has engaged in enforcement action under CERCLA and one of the [PRPs] which the EPA has identified files a suit asking for a declaratory judgment that it is not liable." *See id.* at 1242. Furthermore, in *Allied Princess Bay Co. v. Atochem North America, Inc.*, 855 F. Supp. 595, 602-03 (E.D.N.Y. 1993), the District Court for the Eastern District of New York stated that CERCLA specifically provides for a private cause of action even when the extent of the response costs are uncertain, remediation has yet to occur, and the plaintiff is not yet under any government order compelling remediation. The *Allied Princess* court went on to determine that the purchaser's claim to the hold seller responsible for part of the response costs was ripe, and, accordingly, the purchaser could pursue a declaratory judgment that the seller was liable as a responsible party. *See id.*

57. 792 F.2d 896 (9th Cir. 1986).

58. *See id.* at 898. The Ninth Circuit cited CERCLA section 107 in coming to this conclusion. *See id.* For the text of this section, see *supra* note 37.

In *NL Industries,* plaintiff acquired a parcel of land which it later found to be severely contaminated with hazardous substances. *See id.* at 897. As a result of the contamination, state and local officials from California required the plaintiff to expend $1,200,000 to dispose of the hazardous substances. *See id.* Prior to the plaintiff's purchase of the contaminated land, the defendant owned the property for over 70 years and used it to operate facilities for paint and varnish products. *See id.* After the plaintiff cleaned up the site, it sued the defendant under CERCLA section 107(a) to recover its cleanup expenditures. *See id.* The plaintiff alleged that during the defendant's ownership of the contaminated site the defendant deposited the hazardous substances which contaminated the land. *See id.* at 898. Subsequently, the defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted, but the district court denied the motion and defendant appealed. *See id.* at 898-99. The Ninth Circuit affirmed the district court's holding, and cited its earlier decision in *Wickland Oil* as authority for its conclusion. *See id.* at 899.
recovery costs it expended during the cleanup of a contaminated site.\(^{59}\)

Similarly, in *Kelley v. Thomas Solvent Co.*,\(^{60}\) the District Court for the Western District of Michigan held that CERCLA section 107(a) gives a responsible, or potentially responsible party a private right of action against owners and operators for response costs.\(^{61}\) Similarly, the Supreme Court has noted that CERCLA section 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs . . . ."\(^{62}\)

\(^{59}\) See id. The Ninth Circuit allowed the plaintiff to maintain its private cause of action even though the plaintiff incurred its cleanup costs without acting pursuant to a cleanup program approved by a "lead agency". See id. at 899. "Lead agency," as used in this case, referred to "the EPA or a state agency operating pursuant to a contract or cooperative agreement executed under CERCLA." *Wickland Oil*, 792 F.2d at 891. The *NL Industries* court adopted the same definition for "lead agency" as it had declared earlier in the *Wickland Oil* case, thereby following its earlier reasoning in *Wickland Oil* that a governmentally authorized cleanup program was not a precondition to maintaining a private cause of action. See id. at 898-99.


\(^{61}\) See id. at 717. In *Kelley*, EPA and the state of Michigan sought recovery under CERCLA for costs that they expended in cleaning up hazardous wastes at Verona Well Field. See id. at 713. Prior to the cleanup, Thomas Solvent Company (Solvent) was in business as a distributor of chemical products at two locations including one at "the Annex." See id. at 714. The Annex was owned at all times by Grand Trunk Western Railroad (Grand Trunk) and leased to Solvent. See id. Additionally, Grand Trunk owned a third property which was used as its marshalling yard. See id.

Because it was not possible to determine the precise source of contamination at the Verona Well Field, each of the three sites were determined to be potential sources of the contamination. See id. After both parties were found liable to EPA for the cleanup costs, they filed motions seeking reimbursement under CERCLA. See id. at 713. Solvent also sought reimbursement from Grand Trunk for the response costs it expended to cleanup the Verona Well Field. See id. at 715. Grand Trunk argued, however, that Thomas Solvent was liable for the response costs that Grand Trunk expended to cleanup the Annex and the Verona Well Field. See id.

The *Kelley* court began its analysis of each party's claim by examining whether CERCLA permitted a private cause of action for reimbursement under section 107(a). See id. at 717. In concluding that such an action was available, the *Kelley* court stated that "potentially responsible and responsible parties have standing to seek reimbursement for their response costs under section [107(a)] [as it] supports the underlying policy of encouraging prompt and complete response actions to this extremely dangerous contamination." Id. Thus, the *Kelley* court stated that allowing a private cause of action against owners and operators "encourages subsequent owners and occupiers to take prompt response actions when hazardous contamination is discovered and thus, minimizes harm." Id.

\(^{62}\) Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994). The Supreme Court further noted that although CERCLA did not contain any express provisions authorizing a private party that incurred cleanup costs to seek contribution from other potentially responsible parties, several courts recognized section 107 to implicitly authorize such a cause of action. See id. at 813. Additionally, the Supreme Court noted that Congress amended CERCLA in 1986 by adding section 113(f) which created an express cause of action for contribution. See id. at 814.
Moreover, in *GNB Battery Technologies, Inc. v. Gould, Inc.*, the United States Court of Appeals for the Seventh Circuit held that when a declaratory judgment plaintiff filed "an action in anticipation of a threatened action by [a] declaratory judgment defendant, the real and immediate possibility of ... litigation [was] sufficient to create a justiciable controversy." In coming to this conclusion, the Seventh Circuit stated "[t]he test to be applied to determine the existence of an actual controversy in the context of a declaratory judgment action is 'whether ... there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" While courts have held that private causes of action for

Thus, the court stated that CERCLA contained both an express cause of action for contribution in section 113 and "impliedly authorizes a similar and somewhat overlapping remedy in [section] 107." *Id.*

63. 65 F.3d 615 (7th Cir. 1995).

64. *Id.* at 620. In *GNB Battery*, Gould, a publicly-held corporation involved in the business of the manufacture, sale and reclamation of batteries, formed a wholly-owned subsidiary, GNB Batteries, Inc., (GNB Batteries) to facilitate the future sale of Gould's battery business. *See id.* at 618. Gould then transferred the business and assets of its battery business to GNB Batteries and subsequently offered to sell all of the stock of GNB Batteries. *See id.* Subsequently, Stanley Gaines, one of Gould's senior vice-presidents, formed GNB Acquisition Corp. (Acquisition) for the purpose of purchasing GNB Batteries. *See id.*

Prior to the sale of GNB Batteries to Acquisition, Gould executed a Restated Assumption Agreement with GNB Batteries in which GNB Batteries agreed to assume "any and all obligations and liabilities of any nature ... of Gould relating to the businesses and operations of the [Battery] Divisions incurred by Gould ... prior to [April 6, 1984] ... ." *Id.* Pursuant to the sale, Acquisition merged with GNB Batteries and became GNB Battery Technologies, Inc. (GNB). *See id.* Five to six years after this sale, serious environmental problems relating to the battery business surfaced. *See id.*

As a result of potential liability under CERCLA, GNB filed a two-count declaratory judgment action against Gould based on the contention that GNB was not responsible for environmental liabilities that arose at Gould's plants prior to the sale in 1984. *See id.* The first count requested a declaration that "GNB [was] not a potentially responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607, for the hazardous waste disposed of by Gould at its battery manufacturing facilities not acquired by GNB or by Gould at common facilities." *Id.* The second count sought a declaration that "[u]nder the Restated Assumption Agreement, GNB did not undertake responsibility for Gould's liability for environmental cleanups or damages for any Gould properties or manufacturing facilities ... [or] ... for common facilities." *Id.* Gould counterclaimed, and sought declarations that: (1) GNB was liable to Gould under CERCLA; and (2) GNB was responsible under the Restated Assumption Agreement for Gould's environmental liabilities complaint. *See id.* at 618-19. The district court concluded that the Restated Assumption Agreement "unambiguously transferred the disputed environmental liabilities to GNB." *Id.* at 619.

65. *Id.* at 620 (quoting Nuclear Engage Co. v. Scott, 660 F.2d 241, 251-52 (7th Cir. 1981)). The Seventh Circuit determined that under the totality of circumstances, GNB sufficiently alleged that Gould sought to impose CERCLA liability on it, thus creating an actual controversy to warrant jurisdiction. *See id.* at 621. In
reimbursement and contribution under CERCLA are ripe and permissible, courts have also uniformly held that section 113(h) of CERCLA prevents courts from exercising jurisdiction over appeals to certain EPA actions, thereby making these claims unripe.66

In McClellan Ecological Seepage Situation v. Perry,67 the Ninth Circuit stated that the prohibitory language of section 113(h) divests federal courts of jurisdiction over any challenges to removal or remedial actions under CERCLA.68 The Ninth Circuit further noted that "[s]ection 113(h) is clear and unequivocal [and it] amounts to making this determination, the Seventh Circuit stated that "the question of CERCLA liability and the interpretation of any indemnification agreement among the parties liable for the clean-up are inextricably related." Id. The GNB Battery court further noted that CERCLA liability would continue to exist even if contractual liability was determined to be non-existent. See id.

66. See McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328 (9th Cir., cert. denied, 116 S. Ct. 51 (1995) (stating prohibitory language of section 113(h) divests federal courts of jurisdiction over any challenges to removal or remedial actions under CERCLA); Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology, 999 F.2d 1212, 1217 (8th Cir. 1993) (stating CERCLA section 113(h) does not permit challenges to EPA action until after EPA has completed removal or remedial action); Wheaton Indus. v. EPA, 781 F.2d 354, 356 (3d Cir. 1986) (stating pre-enforcement review of EPA's remedial actions contrary to policies underlying CERCLA); Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 884 (3d Cir. 1985) (same).

67. 47 F.3d 325 (9th Cir. 1994).

68. See id. at 328. McClellan involved a situation at McClellan Air Force Base, where large amounts of hazardous wastes were disposed of and subsequently leached into the groundwater. See id. at 327. As a result, McClellan began a cleanup program in 1979 and later modified its cleanup plan to comply with the requirements of the Superfund Amendments and Reauthorization Act of 1986. See id. The amended cleanup plan set forth an agreement by which McClellan would incorporate all of the applicable legislative requirements into its cleanup effort through a Management Action Plan involving itself, EPA, the Air Force and the state of California. See id.

