

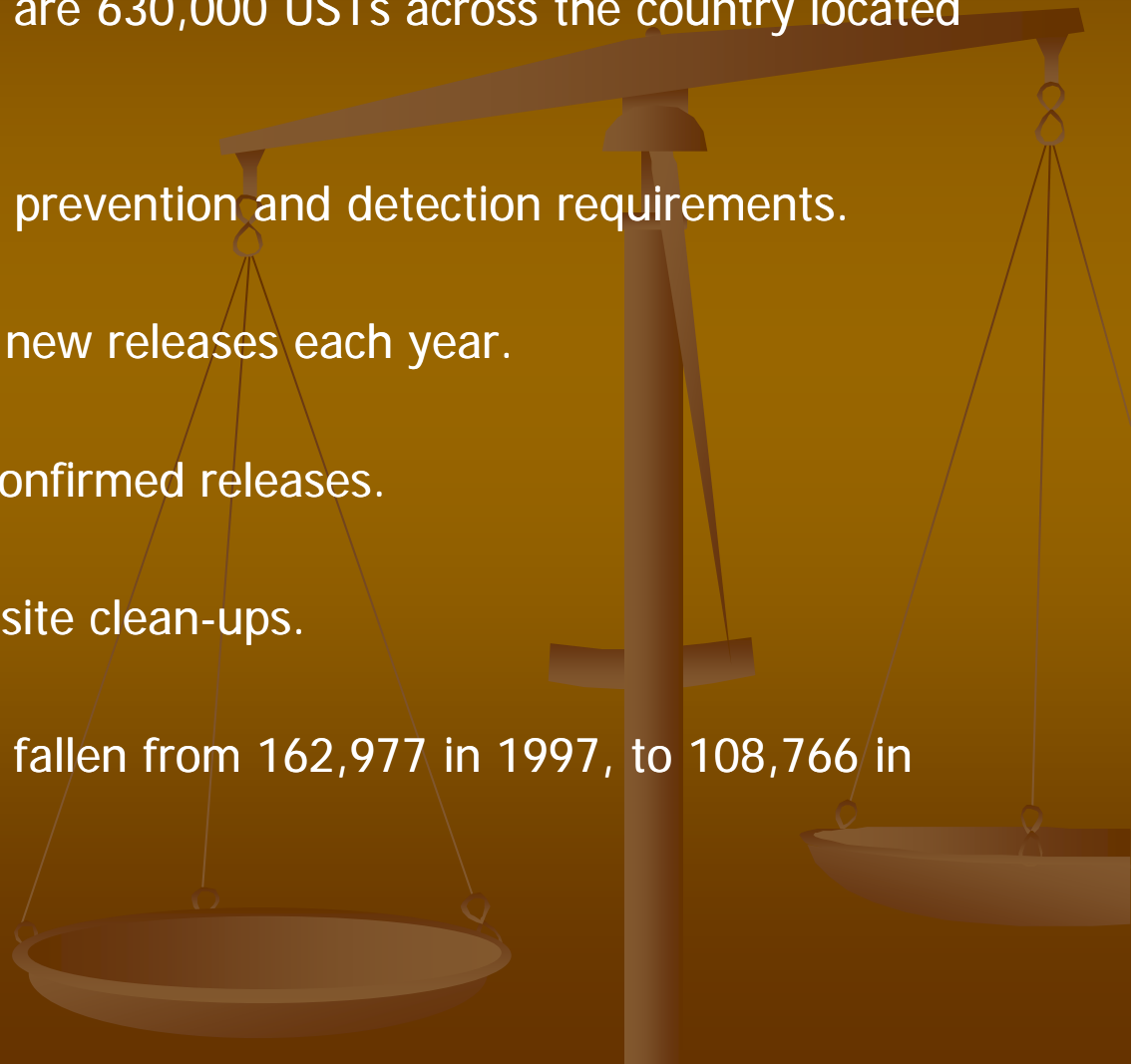


# Legal Update 2008

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# Underground Storage Tanks in 2007

- The EPA reported that there are 630,000 USTs across the country located at 240,000 sites.
- Two-thirds fully comply with prevention and detection requirements.
- On average there are 9,000 new releases each year.
- In 2007, there were 7,570 confirmed releases.
- In 2007, there were 13,862 site clean-ups.
- The backlog of old spills has fallen from 162,977 in 1997, to 108,766 in 2007.



# Major Settlements



# Major Settlements

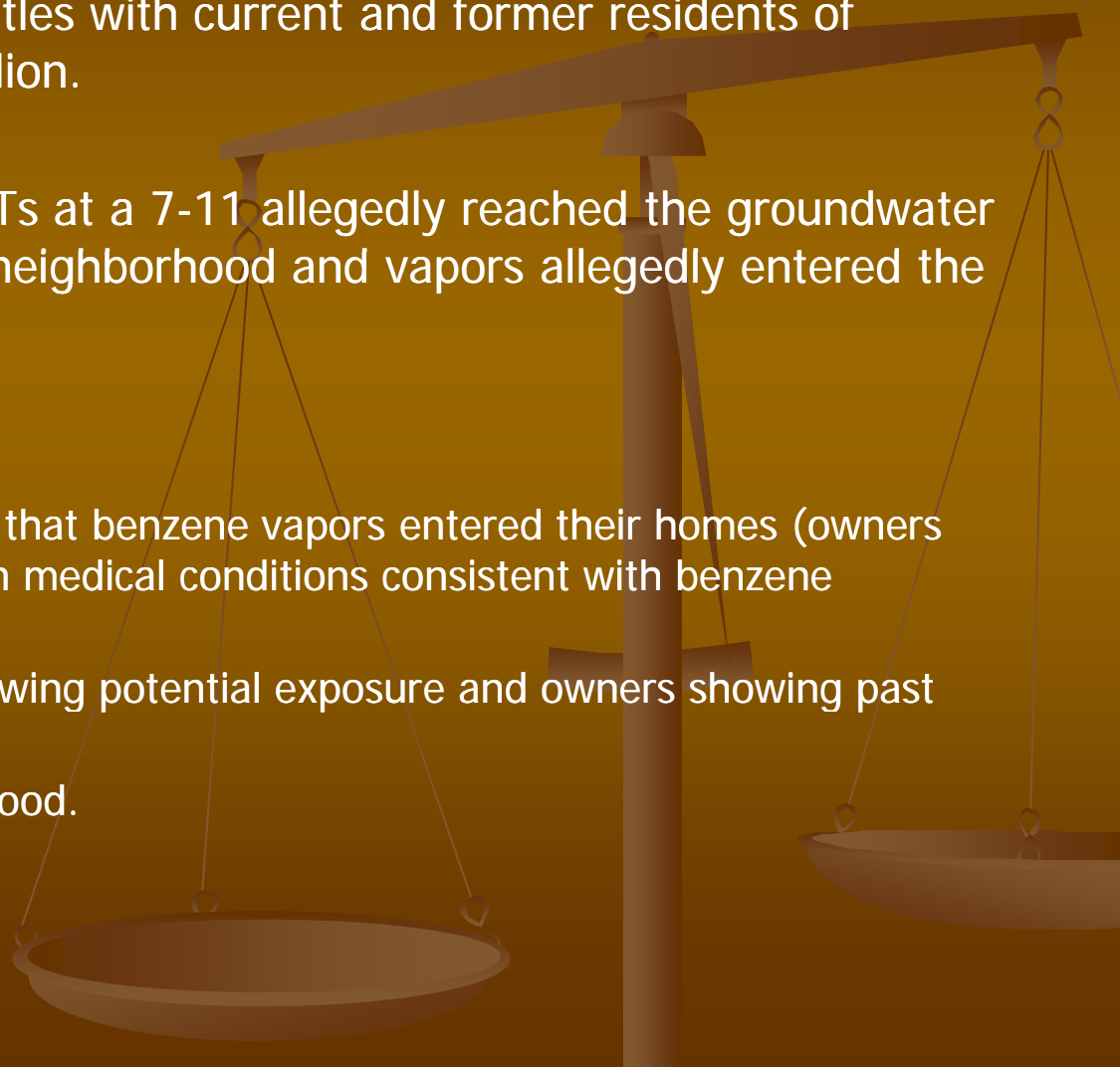
## Chevron

- April 2008: 500 current and former residents of Riggs Park, District of Columbia, and Chillum, Maryland, settle with Chevron.
- Chevron responded to a 1989 spill by alerting the regulators in Maryland, but did not alert Washington, D.C., until 2001.
- The EPA stepped in and ordered Chevron to check the District of Columbia homes for vapors, but Chevron did not comply for two years.
- Settlement with Chillum, Maryland, includes various methods of groundwater remediation and installation of vapor mitigation systems in impacted homes.
- Settlement with Riggs Park: Chevron offers \$6.15 million in March 2008. Final settlement amount not published.