Shortly thereafter, McClellan Ecological Seepage Situation (MESS) brought an action against the United States Secretary of Defense alleging that McClellan's cleanup procedures violated RCRA, the Clean Water Act and the California Water Code. See id. MESS sought an injunction against McClellan to prevent any further cleanup procedures until the applicable standards were met. See id. The district court denied MESS's claim on the grounds that McClellan's cleanup efforts were removal and remedial actions being conducted under CERCLA. See id. at 328. Thus, the district court held that CERCLA section 113(h) barred MESS's claim. See id.

MESS appealed, arguing that CERCLA section 113(h) did not apply because it was merely seeking that McClellan comply with RCRA and Clean Water Act standards that McClellan was already bound to follow. See id. The Ninth Circuit rejected this argument, holding that "the unqualified language of [section 113(h)] precludes 'any challenges' to CERCLA Section 104 clean-ups, not just those brought under other provisions of CERCLA." Id. The Ninth Circuit also held that section 113(h) withholds jurisdiction from all claims and challenges, including citizen suits. See id.
a ‘blunt withdrawal of federal jurisdiction.’” 69 Similarly, in Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology, 70 the Eighth Circuit held that it did not have jurisdiction over an action by citizens who sought a preliminary injunction to prevent EPA from engaging in certain removal action activities. 71 In making this determination, the Eighth Circuit held that CERCLA section 113(h) does not permit such an action until EPA has completed removal or remedial actions. 72

Likewise, in Voluntary Purchasing Groups, Inc. v. Reilly, 73 the Fifth Circuit held that “it is clear that CERCLA explicitly limits judicial review of remedial and removal plans where such review will delay cleanup.” 74 In coming to this conclusion, the Fifth Circuit

69. Id. (quoting North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991)). The Ninth Circuit recognized that in some cases the application of section 113(h) may delay judicial review, if not permanently, and may result in irreparable harm to other important concerns. See id. The Ninth Circuit went on to say, however, that “[w]e must presume that Congress has already balanced all concerns and 'concluded that the interest in removing the hazard of toxic waste from Superfund sites' clearly outweighs the risk of irreparable harm.” Id. at 329 (quoting Boarhead Corp. v. Erickson, 923 F.2d 1011, 1023 (3rd Cir. 1991)).

70. 999 F.2d 1212 (8th Cir. 1993).

71. See id. at 1217. In Peace Center, several companies operated a herbicide and pesticide production facility which eventually led to the contamination of the surrounding area. See id. at 1213. After the site was abandoned, EPA began to initiate immediate removal actions. See id. at 1214. Shortly after cleanup actions began, Greenpeace and the National Toxins Campaign prepared a report criticizing EPA’s removal action cleanup methods. See id. Subsequently, several groups sued EPA, seeking a temporary restraining order and preliminary injunction to enjoin EPA from engaging in the disputed cleanup methods. See id. at 1215. EPA filed a motion to dismiss, arguing that section 113(h) showed Congress’s clear intent that removal actions must be completed before a suit may be filed. See id. at 1216. The district court entered a temporary restraining order on the grounds that the cleanup procedures violated EPA’s procedures and, thus, presented "potential irreparable harm to plaintiffs [that] outweigh[ed] the potential harm to defendants." Id. at 1215. The Eighth Circuit reversed, relying on CERCLA section 113(h). See id. at 1217.

72. See id. The Eighth Circuit relied on two cases in making this determination. See id. In Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir. 1989), the Eleventh Circuit held that the plain language of section 113(h) bars suit until a remedial action is actually completed. In Alabama, the Eleventh Circuit barred a citizen group’s challenge to EPA’s failure to provide them with notice and hearing before it chose the method of remedial action. See id. at 1554.

In Schalk v. Reilly, 900 F.2d 1091, 1095 (7th Cir. 1990), the Seventh Circuit held that section 113(h) barred a citizens’ challenge to a consent decree between EPA and a responsible party for failing to prepare an environmental impact statement which violated the National Environmental Policy Act. The Schalk court stated that “challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage to the statute.” Id.

73. 889 F.2d 1380 (5th Cir. 1989).

74. Id. at 1388. The Fifth Circuit further stated that “after considering the CERCLA statute, its structure, and legislative history, ... [i]n all events, the philos-
relied on CERCLA section 113(h) when adopting EPA's reasoning that a letter identifying PRPs was an "enforcement activity" not subject to judicial review. Moreover, in *Carter Day*, the Second Circuit stated that "under CERCLA, liability is not assessed until after the EPA has investigated a site, decided what remedial measures are necessary, and determined which [potentially responsible parties] will bear the costs."  

However, in *Manville Corp. v. United States*, the United States District Court for the Southern District of New York found that a plaintiff's declaratory judgment action was ripe because EPA threatened the plaintiff with enforcement or "initiated coercive settlement processes." This decision gains little support however when compared to the cases in the Third Circuit.

...
In *Lone Pine Steering Committee v. EPA*, the plaintiff, a PRP, contended that EPA's clean-up plan was excessive compared to its own proposed clean-up plan and, thus, the court should have jurisdiction to determine whether the plaintiff's plan was sufficient. The Third Circuit denied review of the clean-up plan on the premise that "CERCLA was enacted in response to concerns about the danger to public health presented by hazardous waste sites and the slow reaction by the EPA to solve the problem." Later, in *Wheaton Industries v. EPA*, the Third Circuit affirmed its *Lone Pine* decision when it held "unequivocally that pre-enforcement review of EPA's remedial actions was contrary to the policies underlying CERCLA's statutory language and legislative history illustrate that "Congress did not contemplate pre-enforcement judicial review of EPA's decision to implement response action." The district court granted EPA's motion to dismiss for lack of subject matter jurisdiction on the grounds that "delay will often exacerbate an already serious situation" and that "it is preferable to err on the side of protecting public health, welfare and the environment in administering the response authority of the fund." The Third Circuit began with the premise that "[j]udicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe such was the purpose of Congress." Rather, the Third Circuit stated that when public health is threatened, an administrative agency is permitted to act first and litigate later. Thus, the Third Circuit looked to CERCLA's legislative history which stated that "delay will often exacerbate an already serious situation and that 'it is preferable to err on the side of protecting public health, welfare and the environment in administering the response authority of the fund.'" Therefore, the *Lone Pine* court ruled that "[t]o delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment."
CLA." The Wheaton court further stated that "'[t]he legal question of when judicial review is available should not depend on the peculiar facts of each case.'"85

Furthermore, in Boarhead Corp. v. Erickson,86 the Third Circuit held that it did not have jurisdiction under CERCLA to hear a plaintiff's challenge to EPA's pre-cleanup activities, noting that "CERCLA's language shows Congress concluded that disputes about who is responsible for a hazardous site, what measures actually are necessary to clean-up the site and remove the hazard or who is responsible for its costs should be dealt with after the site has been cleaned up."87 The Boarhead court stated that the plain lan-

84. Id. at 356. In Wheaton, the New Jersey Department of Environmental Protection (NJDEP) informed the plaintiff that it might be a PRP for hazardous waste at a contaminated site. See id. at 355. After unsuccessful negotiations between the plaintiff and the NJDEP about the design and implementation of a remedial investigation/field study at the site, the NJDEP and EPA entered into a cooperative agreement pursuant to CERCLA section 104 whereby EPA would provide money to the NJDEP to conduct the necessary remedial investigation or field study at the site. See id. The plaintiff then filed a declaratory judgment and preliminary injunction action seeking to enjoin EPA from spending federal money on the contaminated site. See id. at 355-56.

The trial court then granted EPA's motion to dismiss for lack of subject matter jurisdiction on the premise that CERCLA does not allow judicial review before a cost recovery action and that EPA's refusal to allow plaintiff to perform the remedial investigation or field study was not a final agency action subject to judicial review under the Administrative Procedure Act. See id. Subsequently, the plaintiff appealed, arguing that Lone Pine was not controlling because the plaintiff in Lone Pine appealed from EPA's rejection of its proposal in favor of an EPA proposal, as distinguished from the present situation in which the plaintiff appealed from EPA's refusal to permit the plaintiff to perform its own remedial investigation or field study. See id. In denying this argument, the Wheaton court stated that "'[i]n each case, the plaintiff sought control of an activity that is a necessary component of remedial actions and based the substantive claim on section 104 of CERCLA.'" Id.

85. Id. Rather, the Wheaton court stated that "'[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.'" Id. at 357 (quoting Block v. Community Nutrition Inst., 467 U.S. 340 (1984)); see also Barnes v. United States Dist. Court for W. Dist. of Wash., 800 F.2d 822 (9th Cir. 1986) (stating that CERCLA does not authorize pre-enforcement review of EPA orders); Aminoil, Inc. v. EPA, 599 F. Supp. 69, 71 (C.D. Cal. 1984) (stating "the legislative history of CERCLA indicates that courts should not engage in premature analysis of issues lying within the expertise of EPA, including issues as whether an emergency exists and, if so, whether the particular response action is necessary and proper").

86. 923 F.2d 1011 (3d Cir. 1991).

87. Id. at 1019. In Boarhead, the plaintiff owned farm property that was once used as a burial ground by Native Americans and, as a result of such use, the property was also eligible to be listed as a historic site. See id. at 1013. When EPA determined that the plaintiff exposed the property to toxic waste and that pre-cleanup studies needed to be conducted on such property, the plaintiff contended that the Native American remains and artifacts should be protected before EPA
guage of CERCLA indicates Congress intended to deny the court jurisdiction over EPA pre-cleanup challenges even if a statute other than CERCLA would create a federal claim. Other federal circuit courts have also followed this reasoning.

In Wagner Seed Co. v. Daggett, the Second Circuit followed the same reasoning as the Lone Pine court in declaring that it did not have subject matter jurisdiction over an EPA order requiring plaintiff to undertake certain remedial actions and to develop a plan to complete elimination of contamination. The Second Circuit conducted its studies. See id. Consequently, the plaintiff brought an action under the Preservation Act to prohibit EPA's CERCLA-related activities on the property. See id.

The district court dismissed the plaintiff's complaint, finding that it did not meet the timing procedures for judicial review specified in CERCLA section 113(h). See id. Further, the district court concluded that "the Preservation Act did not trump § 113(h)'s jurisdictional limitations and that any claim . . . [plaintiff] may have against the EPA . . . under the Preservation Act can be asserted only in accordance with § 113[(h)]'s review procedures." Id. at 1012. Moreover, the district court stated that under section 113(h), the plaintiff could not seek review of EPA's removal or remedial actions until either an enforcement or cost-recovery action was commenced under sections 106 or 107, or removal and remedial action was completed. See id.

88. See id. The Third Circuit noted that Congress expressly granted jurisdiction to all federal courts to hear claims arising under the Preservation Act. See id. at 1016. In determining that it did not have jurisdiction over the plaintiff's claim, however, the Boarhead court stated that "Congress could hardly have chosen clearer language to express its intent generally to deprive the . . . court of jurisdiction over claims based on other statutes when the EPA undertakes the clean-up of toxic wastes at a Superfund site." Id. at 1019. Further, the Boarhead court stated that the limits of section 113(h) over the court's jurisdiction "are an integral part of Congress's overall goal that CERCLA free the EPA to conduct forthwith clean-up related activities at a hazardous site." Id. at 1018. 89. For a discussion of similar decisions by other federal courts, see infra notes 90-94 and accompanying text.

90. 800 F.2d 310 (2d Cir. 1986).

91. See id. at 313. In Wagner Seed, the plaintiff's warehouse, which housed animal feed and agricultural chemicals, was burned down, causing contamination of the surrounding properties. See id. The plaintiff immediately commenced cleanup efforts under the supervision of the New York State Department of Environmental Conservation (NYDEC). See id. The plaintiff spent several hundred thousand dollars and claimed to have cleaned up all neighboring properties except two where plaintiff was denied access. See id. The plaintiff further claimed that it requested help from EPA and the NYDEC to gain access to the properties, but that neither could offer any assistance. See id. EPA, however, contended that "a potentially dangerous situation existed" since several areas were still polluted and left unprotected. Id. After several attempts to reach a satisfactory cleanup agreement with the plaintiff, EPA issued its order pursuant to CERCLA. See id. Subsequently, the plaintiff filed for a preliminary injunction which would prohibit EPA's order on the grounds that the court did have subject matter jurisdiction which, if it exercised, would have found that the plaintiff was excused from having to undertake EPA's proposed cleanup. See id. at 313-14. The district court held that it did not have jurisdiction to hear claims challenging EPA orders unless EPA initiated an enforcement action under CERCLA section 104(a). See id. at 314. 92. 21 Cessante: Gopher Oil Co. v. Bunker: Did the Eighth Circuit Make the Ripe De Published by Villanova University Charles Widger School of Law Digital Repository, 1997
stated that, although a presumption exits favoring jurisdiction by federal courts over federal administrative actions, under CERCLA, "introduc[ing] the delay of court proceedings at the outset of a cleanup would conflict with the strong congressional policy that directs cleanups to occur prior to a final determination of the party's [sic] rights and liabilities under CERCLA."92 In Solid State Circuits, Inc. v. EPA,93 the Eighth Circuit also cited the Third Circuit in holding that it lacked subject matter jurisdiction to review the merits of an EPA cleanup prior to an attempt by EPA to enforce it.94

C. Collateral Estoppel

In Johnson v. Consolidated Freightways, Inc.,95 the Supreme Court of Minnesota stated that "collateral estoppel is the 'issue preclusion' branch of the res judicata doctrine."96 The court further held that collateral estoppel applies where:

(1) the issue was identical to one in a prior adjudication;
(2) there was a final judgment on the merits;
(3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.97

92. Id. The Second Circuit also noted that other courts believed that "Congress envisioned a procedure that permits the EPA to move expeditiously in the face of a potential environmental disaster." Id.
93. 812 F.2d 383 (8th Cir. 1987).
94. See id. at 385. In Solid Circuit, EPA, after two months of unsuccessful negotiations, issued a cleanup order to the plaintiff pursuant to CERCLA section 106(a). See id. The order concluded that the plaintiff's handling of toxic substances was the cause of the contamination to the groundwater and that there was an "imminent and substantial endangerment to the public health, welfare, or the environment." Id. Further, the order directed the plaintiff, as a responsible party, "to obtain access to contaminated areas, to provide security at the facility, to submit a detailed clean-up plan to the EPA, and to notify the EPA within two days of their intent to comply with the order." Id.

Pursuant to the order, the plaintiff filed suit seeking to enjoin EPA from enforcing the order. See id. The plaintiff argued, inter alia, that it was not a responsible party under CERCLA and that even if it was, it could not gain access to the contaminated site because it had no property interest in the site. See id. The district court granted EPA's motion to dismiss on the grounds that CERCLA does not permit the court to exercise jurisdiction over pre-enforcement orders issued by the EPA pursuant to section 106. See id. In affirming the district court's decision, the Eighth Circuit cited the holdings of both Wagner Seed and Wheaton. See id. at 385 n.1.

95. 420 N.W.2d 608 (Minn. 1988).
96. Id. at 613 (citing Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 703 (Minn. 1982)).
97. Id; see also Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 711 (8th Cir. 1992) (stating same rule for collateral estoppel as used in Consoli-
In *United States v. Gurley*, the Eighth Circuit stated that under collateral estoppel "‘once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.’"  

In *Consolidated*, the Supreme Court of Minnesota held that the doctrine of collateral estoppel did not preclude the plaintiff's action against a potential tortfeasor in a wrongful death action. See *Consolidated*, 420 N.W.2d at 614. In an earlier hearing, the plaintiff was found to be 20% at fault, but this was before the defendant was identified as a potential tortfeasor. See *id.* Consequently, the *Consolidated* court relied on the notion that "[a]s a flexible doctrine, the focus is on whether [collateral estoppel’s] application would work an injustice on the party against whom estoppel is urged." *Id.* at 613. Thus, the Supreme Court of Minnesota concluded that the doctrine of collateral estoppel did not apply because the defendant was not a party to the previous action, and therefore, there was serious doubt that the plaintiff had an opportunity to fairly litigate the issue of comparative fault. See *id.*

98. 43 F.3d 1188 (8th Cir. 1994).
99. *Id.* at 1197 (quoting Montana v. United States, 440 U.S. 147, 153 (1979)); see also *Kaiser*, 353 N.W.2d at 902 (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)) (stating "once an issue is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation") In *Gurley*, in 1983, EPA brought an action in 1983 against Caldwell and Gurley Refining Company (GRC) under the CWA to recover cleanup costs at a site that Caldwell and GRC contaminated. See *Gurley*, 42 F.3d at 1191. After retaining a judgment for the cleanup costs in 1985, EPA performed a feasibility study and additional cleanup procedures on the contaminated site. See *id.* Subsequently, in 1987, EPA brought another action to recover cleanup costs of the remedial action it adopted after the 1986 study. See *id.* In 1992, the trial court entered judgment for EPA, concluding that GRC, William Gurley (principal shareholder and president of GRC), and Larry Gurley (an employee of GRC) were jointly and severally liable for the cleanup costs. See *id.* at 1192.

GRC and the Gurleys appealed, arguing, *inter alia*, that the district court's judgment should be reversed because under the doctrine of collateral estoppel, EPA was precluded by positions it took in the prior action under the CWA from proving the defendant's liability under CERCLA. See *id.* at 1195. Specifically, GRC and the Gurleys contended that: (1) EPA proved in the prior action that GRC had disposed of "oil," therefore EPA should be precluded from proving that CERCLA's petroleum exclusion does not apply to this cause of action and (2) EPA should be precluded from proving that Gurleys were "operators" under CERCLA because EPA proved that GRC was an "operator" in the prior action. See *id.* at 1198.

The Eighth Circuit held that the issue in the second case was not the same as the first, thus, the argument failed to meet the first component of the test for collateral estoppel. See *id.* The Eighth Circuit stated that in the first litigation, EPA attempted to prove that GRC disposed of either "hazardous substances" or "oil" as defined under CWA. See *id.* In the second case, GRC attempted to prove that it disposed of "petroleum" as defined in CERCLA. See *id.* Thus, the Eighth Circuit held that "although these two definitions may overlap to some degree, a substance
In *Graham v. Special School District No. 1*, the Supreme Court of Minnesota stated that five factors must be satisfied to trigger collateral estoppel in agency decisions:

1. The issue to be precluded must be identical to the issue raised in the prior agency adjudication.
2. The issue must have been necessary to the agency adjudication and properly before the agency.
3. The agency determination must be a final adjudication subject to judicial review.
4. The estopped party was a party or in privity with a party to the prior agency determination.
5. The estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

In *Falgren v. Board of Teaching*, the Supreme Court of Minnesota followed the same test it applied in *Graham*, but further noted that "'whether collateral estoppel is available is a mixed question of law and fact subject to de novo review.'"

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that is included in CWA's definition of 'oil' is not necessarily exempted from CERCLA's definition of 'petroleum.'" *Id.* at 1197. Additionally, the Eighth Circuit held that the issue of whether GRC was an "operator" under the CWA in the first litigation was a different and distinct question than whether the Gurleys are "operators" under CERCLA. *See id.*

100. 472 N.W.2d 114 (Minn. 1991).

101. *Id.* at 116. In *Graham*, a school board conducted a nine-day hearing and determined, based on substantial and competent evidence, that a teacher should be discharged. *See id.* at 115. During the hearing, the teacher filed a tort action against the school board and later added an appeal to the school board's decision to terminate her. *See id.* In response, the school board contended that the factual determinations which it made in the teacher's termination proceeding were precluded from relitigation in the subsequent tort lawsuit. *See id.*

The Supreme Court of Minnesota held that the school board acted in a "quasi-judicial" capacity in handing down its decision to terminate a teacher and thus, collateral estoppel was applicable to the agency decision. *See id.* at 116. The *Graham* court proceeded to hold that the factual issues which arose at the termination proceeding presumably were going to arise again in the tort action and thus, the tort action was barred by collateral estoppel. *See id.* Further, the *Graham* court held that the teacher received a full and fair hearing because both parties were represented by counsel, subpoenas were available, a record was made of the proceeding, and the rules of evidence were followed. *See id.* at 116-18.

102. 545 N.W.2d 901 (Minn. 1996).

103. *Id.* at 905 (quoting *In Re Trusts Created by Hormel*, 504 N.W.2d 505, 509 (Minn. Ct. App. 1995), *pet. for review denied*, (Minn. Oct. 19, 1993)). The *Falgren* court also stated that while the doctrine of collateral estoppel precludes parties from relitigating issues identical to those previously litigated, it is not to be rigidly applied. *See id.* In *Falgren*, based on an arbitrator's factual findings, the plaintiff was terminated by the school board for engaging in immoral conduct. The arbitrator concluded that the plaintiff engaged in nonconsensual sexual contact with a student. *See id.* at 904.