# Major Settlements

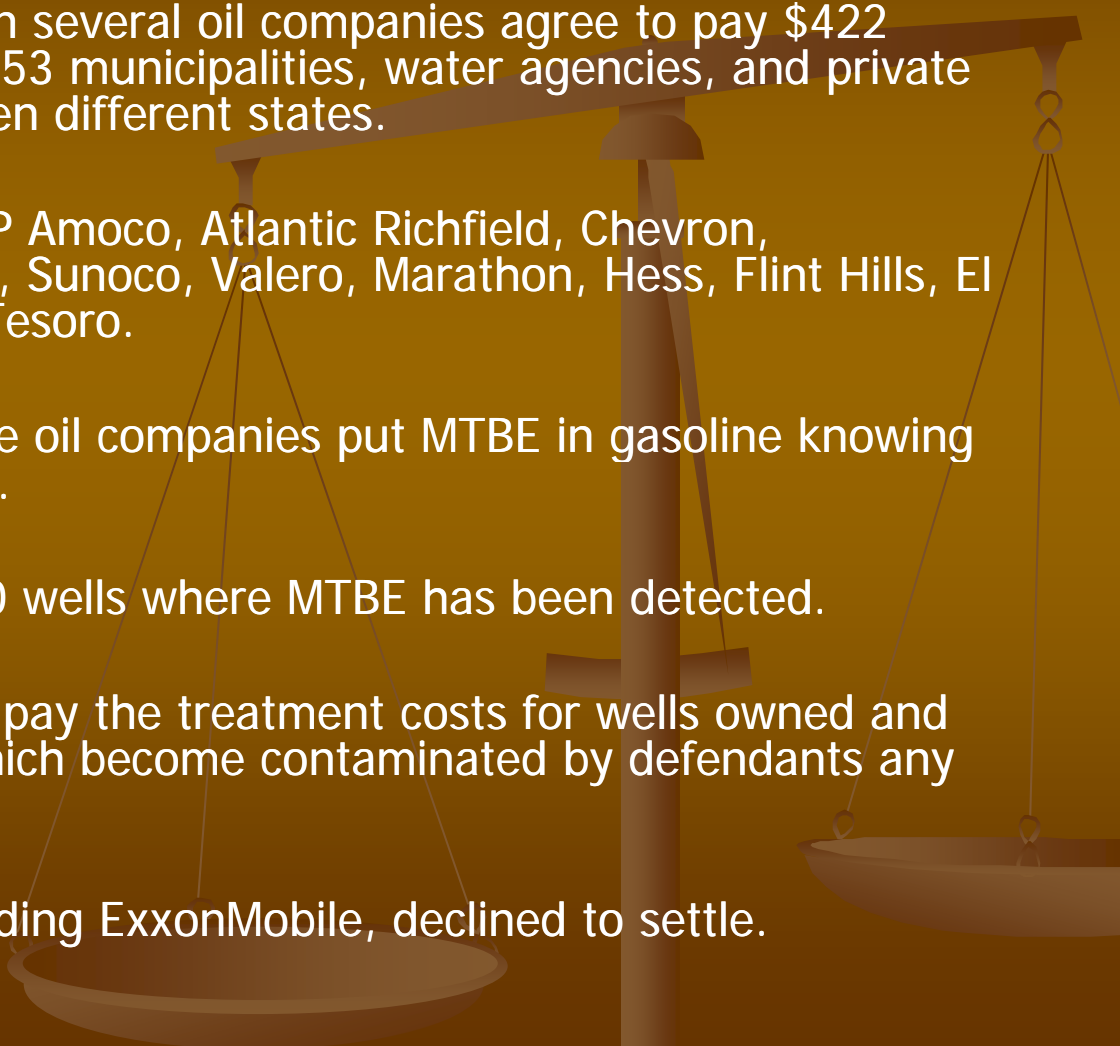
7-11

- February 2008: 7-Eleven settles with current and former residents of Goshen, Indiana for \$20 million.
- Petroleum releases from USTs at a 7-11 allegedly reached the groundwater and soil of the surrounding neighborhood and vapors allegedly entered the surrounding properties.
- Payments will be made to
  - A.) Class members proving that benzene vapors entered their homes (owners and renters) and resulted in medical conditions consistent with benzene exposure.
  - B.) Owners of property showing potential exposure and owners showing past damage to their property.
  - C.) Clean-up the neighborhood.



# Major Settlements

In re: MTBE Products Liability Litigation  
Southern District of New York  
Case Number 1:00-cv-01898-SAS-DCF

- In a multi-district class action several oil companies agree to pay \$422 million in clean-up costs to 153 municipalities, water agencies, and private water companies in seventeen different states.
  - The oil companies include BP Amoco, Atlantic Richfield, Chevron, ConocoPhillips, Shell, CITGO, Sunoco, Valero, Marathon, Hess, Flint Hills, El Paso Merchant Energy and Tesoro.
  - The plaintiffs alleged that the oil companies put MTBE in gasoline knowing it was dangerous to humans.
  - This settlement covers 3,000 wells where MTBE has been detected.
  - The companies also have to pay the treatment costs for wells owned and operated by the plaintiffs which become contaminated by defendants any time in the next 30 years.
  - At least six companies, including ExxonMobile, declined to settle.
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# Searches and Inspections