The plaintiff then appealed the school board's decision from the Minnesota Court of Appeals. *See id.* The school board argued that the plaintiff's appeal was
The Eighth Circuit applied a similar test for determining when collateral estoppel will bar relitigation of a factual issue in a subsequent hearing. The court stated that the factual issue at bar must satisfy the following four part test:

(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been barred by the doctrine of collateral estoppel. See id. After the court of appeals found in favor of the plaintiff, the school board appealed, at which time plaintiff contended that only two of the five requirements for collateral estoppel were not met, viz., the issue was not identical, nor was the agency decision subject to judicial review. See id. at 905. However, the Supreme Court of Minnesota found that the issue in both instances was whether the plaintiff engaged in the alleged immoral conduct, and thus, concluded that the issues were identical. See id. Moreover, the Faigren court also found that under Minnesota law, an arbitrator's decision is subject to review in certain situations and thus, this decision was a final judgment subject to review by the court. See id. Therefore, the court found that the doctrine of collateral estoppel barred the plaintiff's appeal. See id.

104. See Farmland Indus., Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1339 (8th Cir. 1993); see also Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990) (stating "collateral estoppel, sometimes referred to as issue preclusion, precludes parties from relitigating issues which are identical to issues previously litigated and which were necessary and essential to the former resulting judgment"). Farmland involved a situation in which EPA brought a CERCLA action against Morrison Enterprises (Morrison) for past and future response costs that EPA incurred at a contaminated site. See Farmland, 987 F.2d at 1337. This suit was filed in district court in 1988 and EPA was granted partial summary judgment against Morrison in 1990. See id. At the hearing, the district court determined that Morrison owned the contaminated site during the time the hazardous waste was released and thus, Morrison was the responsible person under CERCLA section 107(a)(2). See id. Furthermore, the district court specifically held that its ruling was not based on a determination that Morrison caused the contamination at the site. See id. at 1337-38. Shortly after EPA filed suit against Morrison in 1988, Farmland Industries (Farmland) filed a declaratory judgment action against Morrison pursuant to 42 U.S.C. § 9613(f)(1). See id. at 1338. Farmland sought a ruling that Morrison would be liable for any response costs incurred by Farmland in connection with the investigation and cleanup of the site. See id. Morrison counterclaimed seeking contribution and indemnity from Farmland for costs already incurred and for any future costs incurred in connection with the cleanup of the site. See id. After a jury ruled for Morrison on Farmland's claim and for Farmland on Morrison's counterclaim, both appealed the decision. See id. Farmland argued on appeal that the district court erred by not applying the collateral estoppel effect of the decision of EPA's suit against Morrison. See id. Thus, Farmland contended that collateral estoppel would mandate a finding that Morrison caused the contamination of the site since Morrison was found to be the responsible person. See id. at 1339. Morrison argued that the district court erred in its jury instructions, thus preventing the jury from properly considering Morrison's indemnity claim. See id. After applying these standards, the Eighth Circuit held that since the district court did not rule on causation in the EPA-Morrison suit, collateral estoppel could not be applied to that issue. See id. at 1340. The Eighth Circuit, however, did hold that collateral estoppel prevented Morrison from claiming that the release of hazardous substances at the site did not occur while Morrison was an owner of the property. See id. This issue was resolved when the Morrison court found that a release had occurred causing contamination and that Morrison was the responsible person. See id.
been litigated in the prior action; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment. 105

The court also stated that “[i]f the party against whom the earlier decision is being asserted did not have a full and fair opportunity to litigate the issue in question, collateral estoppel does not apply.” 106 The Eighth Circuit has similarly held that collateral estoppel may be raised at any time during the proceedings, “so long as it is raised at the first reasonable opportunity after the rendering of the decision having the preclusive effect.” 107

IV. NARRATIVE ANALYSIS

The Eighth Circuit’s analysis of the district court’s dismissal of Gopher Oil’s complaint for lack of subject matter jurisdiction claim was de novo. 108 The court’s analysis began with the DJA, which states “that when an ‘actual controversy’ exists, any federal court may declare the rights and other legal relations of any interested party.” 109 In determining whether there was an actual controversy that was ripe for review under the DJA, the Gopher Oil court looked to the following: (1) whether there was “a sufficiently concrete case or controversy within the meaning of Article III of the Constitution”; and (2) whether “prudential considerations ... justi[fied] the present exercise of judicial power.” 110

105. See id. The Eighth Circuit also stated that the “party asserting collateral estoppel bears the burden of proving that a prior decision satisfies all four elements of the test.” Id. at 1338.
107. Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 711 (8th Cir. 1992). The Eighth Circuit also stated that collateral estoppel may be waived as a defense for the first time on appeal. Id.
109. Id. (citing 28 U.S.C. § 2201). For the exact language this section, see supra note 48.
110. Id. (quoting Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1272-73 (8th Cir. 1994)). The Eighth Circuit also stated that for an actual controversy to exist there must be “a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Id. (quoting Caldwell v. Gurley Ref. Co., 755 F.2d
In determining that the MERLA and tort liability claims were not ripe for review, the Eighth Circuit found that the government's threat of suit was too speculative to create an actual controversy. The court also stated that withholding a decision would result in little hardship to Gopher Oil and that the facts did not indicate an immediate threat of either MERLA or tort liability. The Eighth Circuit, however, disagreed with the district court's decision as to the ripeness of the CERCLA and indemnity claims.

The Eighth Circuit began its analysis by looking to the language of CERCLA governing the timing of review. The court stated that section 9613(h)(1) "prohibits judicial review of challenges to remedial action of the EPA until after the EPA has filed...". The Eighth Circuit also stated that "[a] live dispute must exist between the parties at the time of the court's hearing." Id. (quoting Caldwell v. Gurley Ref. Co., 755 F.2d 645, 650 (8th Cir. 1985)).

111. See id. at 1051. The Eighth Circuit made no independent findings on the issues of MERLA and tort liability, but rather it agreed with the district court's analysis finding lack of subject matter jurisdiction. Id. As to the issue of ripeness on all four counts of Gopher Oil's complaint, the district court held that:

It is apparently clear that the plaintiff did receive the letter almost a full year ago which warned it that it would be a potentially liable party. The plaintiff then commenced this suit in expectation that it would be a potentially liable party. The plaintiff then commenced this suit in expectation that it would be named a defendant based on approximately ten months later a telephone call warning it again. In order to bring its claim in this court, however, the plaintiff must allege an actual controversy.

The mere possibility of being named a defendant as responsible party does not constitute the actual controversy which is required. This Court recognizes that [the] EPA, and the United States on its behalf, for any number or reasons, may well and yet decline to sue Gopher Oil, or they may select yet another among ten, or others beyond those listed as potential defendants. They may also defer simply on the fact that this case is too small or any one of a number of reasons, which they seem to be able to come up with at a moment's notice and somehow the cases do not get sued. In the event they are to be sued, those are another issue, but this Court at this time cannot find the requisite immediacy, and in this Court's view there is little hardship to the plaintiff in withholding the Court's consideration.

Id. at 1049 (citing trial on defendant's motion to dismiss, appellant's addendum at 26-27).

112. Id. The Gopher Oil court did not make any independent findings on this conclusion either, rather it relied on the district court's determination in affirming its decision. Id.

113. Gopher Oil, 84 F.3d at 1051. Gopher Oil's complaint sought a declaration that the Estate, as prior owners, caused the release of hazardous substances and that Estate was liable to the extent of Gopher Oil's liability. Id. at 1049. The Estate, however, argued that there was no actual controversy because Gopher Oil had not incurred any response costs nor had the EPA brought a cost-recovery action against Gopher Oil. Id. The Eighth Circuit never addressed the Estate's former contention that Gopher Oil's complaint was not ripe since it had not incurred any cleanup costs. Id.

114. Id.
an action to recover response costs."\textsuperscript{115} The Eighth Circuit then determined that since the EPA had initiated a cost-recovery action pursuant to section 9607, the liability issue under CERCLA was now ripe for review.\textsuperscript{116} The Eighth Circuit noted that while the district court may not have had jurisdiction over the CERCLA claim at the time of the hearing, the recent suit by the EPA created a ripe claim.\textsuperscript{117}

The Eighth Circuit then proceeded to examine Gopher Oil's claim for indemnity from the Estate on the basis of the 1973 contractual indemnity agreement between the Estate and Bame Oil.\textsuperscript{118} In determining that the indemnity claim was ripe, the Eighth Circuit held that "the question of CERCLA liability and the interpretation of any indemnification agreement among the parties liable for the clean-up are inextricably related."\textsuperscript{119} After making this determination, the Eighth Circuit had to consider whether the district court's alternative grant of summary judgment on the indemnity issue was appropriate.\textsuperscript{120} The Eighth Circuit stated that "[s]ummary judgment is appropriate where there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law."\textsuperscript{121} Since a federal court must accord "full faith and credit" to the state court's judgment, the Eighth Circuit looked to the law of Minnesota in making its determination.\textsuperscript{122}

Under Minnesota law, collateral estoppel applies where:

1. the issue was identical to one in a prior adjudication;
2. there was a final judgment on the merits; (3) the es-

\textsuperscript{115}. Id. The Eighth Circuit also relied on the Fifth Circuit's determination that "until the government initiates a cost-recovery action, a potential responsible party cannot obtain judicial review of the agency action." Id. at 1050 (quoting Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1389 (5th Cir. 1989)).

\textsuperscript{116}. Id. The Eighth Circuit, however, left it to the district court "to determine whether CERCLA's objective of avoiding piecemeal litigation would be best served if the subject matter of . . . [the] declaratory judgment action were in some way or manner determined in conjunction with the government's cost-recovery action." Id.

\textsuperscript{117}. Id. at 1051. The Eighth Circuit proceeded to state that there may be "significant problems" concerning the sufficiency of the CERCLA claim. Id.

\textsuperscript{118}. Gopher Oil, 84 F.3d at 1051. The indemnity agreement was executed when Bame Oil purchased Gopher State from the Romnesses. Id. For the exact language of the indemnity agreement, see supra note 24.

\textsuperscript{119}. Gopher Oil, 84 F.3d at 1051 (quoting GNB Battery Tech., Inc. v. Gould, Inc., 65 F.3d 615, 621 (7th Cir. 1995)).

\textsuperscript{120}. Id. The Eighth Circuit reviewed the summary judgment ruling de novo, applying the same standard as the district court. Id.

\textsuperscript{121}. Id. The Eighth Circuit adopted this standard from Fed. R. Civ. P. 56(c).

\textsuperscript{122}. Id. at 1051-52.
topped party was a party or in privity with a party to prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

The Minnesota Court of Appeals addressed Gopher Oil's claim for contractual indemnity and held that the environmental laws, from which the current liabilities arise, were enacted ten years after the agreement was executed, and thus, were neither contemplated by the parties nor covered by the agreement at the time of contracting. Gopher Oil's contention in federal court, however, was that the Minnesota Court of Appeals ruling applied only to the MERLA liability claim under the indemnity agreement and not to the CERCLA claim.

Although the Eighth Circuit agreed with Gopher Oil's argument that the Minnesota state court decision did not contemplate the CERCLA issue, the Eighth Circuit concluded, nevertheless, that "the state court's interpretation of the indemnity agreement applies with equal force to CERCLA liability." Therefore, the court stated that the phrase "existing at close" also applied to the CERCLA claim since CERCLA was not enacted until seven years after the execution of the agreement. Thus, the court concluded that summary judgment was appropriate since the intent of the indemnity agreement was "fully litigated" and "the issue was finally determined on its merits adversely to Gopher Oil."
V. CRITICAL ANALYSIS

A. The Eighth Circuit Properly Held That Gopher Oil’s Liability Claim Under CERCLA Was ripe For Adjudication.

The overwhelming amount of authority pertaining to when a claim is ripe for adjudication supports the Eighth Circuit’s determination that the district court did have subject matter jurisdiction to hear Gopher Oil’s CERCLA liability claim. Although the Eighth Circuit came to the correct conclusion, it did not apply the proper mode of analysis in reaching this result. The Eighth Circuit determined that because the EPA filed a cost-recovery action under CERCLA, the suit to determine liability between Gopher Oil and the Estate was ripe for adjudication. In making this determination, the Gopher Oil court properly stated that under Section 113(h) of CERCLA, a court may not review any challenges to EPA remedial or removal actions “until after the EPA has filed an action to recover response costs.” The Gopher Oil court’s interpretation of this sec-

129. Gopher Oil, 84 F.3d at 1051. In reaching this conclusion, the Eighth Circuit noted that the district court may not have had subject matter jurisdiction at the time of the hearing. See id. Thus, the Eighth Circuit did not rule definitively as to whether the district court’s determination on the CERCLA issue was correct. See id. Rather, the Eighth Circuit analyzed the ripeness of the CERCLA issue solely in light of the EPA’s cost-recovery action. See id.

130. See id. EPA filed this cost-recovery action pursuant to 42 U.S.C. § 9607. See id. For the text of 42 U.S.C. § 9607, see supra note 37. The court based this decision on the provisions of 42 U.S.C. § 9613(h), which governs when judicial review is appropriate under CERCLA. Gopher Oil, 84 F.3d at 1051. For the text of section 9613(h), see supra notes 35-47 and accompanying text.

131. See Gopher Oil, 84 F.3d at 1051 (citing CERCLA § 103, 42 U.S.C. § 9613(h)). For the text of this section, see supra notes 35-47 and accompanying text. This conclusion is supported by Senator Thurmond’s statement that “citizens, including potentially responsible parties, cannot seek review of the response action or their potential liability for a response action—other than in an action for contribution—unless the suit falls within one of the categories provided in section [113].” 132 CONG. REC. S14,929 (daily ed. Oct. 3, 1986) (statement of Sen. Thurmond). Representative Glickman further stated that “[Section 113(h)] also covers all issues that could be construed as a challenge to the [EPA] response [actions], and limits those challenges to the opportunities specifically set forth in this section.” 132 CONG. REC. H9582 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman). Furthermore, the Eighth Circuit has held that section 113(h) of CERCLA does not permit private citizens to seek an injunction to prevent the EPA from engaging in certain removal action activities until after a removal or remedial action has been completed by the EPA. Arkansas Peace Ctr. v. Arkansas Dep’t of Pollution Control and Ecology, 999 F.2d 1212, 1217 (8th Cir. 1993). See also Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1389 (5th Cir. 1989) (holding that “until the government initiates a cost-recovery action, a potential responsible party cannot obtain judicial review of the agency action”); Carter Day Indus., Inc. v. EPA (In re Combustion Equip. Assoc.), 838 F.2d 35, 38 (2d Cir. 1988) (holding plaintiff’s claim against EPA not ripe for review since plaintiff was only named as potentially responsible party and because EPA did not file claim against plaintiff); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325,
tion is supported by the Third Circuit's holding that pre-enforcement review of the EPA's remedial actions was "unequivocally" contrary to the policies underlying CERCLA. Furthermore, the plain language of Section 113(h) illustrates that the Eighth Circuit was correct in determining that a remedial or removal action may not be reviewed until the EPA has filed a cost-recovery action. Although the court was correct in its interpretation of section 113(h), this section should not have controlled the Eighth Circuit's decision.

In determining whether Gopher Oil's claim was ripe for adjudication, the Eighth Circuit should have analyzed the claim under...
the DJA, rather than section 113(h). According to the court in

134. The Eighth Circuit did apply the rules of the DJA to Gopher Oil's MERLA and tort liability claims. *Gopher Oil*, 84 F.3d at 1050-51. Thus, the Eighth Circuit agreed with the district court that in regard to these two claims "the government's threat of suit was too speculative to create an actual controversy between Gopher Oil and the [E]state and that withholding a decision at this time would result in little hardship to Gopher Oil." *Id.* at 1051. There is no debate that the Eighth Circuit's analysis and application of the DJA was sound as to these two issues, however, the Eighth Circuit did not apply this same analysis to the CERCLA claim, as it should have. *See id.*

The district court's decision on whether an actual controversy existed pertained to all four of Gopher Oil's claims, *including the CERCLA claim*. *See id.* at 1049-50. When the Eighth Circuit analyzed the ripeness of the CERCLA claim, however, it divorced itself from the "actual controversy" standard employed by the district court. *See id.* at 1051. The Eighth Circuit specifically stated that, "given the latest developments in the case"—namely the cost-recovery action filed by the EPA against Gopher Oil—it disagreed with the district court's holding that the CERCLA and indemnity claims were not ripe. *Id.* The next step the Eighth Circuit took, however, was to look to CERCLA's provisions for the timing of judicial review. *Id.* This peculiarity, in itself, illustrates that the Eighth Circuit erroneously employed section 113(h) of CERCLA instead of continuing to analyze the issue of ripeness from within the "actual controversy" framework. *See id.*

This is supported by the district court's statement that "in the event [Gopher Oil and the other potentially responsible parties] are to be sued, those are another issue", but at this time the "requisite immediacy" is lacking to create an actual controversy. *Id.* at 1050. Thus, as the district court indicated, once the EPA filed a cost-recovery action, it presented "another issue" for the Eighth Circuit to analyze under the actual controversy standard; it was not a means of getting to section 113(h) of CERCLA. *See id.* As noted previously, both the district court and the Eighth Circuit found "that the government's threat of suit in this case was too speculative to create an actual controversy". *Id.* at 1051. Thus, once the EPA filed its cost-recovery against Gopher Oil, the "threat of suit" was no longer "too speculative". *See id.* Therefore, in keeping consistent with its reasoning, the Eighth Circuit should have continued to apply the same declaratory judgment standard that it did to the MERLA and tort claims. *See id.* This conclusion is also supported by the proposition that there are two factors to consider when determining whether a declaratory judgment action exists: (1) the fitness of the matter for judicial decision; and (2) the hardship to the parties of withholding consideration. *Carter Day*, 838 F.2d at 37-38.

Applying this test to the facts in *Gopher Oil* illustrates that the district court was using a declaratory judgment standard when it analyzed the ripeness of Gopher Oil's claim, because the district court specifically stated "that withholding a decision at this time would result in little hardship to Gopher Oil." (emphasis added) *Gopher Oil*, 84 F.3d at 1051. Furthermore, the district court stated that it could not find the "requisite immediacy" necessary to create an actual controversy. *Gopher Oil*, 84 F.3d at 1050. *See GNB Battery*, 65 F.3d at 620 (stating that to determine whether an actual controversy exists in declaratory judgment context there must be "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment"). Thus, since the district court applied a declaratory judgment test to all of Gopher Oil's claims, the Eighth Circuit should have done the same. *See Gopher Oil*, 84 F.3d at 1050. Furthermore, when one considers, both, that the Eighth Circuit affirmed the district court's ripeness determination as to the MERLA and the tort liability issues, and that the district court's decision was made in reference to all of Gopher Oil's claims, it seems difficult to understand how the Eighth Circuit could abandon a mode of analysis that it partly affirmed and instead look to CERCLA's timing provisions for judicial review of challenges made to EPA removal and remedial
Arawana Mills Co. v. United Technologies Corp.,

ripeness "controls only those cases in which the EPA has engaged in enforcement action under CERCLA and one of the potentially responsible parties which the EPA has identified files a suit asking for a declaratory judgment that it is not liable." Similarly, the Ninth Circuit has held that the absence of EPA enforcement actions does not render a CERCLA claim "remote" or "hypothetical".

In Gopher Oil, Gopher Oil's complaint sought a declaration that the Estate was a responsible party under CERCLA to the extent of Gopher Oil's liability; the complaint did not, however, challenge the EPA's determination that Gopher Oil was a potentially responsible party. Therefore, the Gopher Oil court did not have to wait for EPA to engage in enforcement action, namely a cost-recovery action, prior to determining that Gopher Oil's claim was ripe. Moreover, since Gopher Oil's claim was a private cause of action actions. See id. at 1051. It does not seem logical for the Eighth Circuit to partly affirm a district court decision—a decision that specifically analyzed the ripeness of the CERCLA issue without looking to Section 113(h)—and at the same time apply an independent standard without stating the reasons for its divergence from the standard it previously affirmed. See id. See also Carter Day, 838 F.2d at 87 (stating that the purpose of the DJA is to enable parties to adjudicate disputes before either side suffers great damage).