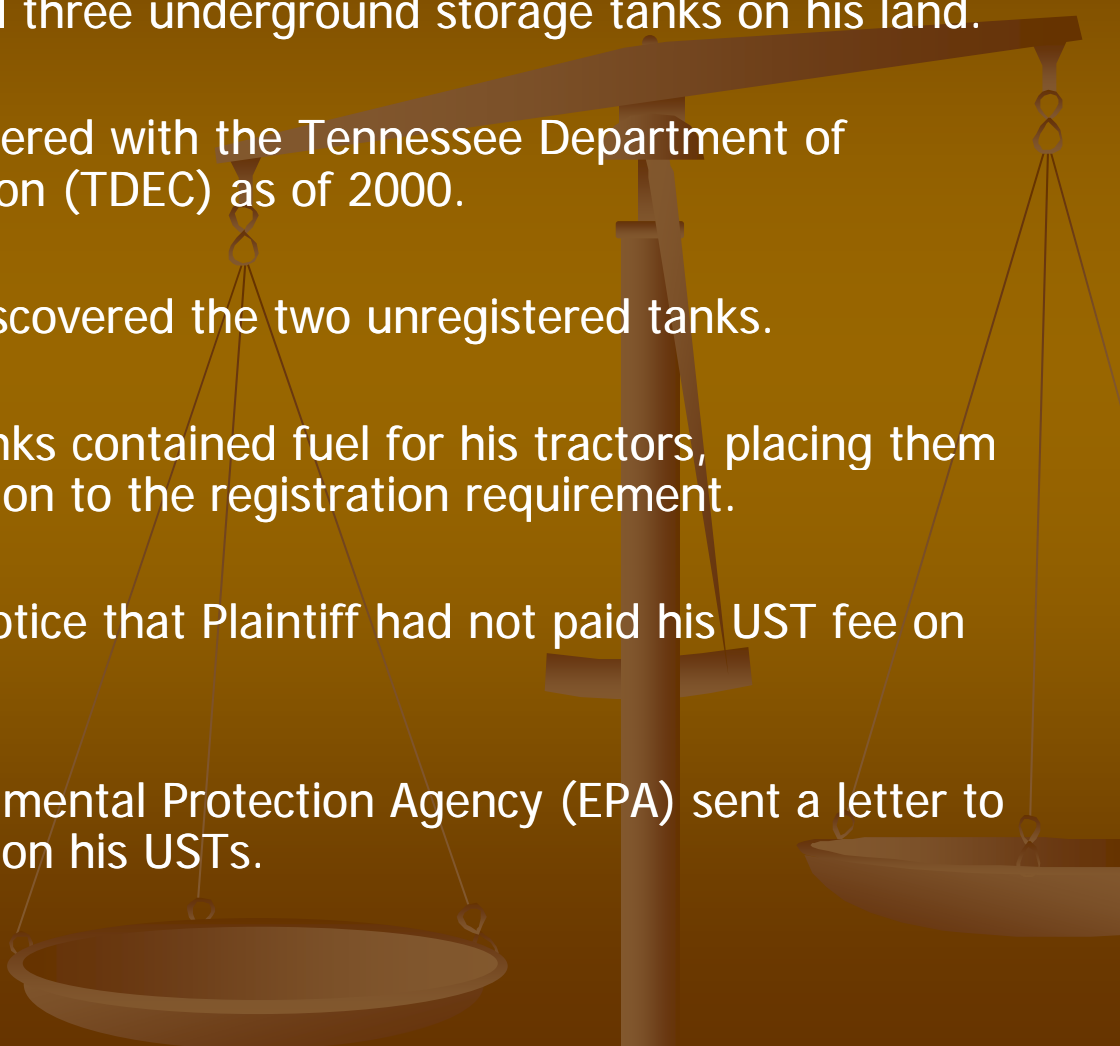


## Mayes v. E.P.A.

United States District Court, E.D. Tennessee

2008 WL 65178

January 04, 2008

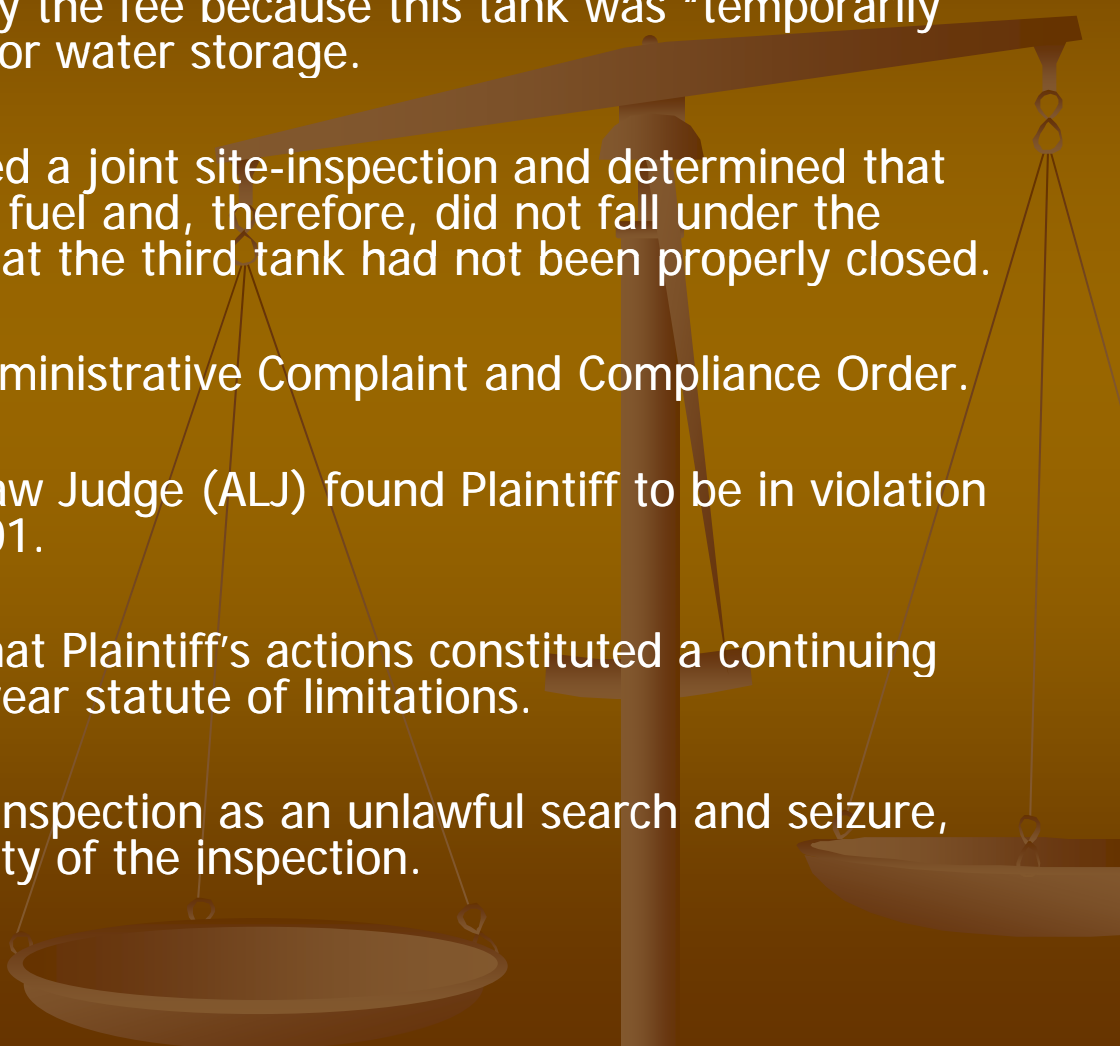
- Plaintiff, Norman Mayes, had three underground storage tanks on his land.
  - Only one of these was registered with the Tennessee Department of Environment and Conservation (TDEC) as of 2000.
  - Upon investigation, TDEC discovered the two unregistered tanks.
  - Plaintiff stated that these tanks contained fuel for his tractors, placing them under an agricultural exception to the registration requirement.
  - Later that year TDEC sent notice that Plaintiff had not paid his UST fee on the registered tank.
  - Around this time the Environmental Protection Agency (EPA) sent a letter to plaintiff seeking information on his USTs.
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## Mayes v. E.P.A.

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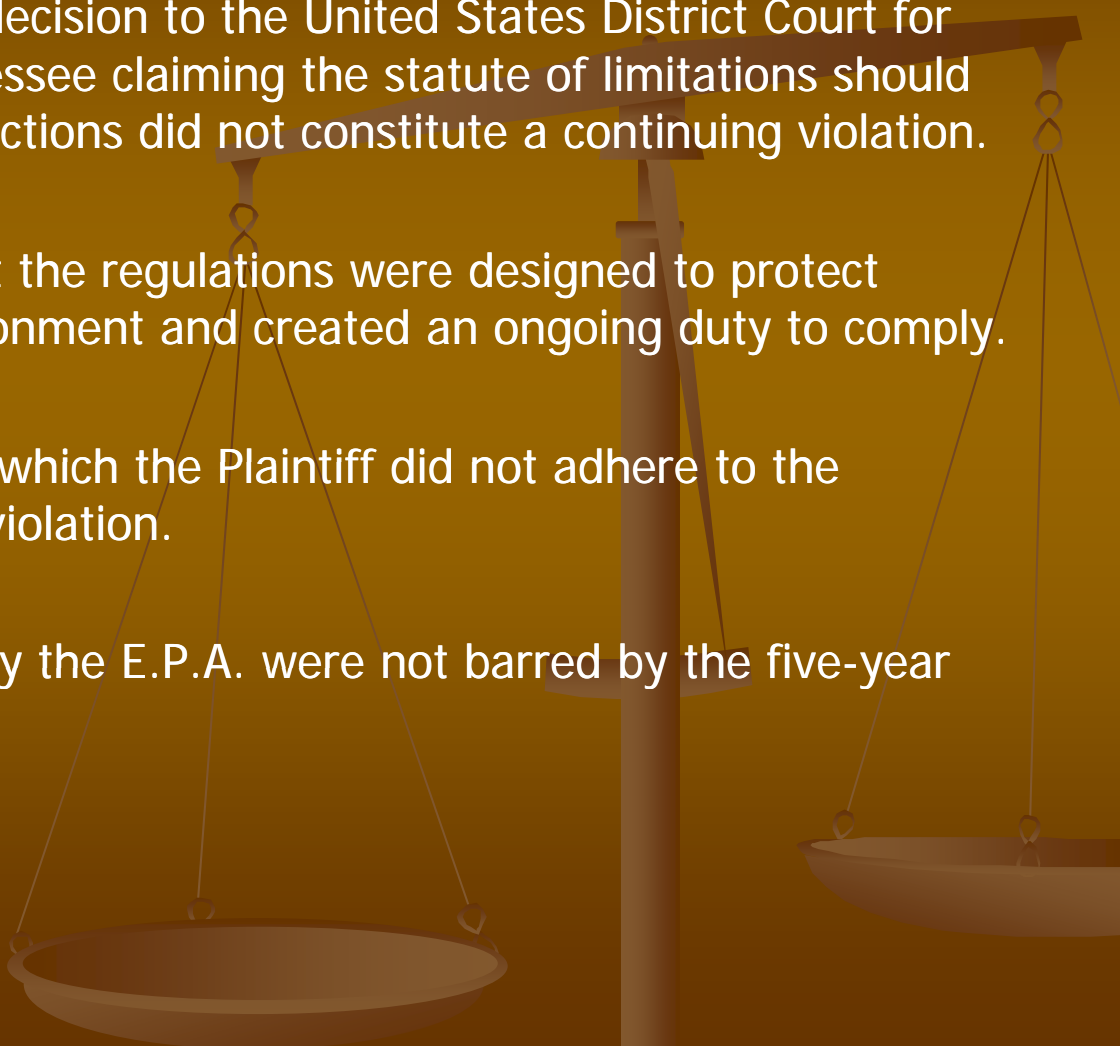
- Plaintiff stated he did not pay the fee because this tank was “temporarily closed” as it was now used for water storage.
  - The EPA and TDEC conducted a joint site-inspection and determined that the tanks contained aviation fuel and, therefore, did not fall under the agricultural exception and that the third tank had not been properly closed.
  - In 2002, the EPA filed an Administrative Complaint and Compliance Order.
  - In 2004 an Administrative Law Judge (ALJ) found Plaintiff to be in violation and imposed a fee of \$66,301.
  - Additionally, the ALJ ruled that Plaintiff’s actions constituted a continuing violation, negating the five-year statute of limitations.
  - Plaintiff challenged the EPA inspection as an unlawful search and seizure, but the ALJ upheld the validity of the inspection.
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## Mayes v. E.P.A.