Arawana, the District Court for Connecticut found that a private plaintiff's motion for declaratory judgment that defendant was liable for cleanup and future costs was ripe. Id. In coming to this conclusion, the Arawana court looked to the dispute between the private parties to determine whether the claim was ripe, not to whether CERCLA's timing provisions for judicial review were invoked. See id.

The Ninth Circuit specifically reversed the district court's holding that "an authorized governmental cleanup program, initiated by the EPA or by state authorities pursuant to a cooperative agreement, must commence before a private party can state a claim for damages under CERCLA." Id. at 890 (quoting Wickland Oil Terminals v. Asarco, Inc., 590 F. Supp. 72, 77 (N.D. Cal. 1984)).

See Gopher Oil, 84 F.3d at 1049. See also Allied Princess Bay Co. v. Atochem N. Am., Inc., 855 F. Supp. 595, 602 (E.D.N.Y. 1993) (stating CERCLA specifically provides for private cause of action even where extent of response costs are uncertain, remediation has yet to occur, and the plaintiff is as yet under no government order compelling remediation).

The Eighth Circuit based its ripeness determination solely on the fact that EPA had filed a cost-recovery action against Gopher Oil. Id. Thus, the Eighth Circuit analyzed whether Gopher Oil's CERCLA claim was ripe for review based on the judicial review provisions of section 113(h).

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against the Estate and not the EPA, the Eighth Circuit should have determined whether an "actual controversy" existed under the DJA to allow the court to have subject matter jurisdiction. 140

To determine whether an actual controversy exists in a declaratory judgment context, there must be "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 141 Gopher Oil's complaint presented a "substantial controversy" since it involved a private cause of action which sought a court determination of which party was liable under CERCLA as between itself and the Estate. 142 The claim also had "sufficient immediacy" be-

140. 28 U.S.C. § 2201. Under this section of the DJA, once the court has determined that an actual controversy exists, it may determine the rights of the parties seeking the declaration and "whether or not further relief is or could be sought." Id. In order for section 113(h) of CERCLA to apply, Gopher Oil would have had to bring suit against the EPA challenging one of its removal or remedial orders, as this section provides that the court shall not have "jurisdiction to review any challenges of remedial or removal actions" except in the enumerated instances. See CERCLA § 103, 42 U.S.C. § 9613(h). For the full text of Section 113(h), see supra notes 35-47. Since Gopher Oil did not challenge either an EPA remedial action or a removal action, section 113(h) was rendered moot, and thus, the Eighth Circuit could determine the rights of the parties once an actual controversy was presented. See Gopher Oil, 84 F.3d at 1051. The cases involving the applicability of section 113(h) illustrate that it is not invoked unless the EPA action is implicated or challenged in the lawsuit. In Arkansas Peace Center v. Arkansas Department of Pollution Control and Ecology, 999 F.2d 1212, 1216-17 (8th Cir. 1993), the Eighth Circuit stated that section 113(h) of CERCLA does not grant jurisdiction to the courts until after removal and remedial actions have been completed by EPA. In Peace Center, the Eighth Circuit held that it did not have jurisdiction over an action by private citizens who sought a preliminary injunction to prevent EPA from engaging in removal action activities which the citizens opposed. Id. at 1218. For a further discussion of the facts of Peace Center, see supra notes 70-72 and accompanying text.

141. GNB Battery, 65 F.3d at 620 (quoting Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 251-52 (7th Cir. 1981)). Applying this standard, the GNB Battery court held that there was a justiciable controversy when a plaintiff filed a declaratory judgment action in anticipation of a threatened action by the defendant. Id. Specifically, the GNB Battery court held that, looking at the totality of circumstances, plaintiff had sufficiently alleged that defendant sought to impose CERCLA liability on it, thereby creating an actual controversy. Id. at 621. For the facts of GNB Battery, see supra notes 64-66 and accompanying text.

142. See Gopher Oil, 84 F.3d at 1049-50. In GNB Battery, the plaintiff sought a declaration that: (1) defendant was liable to plaintiff under CERCLA; and (2) that defendant was responsible for plaintiff's environmental liabilities on the basis of an agreement between the parties. See GNB Battery, 65 F.3d at 618-19. These facts rival those in Gopher Oil, as Gopher Oil sought both a declaration that the Estate was liable for Gopher Oil's CERCLA liability and that the Estate was required to indemnify Gopher Oil for any liabilities arising under CERCLA. See Gopher Oil, 84 F.3d at 1049. Thus, since the court in GNB Battery held that "the question of CERCLA liability and the interpretation of any indemnification agreement among the parties liable for the clean-up are inextricably related," Gopher Oil's complaint
cause the EPA had threatened to sue Gopher Oil for cleanup costs in the near future and it was necessary to get a determination as to whether Gopher Oil or the Estate would be liable to EPA for these costs. There were also "adverse legal interests" present, since neither party could agree as to who was liable for the cleanup costs under CERCLA.

Furthermore, according to the Ninth Circuit, "a case is ripe where the essential facts establishing the right to declaratory relief must have presented a "substantial controversy". See GNB Battery, 65 F.3d at 619. This invariably holds true when one considers that since the Eighth Circuit entertained the merits of the "inextricably related" indemnity claim, they must have determined that there was at least a "substantial controversy" with respect to the indemnity agreement. See Gopher Oil, 84 F.3d at 1051. Therefore, since the CERCLA claim and the indemnity cannot be separated under the analysis set forth in GNB Battery, there must have been a "substantial controversy" in regard to Gopher Oil's CERCLA claim as well. This is supported by Allied Princess Bay Co. v. Atochem North America, Inc., 855 F. Supp. 595, 602 (E.D.N.Y. 1993), in which the court stated that CERCLA specifically provides for a private cause of action even when the extent of the response costs are uncertain, remediation has yet to occur, and the plaintiff is as yet under no government order compelling remediation.

Furthermore, the immediacy of Gopher Oil's claim is apparent when one considers that CERCLA liability will continue to exist even if contractual liability is determined to be non-existent. See Gopher Oil, 84 F.3d at 1049-50. The "immediacy" of Gopher Oil's claim is compounded by the fact that a representative from the EPA informed Gopher Oil that the EPA anticipated referring this matter to the Department of Justice and expected a CERCLA suit to be brought in the first quarter of 1995. See id. at 1049. The fact that the EPA did eventually file a cost-recovery action against Gopher Oil lends more support to the immediacy argument, since Gopher Oil specifically attempted to divert liability by filing its action against the Estate. See id. Furthermore, the immediacy of Gopher Oil's claim is apparent when one considers that CERCLA liability will continue to exist even if contractual liability is determined to be non-existent. See GNB Battery, 65 F.3d at 621 (noting that the issues of CERCLA liability and contractual liability are "inextricably" interrelated). Thus, the Eighth Circuit could entertain subject matter jurisdiction on the grounds that it had to determine liability for the purposes of CERCLA liability if for no other reason. This is supported by the court's reasoning in GNB Battery, that the "totality of circumstances" test can be used to determine whether a claim creates an actual controversy. See id. at 620. Following the GNB Battery court's reasoning, the "totality of circumstances" in Gopher Oil suggest that the claim is ripe: the initial threat of suit by the EPA; the naming of Gopher Oil as a potentially responsible party; the cost-recovery action by the EPA against Gopher Oil; and the indemnity agreement between the parties. See Gopher Oil, 84 F.3d at 1049-50. The GNB Battery court stated that when "a declaratory judgment plaintiff files an action in anticipation of a threatened action by the declaratory judgment defendant, the real and immediate possibility of such litigation is sufficient to create a justiciable controversy." GNB Battery, 65 F.3d at 620. But see Gopher Oil, 84 F.3d at 1049-50 (district court decision, which was partly affirmed by Eighth Circuit, stated that merely being named potentially responsible party does not present requisite immediacy required to constitute an actual controversy).

The "adverse legal interests" between the parties are best evidenced by the debate over the interpretation of the indemnity agreement. See id. at 1051. Gopher Oil argued that the indemnity agreement encompassed all liabilities arising from the day the agreement was entered into by the parties. See id. The Estate, whose position was adopted by the court, however, contended that the indemnity agreement did not contemplate environmental laws enacted years after the agreement was executed. See id.
have already occurred."145 In *Gopher Oil*, the "essential fact" establishing Gopher Oil's right to declaratory relief occurred when the Brooklyn Park site was contaminated and the EPA demanded reimbursement for the entire cost of its cleanup efforts from Gopher Oil and nine other potentially responsible parties.146 Thus, after being named a potentially responsible party, Gopher Oil did not have to wait for the EPA to file a cost-recovery action before it could institute a CERCLA liability claim against the Estate.147 Therefore, the

145. Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 893 (9th Cir. 1986). In applying this standard, the Ninth Circuit held that a successor owner's claim that a previous owner was solely and entirely responsible under CERCLA for the release of all hazardous substances was ripe for review even though the EPA had not engaged in any enforcement action against the successor owner. *See id.* The Ninth Circuit held that the essential fact establishing the successor owner's right to declaratory relief was the alleged disposal of hazardous substances at the contaminated site at the time the previous owner occupied the site. *See id.* For a further discussion of the facts in *Wickland Oil*, see *supra* notes 55-57 and accompanying text.

146. *Gopher Oil*, 84 F.3d at 1049. Applying the "essential fact" standard set forth in *Wickland Oil* illustrates that Gopher Oil's situation was analogous to that of the plaintiff in *Wickland Oil* and, therefore, should have been ripe. *See Wickland Oil*, 792 F.2d at 893. In *Wickland Oil*, the plaintiff specifically requested a declaration that the defendant, rather than itself, was solely liable under CERCLA for any release of the hazardous substances at the contaminated site. *See id.* at 889. This declaration was filed prior to any enforcement action by the EPA, but after plaintiff had incurred some cleanup costs. *See id.* Count one of Gopher Oil's complaint, which was also filed prior to EPA enforcement action, was almost identical to the plaintiff's request in *Wickland Oil* in that it alleged that the Estate was a responsible party under CERCLA to the extent of Gopher Oil's liability. *See Gopher Oil*, 84 F.3d at 1049. Furthermore, the "essential fact" in *Wickland Oil*, the alleged disposal of hazardous substances at the contaminated site when it was owned by defendant, was very similar to the situation in *Gopher Oil*. *See id.* Although *Gopher Oil* did not involve a piece of property once owned by the Estate, it did involve a declaration that the Estate, as predecessor corporation, actually caused the release of the hazardous substances at Brooklyn Park and therefore was liable under CERCLA for cleanup costs. *Id.* This correlation illustrates that Gopher Oil's complaint was ripe for review because the "essential fact," namely the contamination at the Brooklyn Park site coupled with potential CERCLA liability, had already occurred when Gopher Oil filed its action. *See Gopher Oil*, 84 F.3d at 1049-50.