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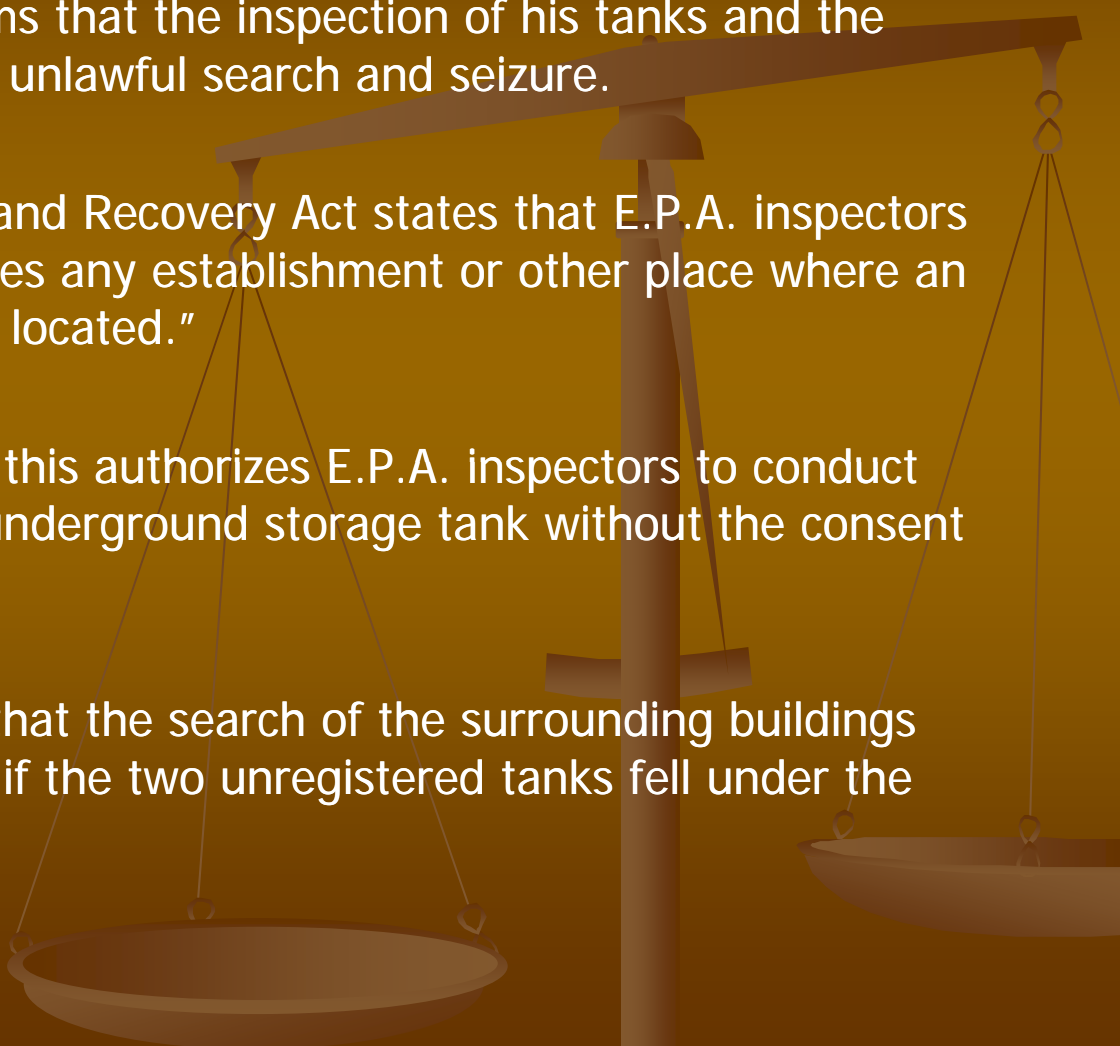
- Plaintiff appealed the ALJ's decision to the United States District Court for the Eastern District of Tennessee claiming the statute of limitations should have barred the suit as his actions did not constitute a continuing violation.
  - The District Court found that the regulations were designed to protect human health and the environment and created an ongoing duty to comply.
  - This duty made each day in which the Plaintiff did not adhere to the regulations a new, discrete violation.
  - Thus, the charges brought by the E.P.A. were not barred by the five-year statute of limitations.
- 

## Mayes v. E.P.A.

United States District Court, E.D. Tennessee

2008 WL 65178

January 04, 2008

- Also on appeal, Plaintiff claims that the inspection of his tanks and the buildings on his land was an unlawful search and seizure.
  - The Resource Conservation and Recovery Act states that E.P.A. inspectors can “enter at reasonable times any establishment or other place where an underground storage tank is located.”
  - The District Court ruled that this authorizes E.P.A. inspectors to conduct warrantless searches of an underground storage tank without the consent of the owner.
  - The District Court also held that the search of the surrounding buildings was necessary to determine if the two unregistered tanks fell under the agricultural exception.
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# Class Actions

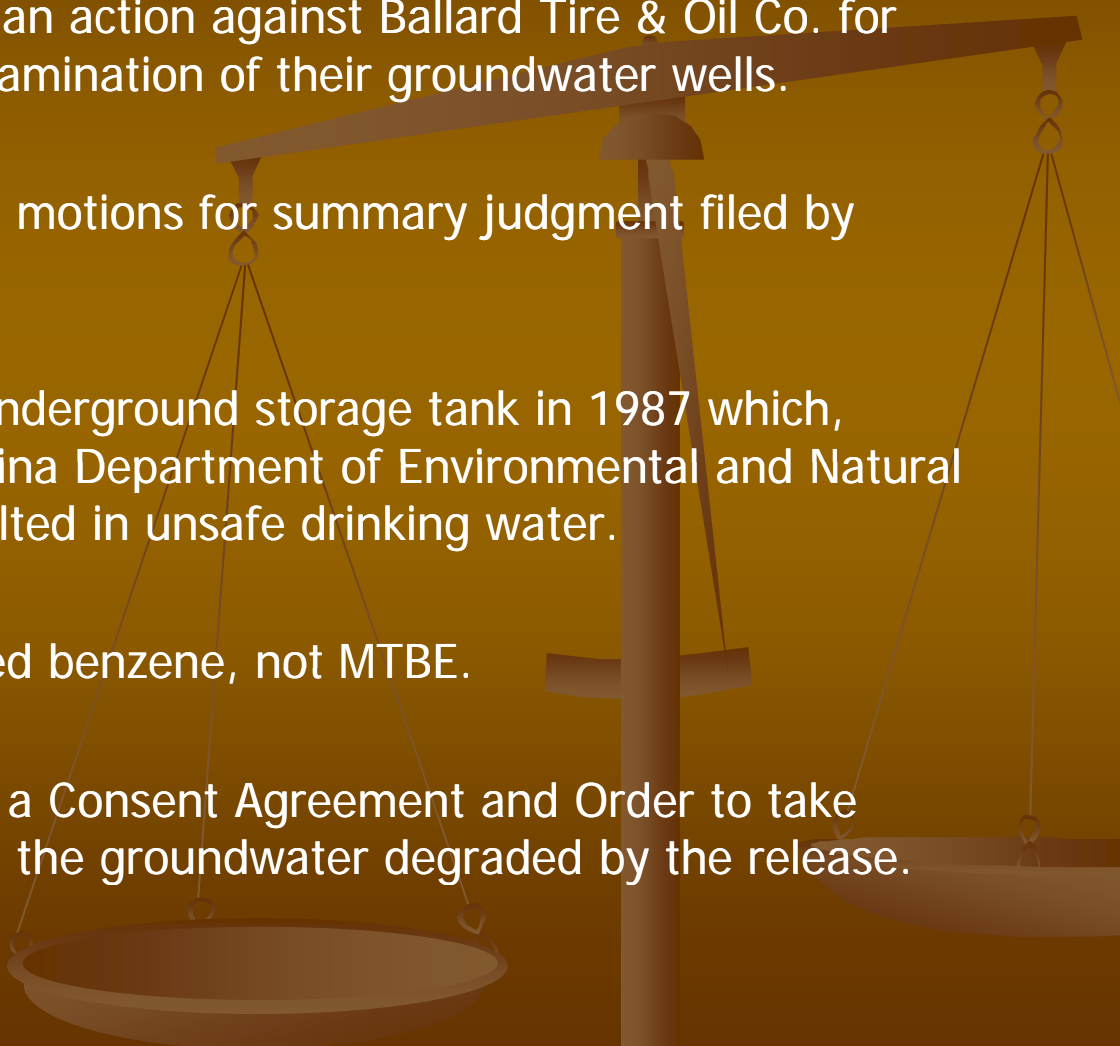


## Adams v. A.J. Ballard, Jr. Tire & Oil Co.

Superior Court of North Carolina

2006 WL 1875965

June 30, 2006

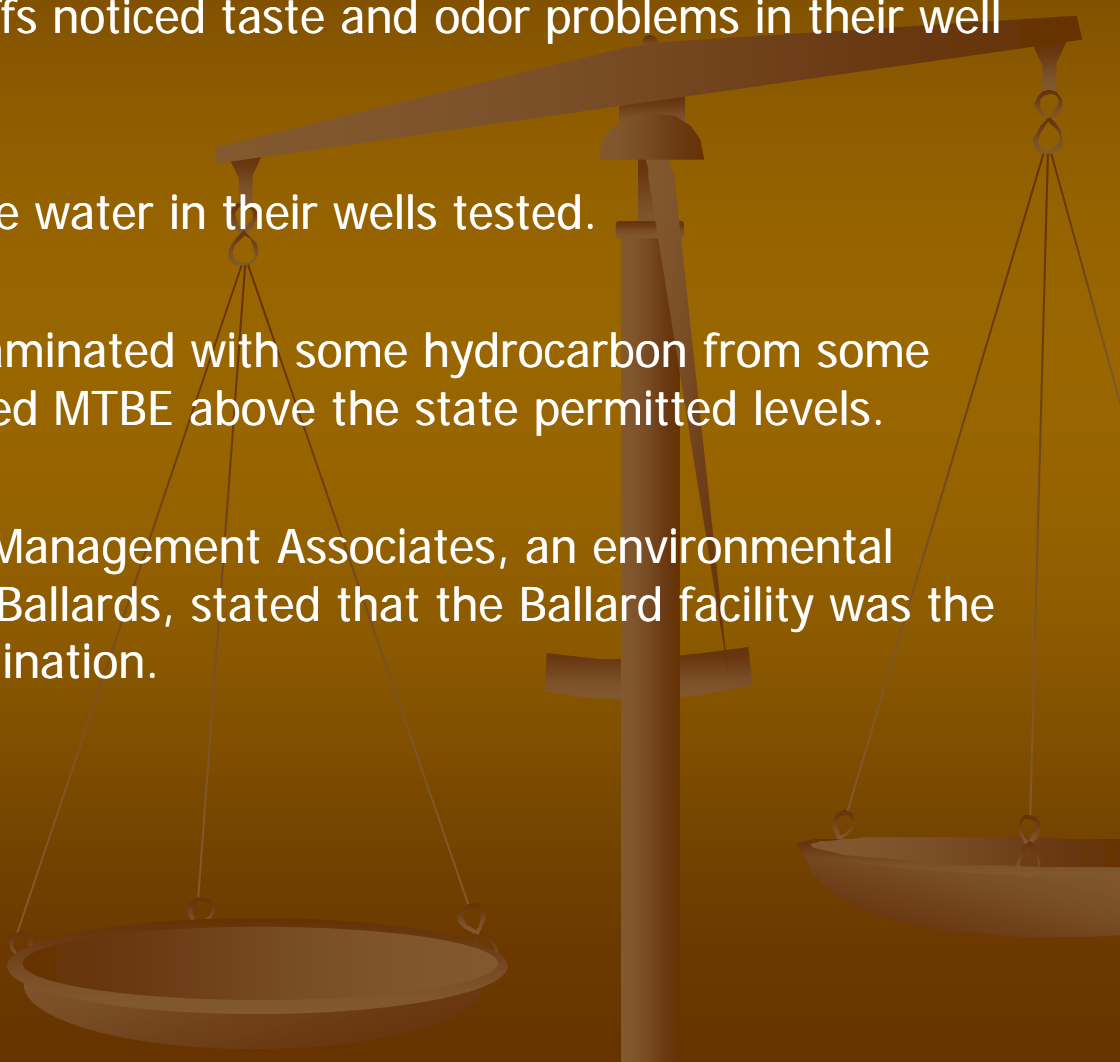
- Numerous plaintiffs brought an action against Ballard Tire & Oil Co. for petroleum hydrocarbon contamination of their groundwater wells.
  - This opinion is related to the motions for summary judgment filed by plaintiffs and defendant.
  - Ballard had a spill from an underground storage tank in 1987 which, according to the North Carolina Department of Environmental and Natural Resources (DENR), had resulted in unsafe drinking water.
  - The spilled gasoline contained benzene, not MTBE.
  - In 1992 Ballard entered into a Consent Agreement and Order to take corrective action and restore the groundwater degraded by the release.
- 

## Adams v. A.J. Ballard, Jr. Tire & Oil Co.

Superior Court of North Carolina

2006 WL 1875965

June 30, 2006

- In 2000, some of the plaintiffs noticed taste and odor problems in their well water.
  - Many of the plaintiffs had the water in their wells tested.
  - Most of the wells were contaminated with some hydrocarbon from some source, but only three showed MTBE above the state permitted levels.
  - A report from Groundwater Management Associates, an environmental consulting firm hired by the Ballards, stated that the Ballard facility was the most likely source of contamination.
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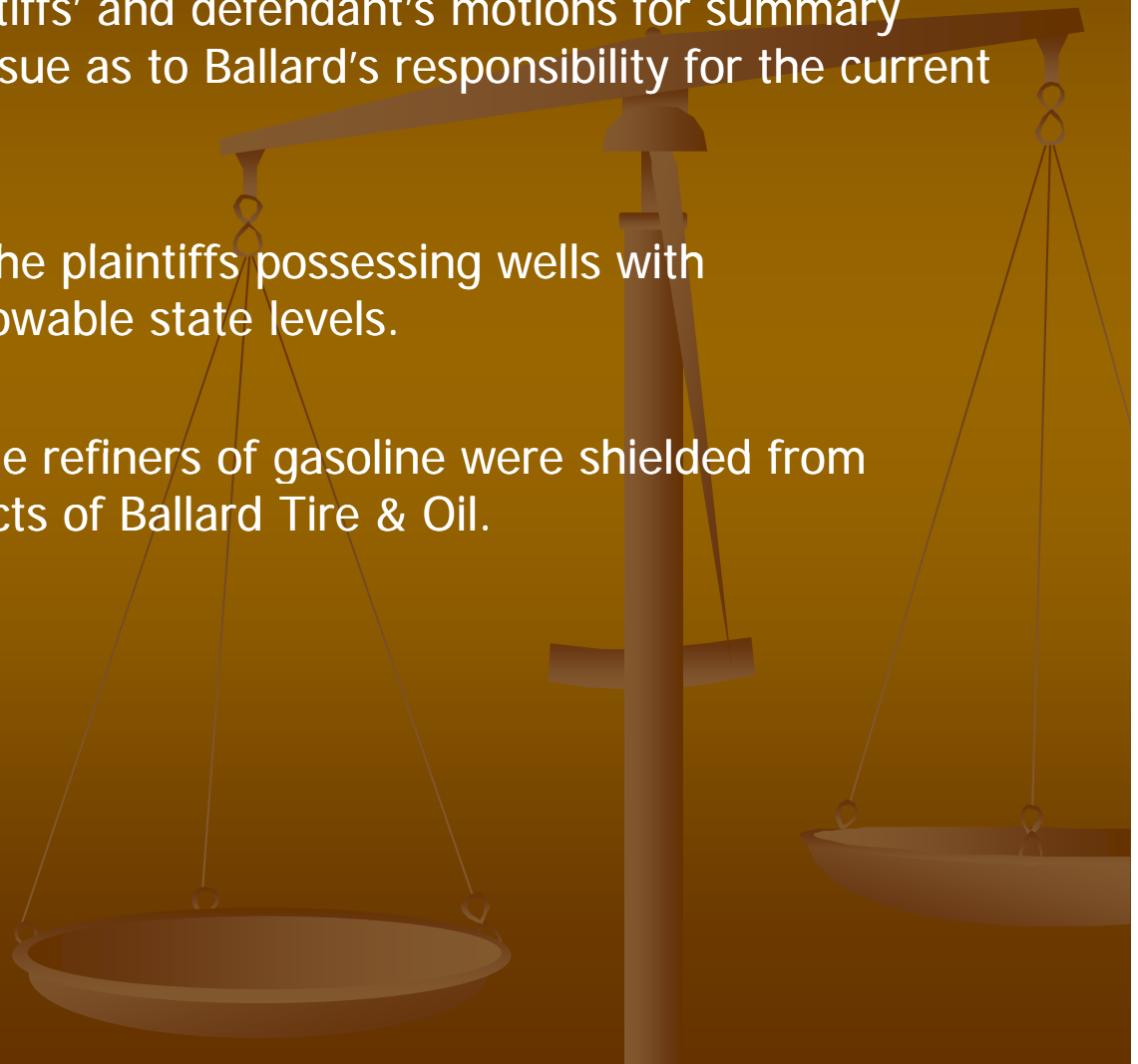
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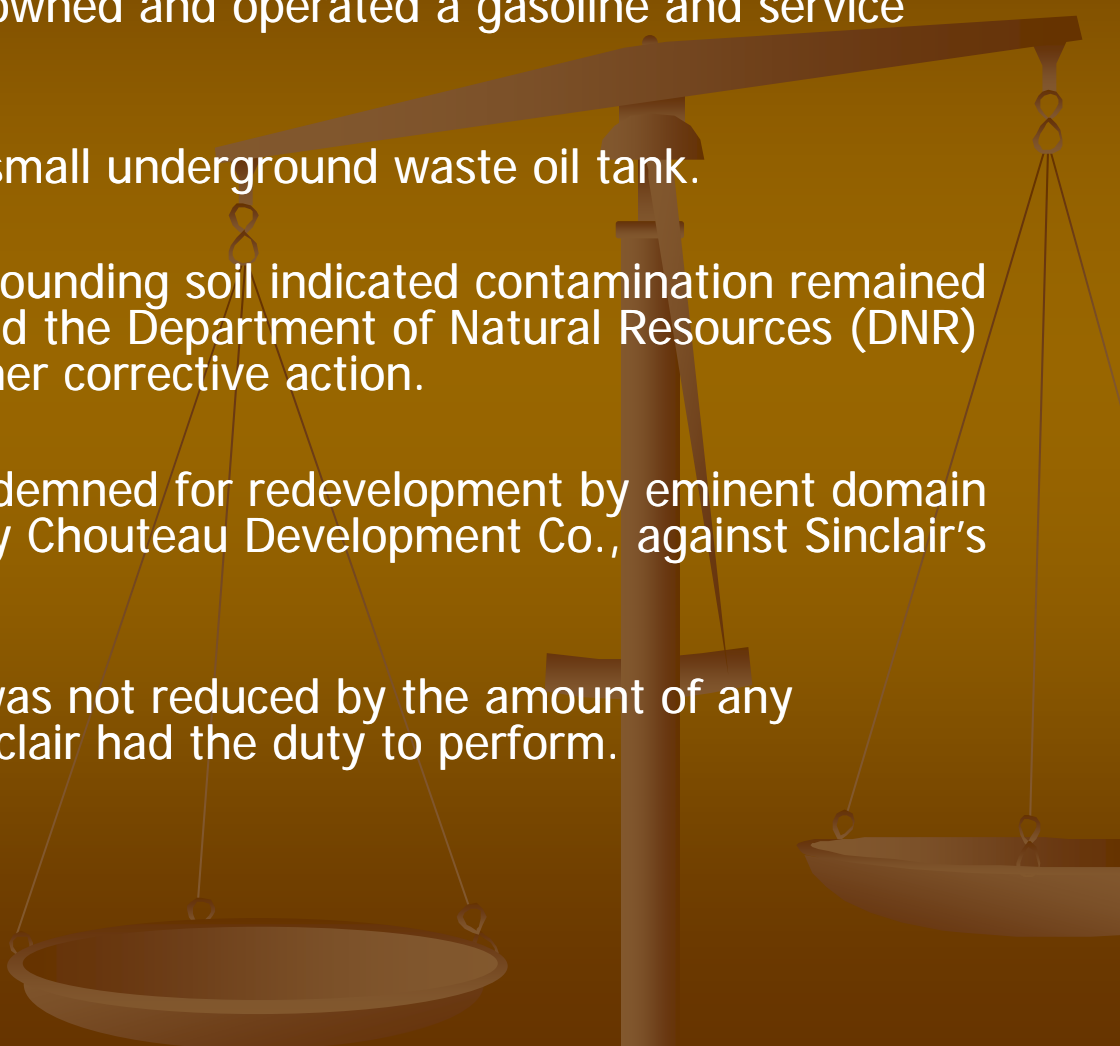
- The Court denied both plaintiffs' and defendant's motions for summary judgment finding a triable issue as to Ballard's responsibility for the current contamination.
- The Court eliminated all of the plaintiffs possessing wells with contamination below the allowable state levels.
- The Court also found that the refiners of gasoline were shielded from liability by the intervening acts of Ballard Tire & Oil.
- This case is still pending.