Furthermore, just because Gopher Oil did not expend any cleanup costs does not render Gopher Oil's claim unripe, since the "occurrence of the contamination" was the "essential fact" establishing the right to declaratory relief, not the expenditure of cleanup costs. *See id.* Thus, applying the standards set forth in *Wickland Oil*, the Eighth Circuit could determine that an actual controversy existed between Gopher Oil and the Estate.

147. *See Caldwell v. Gurley Ref. Co.*, 755 F.2d 645 (8th Cir. 1985). The *Caldwell* court held that there was an actual controversy between a lessor and lessee to warrant a declaratory judgment action seeking a determination of lessor's right to indemnity against lessee for liability arising under CERCLA. *See id.* at 650. The *Caldwell* court made this ruling even though the EPA had not filed a cost-recovery action against either party. *See id.* Prior to the lawsuit, however, the Coast Guard notified the parties that one, or both of the parties, would be liable for the EPA's cleanup costs. *See id.* Based on these facts, the Eighth Circuit found that there was a "live dispute" between the parties. *Id.* For a discussion of the facts of *Caldwell*,
Eighth Circuit should have focused its analysis on the ripeness of Gopher Oil's claim under the DJA, not on whether Gopher Oil's claim met the provisions of Section 113(h).\(^{148}\)

Moreover, this conclusion is also supported by the spirit of CERCLA, which contains an express cause of action for contribution under section 9613 and "implies authorize[s] a similar and somewhat overlapping remedy in [section 9607]."\(^{149}\) In *Kelley v. Thomas Solvent Co.*,\(^{150}\) the District Court for the Western District of Michigan held that section 9607 creates a private cause of action and that allowing such a cause of action "encourages subsequent owners and occupiers to take prompt response actions when hazardous contamination is discovered and thus, minimizes harm."\(^{151}\) Although Gopher Oil's complaint did not seek contribution under section 9607, it did seek a private cause of action attempting to hold the Estate liable to the extent of Gopher Oil's CERCLA liability.\(^{152}\)

Thus, Gopher Oil's claim to redistribute liability is similar in spirit to a private cause of action for reimbursement and contribution in that none of these causes of action run counter to CERCLA's goal of allowing the EPA to conduct cleanup activities at hazardous waste sites.\(^{153}\) This holds true because none of these causes of ac-

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\(^{148}\) See supra note 49 and accompanying text. *See also* GNB Battery Technologies, Inc. v. Gould, Inc., 65 F.3d 615, 620 (7th Cir. 1995). For a discussion of *GNB Battery*, see supra notes 64-66 & 144.

\(^{149}\) See Arawana Mills Co. v. United Technologies Corp., 795 F. Supp. 1238, 1247 (D. Conn. 1992) (stating that ripeness "controls only those cases in which the EPA has engaged in enforcement action under CERCLA and one of the potentially responsible parties which the EPA has identified files a suit asking for a declaratory judgment that it is not liable").

\(^{150}\) Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994). The pertinent part of section 9607(a) of CERCLA provides that liability extends to "any other necessary costs of response incurred by any other person consistent with the national contingency plan." CERCLA § 107, 42 U.S.C. § 9607(a)(4)(B). For the text of section 9607, see supra note 37. Section 9613(f) of CERCLA provides, in pertinent part, that "[a]ny person may seek contribution from any other person who is liable or potentially liable under 9607(a) of [CERCLA], during or following any civil action under section 9606 of [CERCLA] or under section 9607(a) of [CERCLA]." CERCLA § 113, 42 U.S.C. § 9613(f).


\(^{152}\) Id. at 717. For a discussion of the facts in *Kelley*, see supra notes 61 and accompanying text. *See also* NL Indus., Inc. v. Kaplan, 792 F.2d 896, 899 (9th Cir. 1986) (concluding that section 9607 permits private cause of action to recover cleanup costs even though plaintiff incurred its cleanup costs without acting pursuant to cleanup program approved by "lead agency."). For a discussion of the facts of *NL Industries*, see supra notes 58-60 and accompanying text.

\(^{153}\) Gopher Oil Co. v. Bunker, 84 F.3d 1047, 1049 (8th Cir. 1996).
tion challenge any action taken by the EPA, thus no delay results in remedial or removal actions since these suits only involve private parties.154

B. The Eighth Circuit Properly Concluded That Collateral Estoppel Barred Gopher Oil’s CERCLA Claim In Federal Court.

In Gopher Oil, the Eighth Circuit had to determine whether Gopher Oil’s contractual indemnity claim under CERCLA was barred by the doctrine of collateral estoppel.155 For collateral estoppel to apply, the four previously mentioned factors must be satisfied.156 Even if these criteria are met, however, the Eighth Circuit still had to focus on whether the application of collateral estoppel would work an injustice against Gopher Oil since collateral estoppel is a “flexible doctrine.”157 Applying these standards, the Gopher Oil

154. See Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1388 (5th Cir. 1989) (stating “it is clear that CERCLA explicitly limits judicial review of remedial and removal plans where such review will delay cleanup”).

155. Gopher Oil, 84 F.3d at 1051-52. The debated contractual provision reads “[a]ll liabilities of the Company of any nature, whether accrued, absolute, contingent, or otherwise, existing at closing, to the extent not reflected or reserved against in full in the Company’s financial statements or otherwise mentioned or expected herein . . . arising out of transactions entered into, or any state of facts existing prior to such date.” (emphasis added). State v. Gopher Oil Co., No. C8-94-225, 1994 WL 328631, *1 (Minn. Ct. App. July 12, 1994). For further discussion of the Minnesota Court of Appeals’ analysis of the indemnity agreement, see supra notes 24-28 and accompanying text.

156. For a list of the four factors needed for collateral estoppel to apply, see supra text accompanying note 97. See Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613 (Minn. 1988); See also Tarutis v. Commissioner of Revenue, 393 N.W.2d 669 (Minn. 1986) (stating same rule for collateral estoppel as used in Consolidated); Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990) (same); Aetna Cas. and Sur. Co. v. General Dynamics Corp., 968 F.2d 707, 711 (8th Cir. 1992) (same); Bublitz v. Commissioner of Revenue, 545 N.W.2d 382, 385 (Minn. 1996) (same); Farmland Industries, Inc. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1339 (8th Cir. 1993) (stating collateral estoppel applies when factual issue at bar meets four part test: “(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been litigated in the prior action; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment”); Graham v. Special Sch. Dist. No. 1, 472 N.W.2d 114, 116 (Minn. 1991) (stating additional factor must be met to trigger collateral estoppel to agency decisions: “the agency determination must be a final adjudication subject to judicial review”). The Eighth Circuit accorded full faith and credit to the Minnesota court’s decision, giving it the same preclusive effect in federal court as it would have in a Minnesota state court. Gopher Oil, 84 F.3d at 1051-52. Thus, the Eighth Circuit looked to Minnesota law to determine the preclusive effect of the state court’s decision. Id. at 1052.

157. See Consolidated, 420 N.W.2d at 613-14. In Consolidated, the Supreme Court of Minnesota combined this standard with the four collateral estoppel elements to determine that although plaintiff had fully litigated a tort action in a
court found that although the CERCLA liability issue was not raised in state court, the state court's interpretation of the indemnity agreement applied with equal force to CERCLA liability.\textsuperscript{158} Moreover, since collateral estoppel "is a mixed question of law and fact subject to de novo review," the \textit{Gopher Oil} court had to apply this standard when reviewing the district court's decision.\textsuperscript{159}

The Eighth Circuit's determination that collateral estoppel barred Gopher Oil's claim was correct. The Estate raised the issue of collateral estoppel "at the first reasonable opportunity after the rendering of the decision having the preclusive effect," thus the Eighth Circuit was justified in entertaining the Estate's collateral estoppel defense.\textsuperscript{160} Applying the first criteria necessary for collateral estoppel illustrates that the language in the indemnity agreement which Gopher Oil attempted to apply to the CERCLA claim was identical to the MERLA claim asserted at the state level.\textsuperscript{161} The

different proceeding, collateral estoppel did not bar his claim against a later discovered potential tortfeasor. \textit{See id.}\textsuperscript{158} The \textit{Consolidated} court stated that plaintiff did not have an opportunity to fairly litigate in the earlier action because the defendant had not been identified as a potential tortfeasor. \textit{See id.}\textsuperscript{159} Thus, although the issue of fault in the tort action was litigated earlier it was not done to its fullest extent. \textit{See id.}\textsuperscript{160}

\textsuperscript{158.} \textit{Gopher Oil}, 84 F.3d at 1052. The Eighth Circuit followed the Minnesota Court of Appeals' reasoning that "[t]he liabilities at issue in this case arise under environmental laws enacted ten years after the [indemnity] agreement was executed. They were neither contemplated by the parties nor covered by the agreement. The qualifying phrase 'existing at closing' clearly limits Gopher State's liability." \textit{Id.} (quoting State v. Gopher Oil Co., No. C8-94-225, 1994 WL 328631, *1 (Minn. Ct. App. July 12, 1994)).

\textsuperscript{159.} \textit{See Falgren v. Board of Teaching}, 545 N.W.2d 901, 905 (Minn. 1996) (quoting \textit{In Re Trusts Created by Hormel}, 504 N.W.2d 505, 509 (Minn. Ct. App. 1993), \textit{pet. for review denied}, (Minn. Oct. 19, 1993)) (stating that while collateral estoppel precludes parties from relitigating issues identical to those previously litigated, it is not applied rigidly). For a discussion of the facts in \textit{Falgren}, see \textit{supra} notes 102-03 and accompanying text.