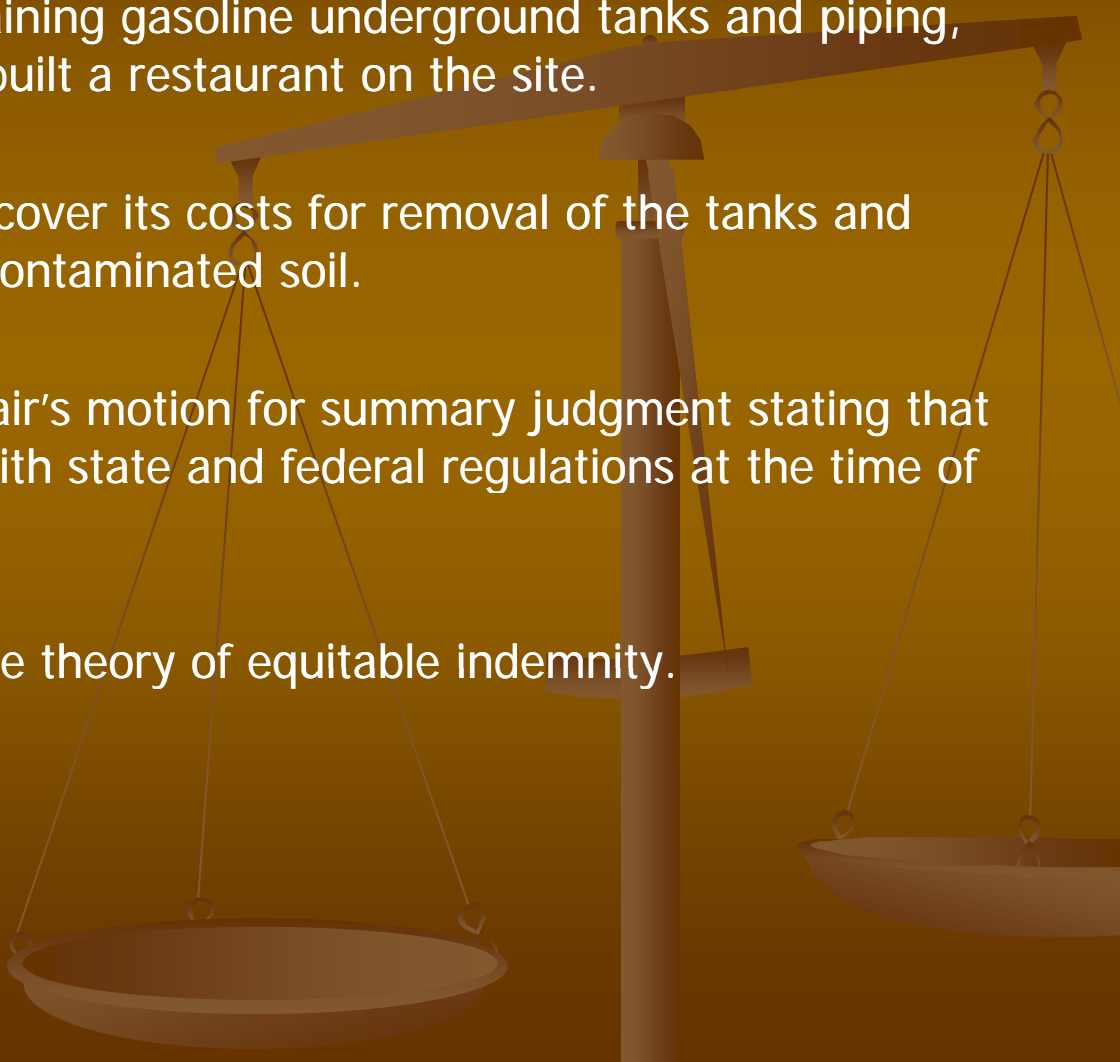


# Duty to Remove or Remediate

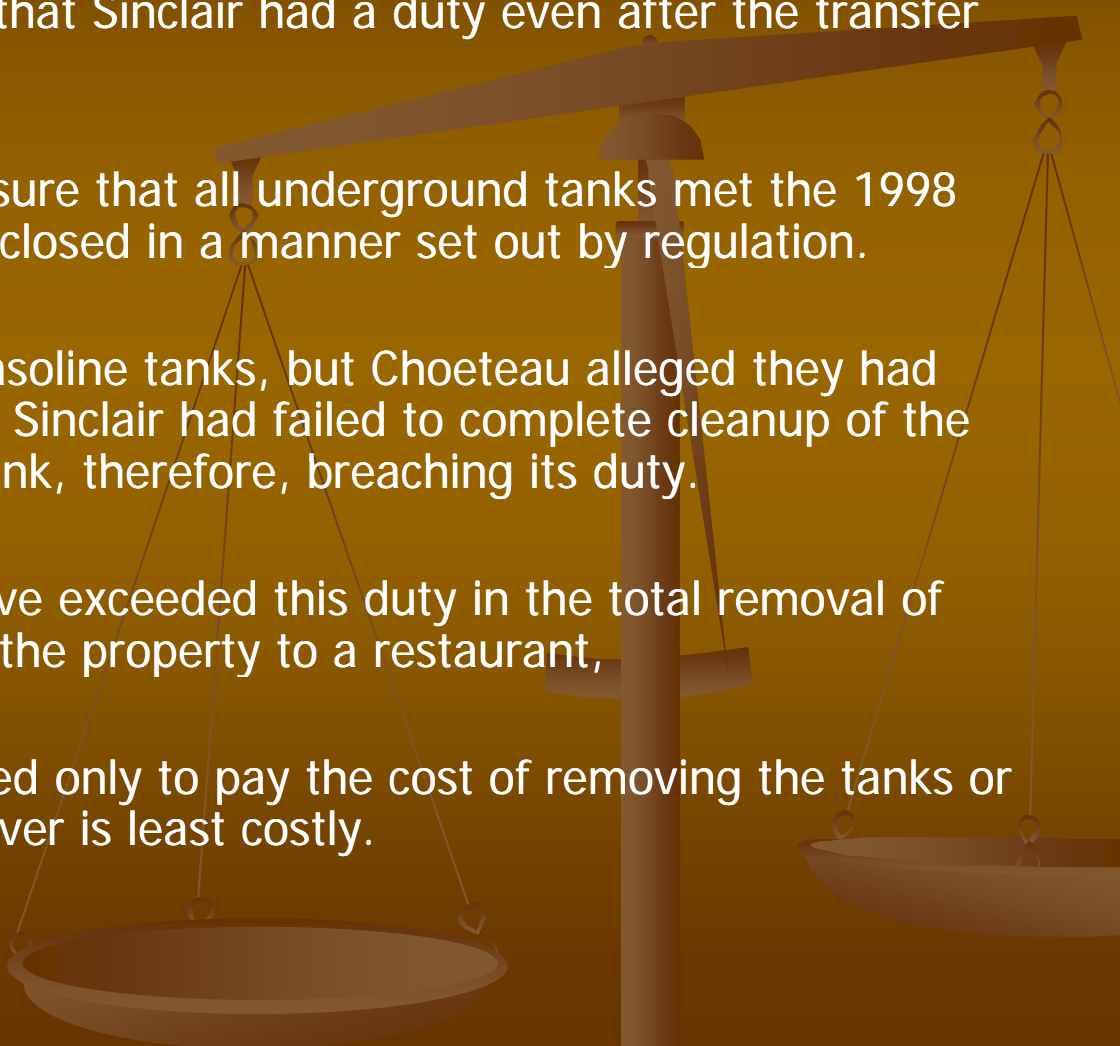
Chouteau Development Co., LLC v. Sinclair Marketing, Inc.  
Missouri Court of Appeals, Western District  
*200 S.W.3d 68*  
May 30, 2006

- From 1983 to 1999 Sinclair owned and operated a gasoline and service station.
  - In 1998 Sinclair removed a small underground waste oil tank.
  - Samples taken from the surrounding soil indicated contamination remained in the downgradient wall, and the Department of Natural Resources (DNR) ordered Sinclair to take further corrective action.
  - In 1999 the station was condemned for redevelopment by eminent domain and possession was taken by Chouteau Development Co., against Sinclair's wishes.
  - The value given to Sinclair was not reduced by the amount of any environmental work that Sinclair had the duty to perform.
- 

Chouteau Development Co., LLC v. Sinclair Marketing, Inc.  
Missouri Court of Appeals, Western District  
*200 S.W.3d 68*  
May 30, 2006

- Chouteau removed the remaining gasoline underground tanks and piping, excavated a lot of soil, and built a restaurant on the site.
  - Chouteau sued Sinclair to recover its costs for removal of the tanks and excavation of the allegedly contaminated soil.
  - The trial court granted Sinclair's motion for summary judgment stating that Sinclair was in compliance with state and federal regulations at the time of sale.
  - Chouteau appealed under the theory of equitable indemnity.
- 

Chouteau Development Co., LLC v. Sinclair Marketing, Inc.  
Missouri Court of Appeals, Western District  
*200 S.W.3d 68*  
May 30, 2006

- The Court of Appeals found that Sinclair had a duty even after the transfer of the property.
  - This included the duty to ensure that all underground tanks met the 1998 upgrade standards, or were closed in a manner set out by regulation.
  - Sinclair had upgraded the gasoline tanks, but Chouteau alleged they had not, and further alleged that Sinclair had failed to complete cleanup of the release from the waste oil tank, therefore, breaching its duty.
  - Chouteau, however, may have exceeded this duty in the total removal of the tanks and conversion of the property to a restaurant,
  - Sinclair, therefore, is required only to pay the cost of removing the tanks or upgrading the tanks, whichever is least costly.
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Imminent Threat

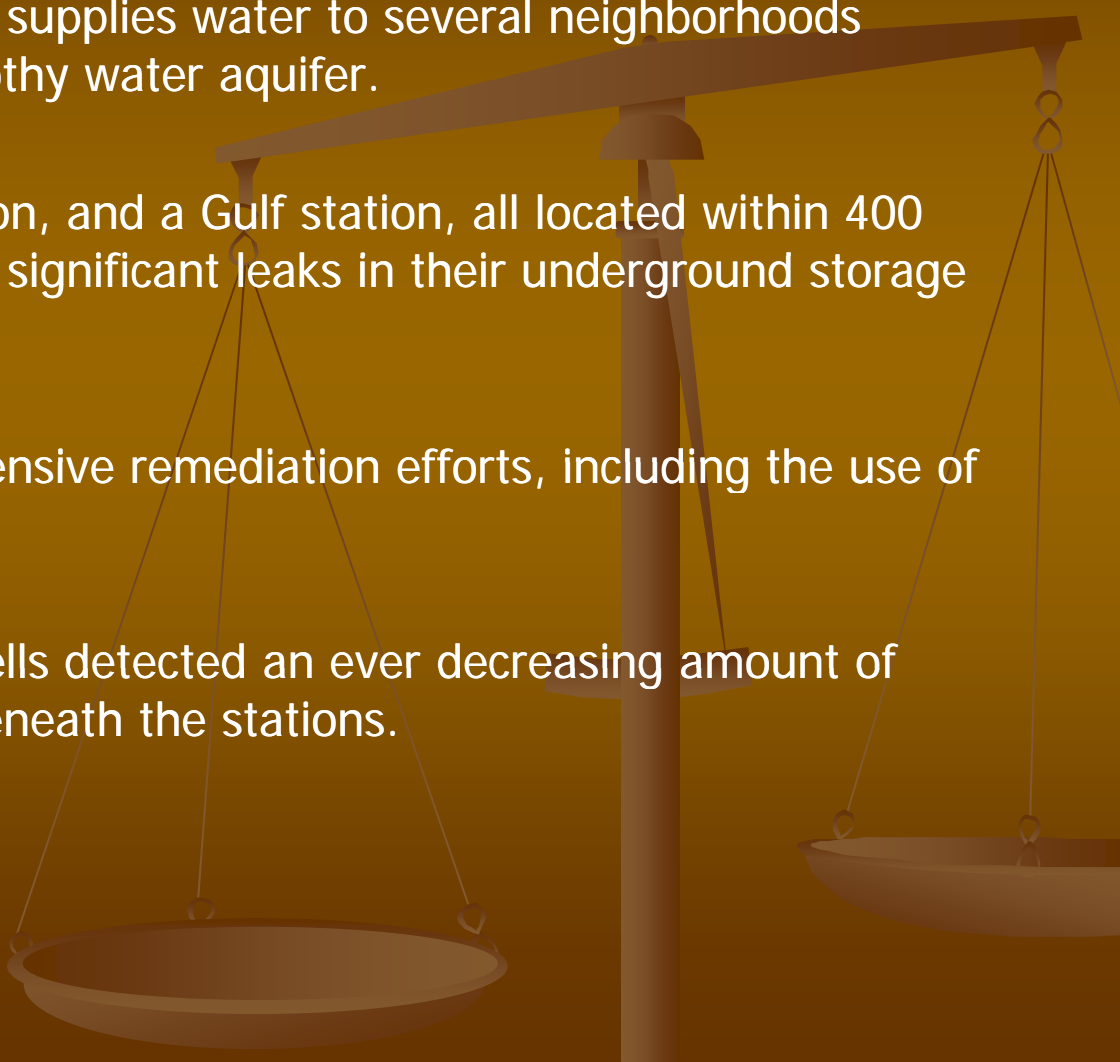


# Plainview Water District v. Exxon Mobil Corporation

Supreme Court of New York

*2008 WL 220192*

January 9, 2008

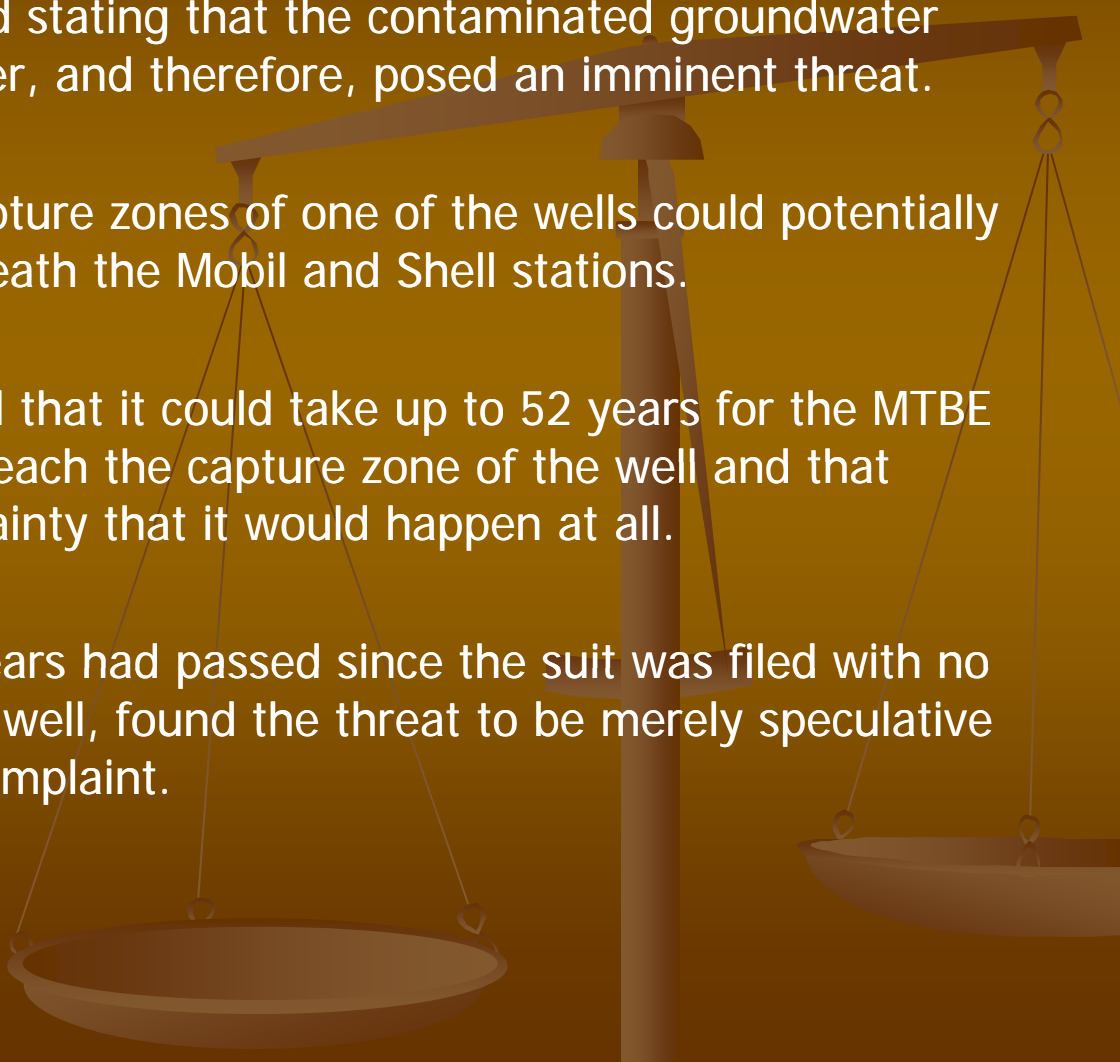
- The Plainview Water District supplies water to several neighborhoods through the use of the Magothy water aquifer.
  - A Mobil station, a Shell station, and a Gulf station, all located within 400 feet of a Plainview well, had significant leaks in their underground storage tanks.
  - Both stations undertook extensive remediation efforts, including the use of monitoring wells.
  - Over time the monitoring wells detected an ever decreasing amount of MTBE in the groundwater beneath the stations.
- 