\textsuperscript{160.} \textit{See Aetna Cas. and Sur. Co. v. General Dynamics Corp.}, 968 F.2d 707, 711 (8th Cir. 1992) (setting forth notion that collateral estoppel may be raised at any time during proceedings "so long as it is raised at the first reasonable opportunity after the decision having the preclusive effect"). In \textit{Gopher Oil}, the Estate raised the issue of collateral estoppel during proceedings at the district court level. \textit{See Gopher Oil}, 84 F.3d at 1051. This was the first opportunity the Estate had to raise the issue of collateral estoppel at the federal level, because all of Gopher Oil's claims pertaining to the Brooklyn Park site were raised initially in federal court. \textit{See id.}\textsuperscript{161} Thus, the Brooklyn Park litigation presented the first opportunity for the Estate to rely on the findings of the Minnesota state courts in the earlier liability action. \textit{See id.}\textsuperscript{162}

\textsuperscript{161.} \textit{See Gopher Oil}, 84 F.3d at 1052. When Bame Oil (which later became Gopher Oil) acquired Gopher State from the Romnesses, the Romnesses agreed to indemnify Bame with respect to any of Gopher State's liabilities existing at closing. \textit{Id.} at 1049. The Minnesota Court of Appeals held that "the qualifying phrase 'existing at closing' clearly limits Gopher State's liability." \textit{Id.} at 1052. \textit{See also Falgren}, 545 N.W.2d at 905 (holding that where teacher was terminated for engaging in
decision by the Minnesota Court of Appeals supports the Eighth Circuit’s conclusion that “[t]he intent of the indemnity agreement with regard to later enacted environmental laws is the identical issue that was fully litigated by Gopher Oil in the state court third-party complaint, and the issue was finally determined on its merits adversely to Gopher Oil.”162

Gopher Oil’s claim also satisfied the second element of collateral estoppel since the decision rendered by the Court of Appeals of Minnesota pertaining to contractual liability was a “final judgment on the merits.”163 The third criteria was also satisfied since both Gopher Oil and the Estate were parties to the prior adjudications.

162. Gopher Oil, 84 F.3d at 1052. Gopher Oil contended that the Minnesota Court of Appeals’ ruling on the indemnity agreement applied only to the MERLA claim and not to the CERCLA claim. See id. Although the Eighth Circuit agreed with Gopher Oil’s argument, it nevertheless stated that the issue pertaining to the CERCLA claim was identical to the issue pertaining to the MERLA claim which was adjudicated at the state court level. See id. See United States v. Gurley, 43 F.3d 1188, 1198 (8th Cir. 1994) (stating collateral estoppel did not bar EPA’s suit against waste oil reclamation company since issues in present cause of action were not identical to those in an earlier action against defendant). The Gurley court held that the earlier action involved both whether a substance disposed of was “oil” as defined in the CWA and whether defendant was an “operator” under the CWA. See id. at 1198-99. The subsequent EPA action, however, concerned both whether a substance was “petroleum” under CERCLA and whether defendant was an “operator” under CERCLA. See id. at 1198. The Gurley court found that, although these definitions were closely related, they did not comprise the same issue. See id. For a further discussion of Gurley, see supra notes 98-99 and accompanying text.

tion. Moreover, by determining that the language of the indemnity agreement limited the Estate's liability to all liabilities "existing at closing," the state court gave Gopher Oil a "full and fair" opportunity to adjudicate the contractual indemnity issue. Finally, since each of these factors were met, Gopher Oil would not suffer injustice by invoking collateral estoppel against its indemnity claim. Thus, the Eighth Circuit properly concluded that collateral estoppel barred Gopher Oil's contractual indemnity claim under CERCLA in the federal courts.

VI. IMPACT

The Eighth Circuit's decision in Gopher Oil will have a negative impact on future cases that involve a private party declaratory judgment action against another private party seeking a declaration that the former is not liable for cleanup costs under CERCLA. This holds true even though the Eighth Circuit ultimately reached the correct conclusion as to the ripeness issue. By applying section 113(h) of CERCLA to Gopher Oil's CERCLA liability claim, the Eighth Circuit essentially divorced itself from the actual controversy.

164. See Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613 (stating third element of when collateral estoppel applies is where "the estopped party was a party or in privity with a party to the prior adjudication"); State v. Gopher Oil Co., No. C8-94-225, 1994 WL 328631, *1 (Minn. Ct. App. July 12, 1994) (showing Gopher Oil denied any liability and served third-party complaint against Estate alleging that Estate must indemnify it for any environmental liability).

165. See Consolidated, 420 N.W.2d at 613 (stating fourth element of collateral estoppel is where "the estopped party was given a full and fair opportunity to be heard on the adjudicated issue"). The Minnesota Court of Appeals set forth the proposition that whether the indemnity agreement was ambiguous was a legal determination for the court to decide. See State v. Gopher Oil Co., No. C8-94-225, 1994 WL 328631, *1 (Minn. Ct. App. July 12, 1994). After reviewing the agreement, the appellate court held that neither party contemplated liabilities arising under environmental laws enacted ten years after the agreement. See id. According full faith and credit to the state court decision, the Eighth Circuit found that the same analysis applied to the CERCLA claim since CERCLA was enacted seven years after the indemnity agreement. See Gopher Oil, 84 F.3d at 1051-52. Thus, Gopher Oil received a "full and fair opportunity" to have the indemnity issue litigated. See Graham v. Special Sch. Dist. No. 1, 472 N.W.2d 114, 116-18 (Minn. 1991) (holding teacher received full and fair hearing where both parties where represented by counsel; subpoenas were available; record was made of the proceedings; and rules of evidence were followed at proceeding to determine whether teacher should be discharged). For a discussion of the facts of Graham, see supra notes 100-01 and accompanying text.

166. See Consolidated, 420 N.W.2d at 613-14 (stating "[a]s a flexible doctrine, the focus is on whether [collateral estoppel's] application would work an injustice on the party against whom estoppel is urged.").

167. As to the collateral estoppel issue, the Eighth Circuit's holding was accurate under Minnesota law and, therefore, its decision will not adversely impact future cases involving collateral estoppel.
standard applied by other courts in a like situation. Thus, private parties bringing CERCLA liability claims in the Eighth Circuit will no longer be subject to the requirements of the DJA, rather, they will have to satisfy the requirements of section 113(h) before they can obtain a declaratory judgment.

Therefore, from a practical standpoint, where EPA decides against engaging in an enforcement action that would invoke federal jurisdiction under section 113(h), a private party will not be able to get a declaration assessing CERCLA liability in the Eighth Circuit. The negative implications that this scenario produces are endless, but perhaps the most compelling is a situation in which a private party engages in voluntary cleanup, thereby incurring costs, and subsequently seeks a declaration that another party should be required to indemnify it for its cleanup costs under CERCLA. This scenario obviously creates not only a difficult situa-

168. See Gopher Oil Co. v Bunker, 84 F.3d 1047, 1051 (8th Cir. 1996). For a discussion of how the Eighth Circuit diverged from the “actual controversy” standard set forth in the DJA and applied by other courts see supra notes 129-54 and accompanying text.

169. This result is very difficult to rationalize when one considers that section 113(h) applies to judicial review of removal and remedial actions by the EPA, not whether a claim presents an “actual controversy” under the DJA. See CERCLA § 113(h), 42 U.S.C. § 9613(h). This is illustrated by section 113(h) which states that federal court jurisdiction to review any challenges of remedial or removal actions is limited to five specific instances, including “(1) an action under section 9607 of [CERCLA] for recovery of response costs or damages or contribution ....” Id. Therefore, in causes of action similar to that in Gopher Oil, a party will have to wait for the EPA to file an action against it before it can get a declaration that it should not be liable for cleanup costs. See Gopher Oil, 84 F.3d at 1051. Thus, the Eighth Circuit’s analysis conflicts with the DJA’s purpose of enabling “parties to adjudicate disputes before either side suffers great damage.” Carter Day Indus., Inc. v. EPA (In re Combustion Equip. Assoc.), 838 F.3d 35, 38 (2d Cir. 1988).

170. See Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1389 (5th Cir. 1989) (holding “until the government initiates a cost-recovery action, a potential responsible party cannot obtain judicial review of the agency action.”); see also Carter Day, 838 F.2d at 38 (holding plaintiff’s claim against EPA was not ripe for review since plaintiff was only named as potentially responsible party and because EPA did not file claim against plaintiff); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328-29 (9th Cir.), cert. denied, 116 S.Ct. 51 (1995) (holding prohibitory language of section 113(h) divests federal courts of jurisdiction over any challenges to removal or remedial actions under CERCLA); Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 385-86 (8th Cir. 1987) (holding CERCLA does not permit court to exercise jurisdiction over pre-enforcement orders issued by EPA pursuant to section 106 of CERCLA). For a further discussion of the application of section 113(h) of CERCLA, see supra notes 35-94 and accompanying text.

171. This situation has been presented before the federal courts in many instances and, in each case, the court has analyzed the claim under an “actual controversy” standard. See Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986) (holding successor owner’s claim against previous owner to determine liability under CERCLA was ripe even though EPA had not filed an action against either party); Arawana Mills Co. v. United Technologies Corp., 795 F. Supp. 1238,
tion for parties who acquire cleanup costs under CERCLA, but also poses a difficult decision for parties in deciding whether to voluntarily cleanup hazardous waste sites. Therefore, the Eighth Circuit's decision in *Gopher Oil* may produce inequitable results, dissuade parties from cleanup contributions, and leave private parties without a proper course of action in future CERCLA liability lawsuits.

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1245-46 (D. Conn. 1992) (holding private plaintiff's motion for declaratory judgment that defendant was liable for cleanup and future costs was ripe); Allied Princess Bay Co. v. Atochem N. Am., Inc., 855 F. Supp. 595, 602-03 (E.D.N.Y. 1993) (stating CERCLA specifically provides for private cause of action even when extent of response costs are uncertain, remediation has yet to occur, and plaintiff is as yet under no government order compelling remediation); GNB Battery Technologies, Inc. v. Gould, Inc., 65 F.3d 615, 620 (7th Cir. 1995) (holding that when declaratory judgment plaintiff filed "an action in anticipation of a threatened action by [a] declaratory judgment defendant, the real and immediate possibility of . . . litigation [was] sufficient to create a justiciable controversy"). For a further discussion of these cases, see supra notes 54-66 and accompanying text.

172. Parties may be reluctant to voluntarily cleanup waste sites if they are not assured a proper course of action in federal courts. Furthermore, the Eighth Circuit's decision conflicts with CERCLA's theory of providing restitution to parties by making those parties responsible for causing hazardous substances releases liable for cleanup costs. See John C. Cruden, *Environmental Litigation*, SA85 ALI-ABA 517, 519-21 (1996).