## Plainview Water District v. Exxon Mobil Corporation

Supreme Court of New York

2008 WL 220192

January 9, 2008

- Plainview Water District sued stating that the contaminated groundwater could migrate into the aquifer, and therefore, posed an imminent threat.
  - Plainview stated that the capture zones of one of the wells could potentially extend to an area deep beneath the Mobil and Shell stations.
  - Expert testimony established that it could take up to 52 years for the MTBE underneath the stations to reach the capture zone of the well and that there was no degree of certainty that it would happen at all.
  - The Court, noting that six years had passed since the suit was filed with no sign of contamination in the well, found the threat to be merely speculative and dismissed Plainview's complaint.
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# Subrogation

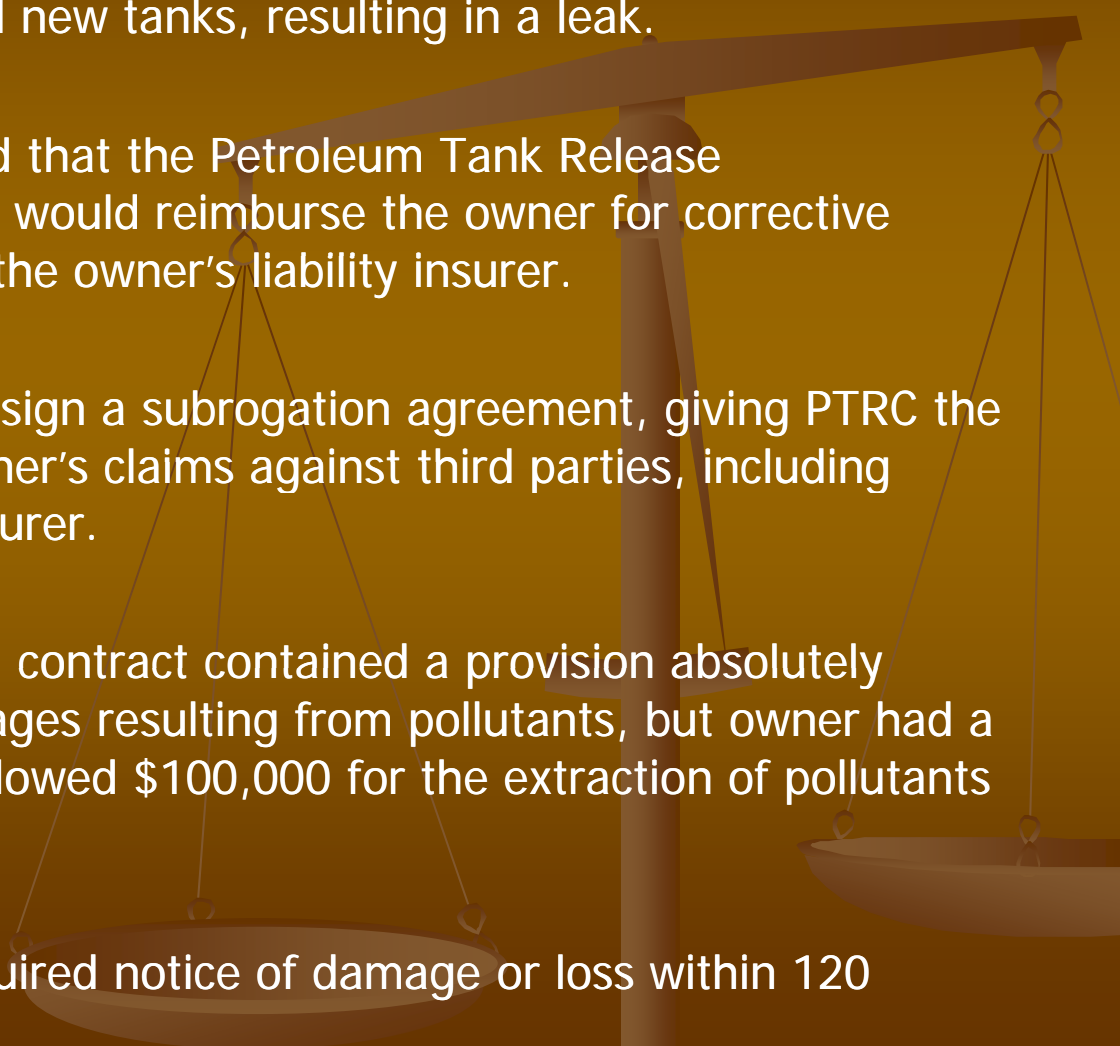


# Montana Petroleum Tank Release Comp. Board v. Crumley's

Supreme Court of Montana

*174 P.3d 948*

January 3, 2008

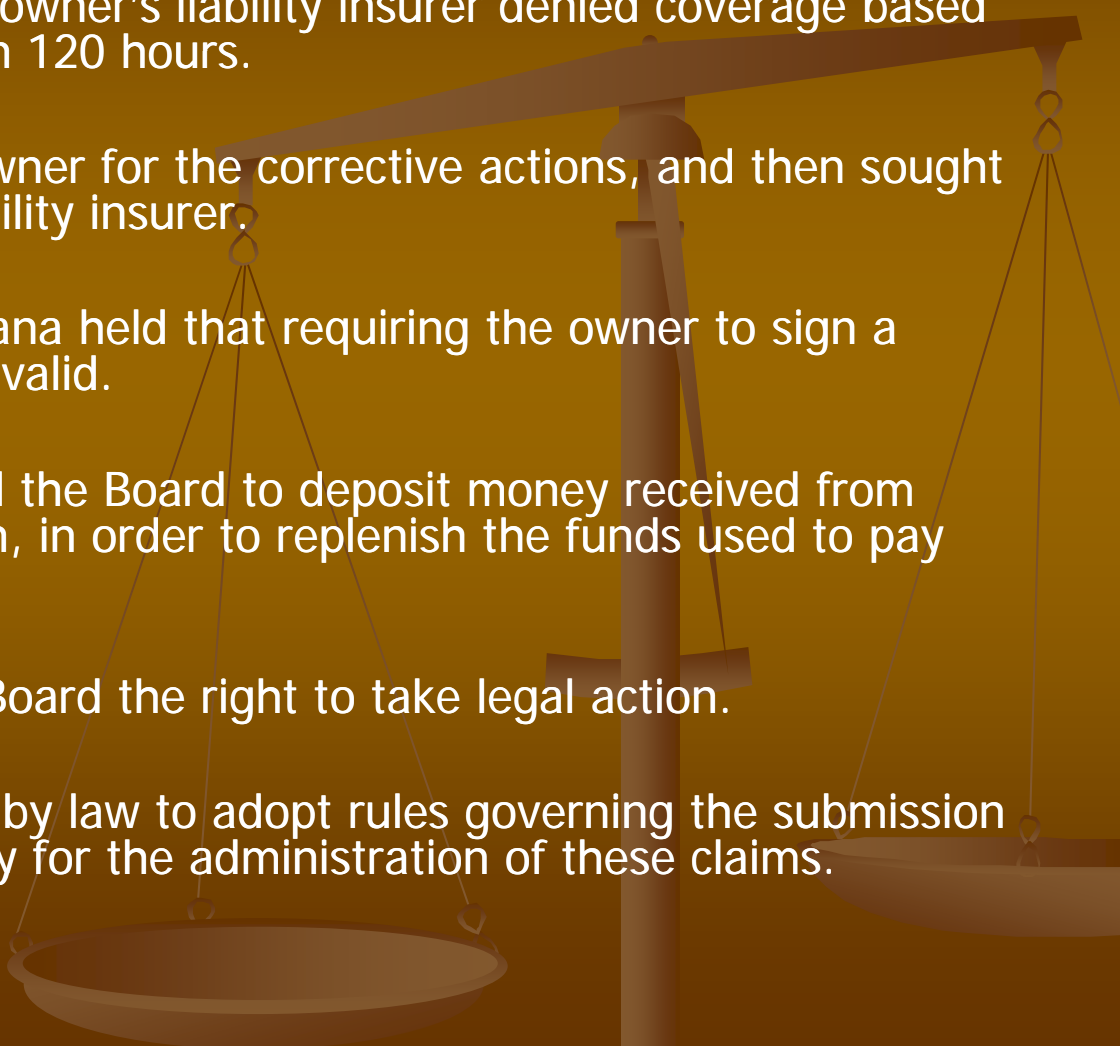
- A gas station owner installed new tanks, resulting in a leak.
  - The law in Montana provided that the Petroleum Tank Release Compensation Board (PTRC) would reimburse the owner for corrective action costs not covered by the owner's liability insurer.
  - PTRC required the owner to sign a subrogation agreement, giving PTRC the right to pursue all of the owner's claims against third parties, including those against the liability insurer.
  - The liability insurer's general contract contained a provision absolutely excluding coverage for damages resulting from pollutants, but owner had a coverage extension which allowed \$100,000 for the extraction of pollutants from the land or the water.
  - This coverage extension required notice of damage or loss within 120 hours.
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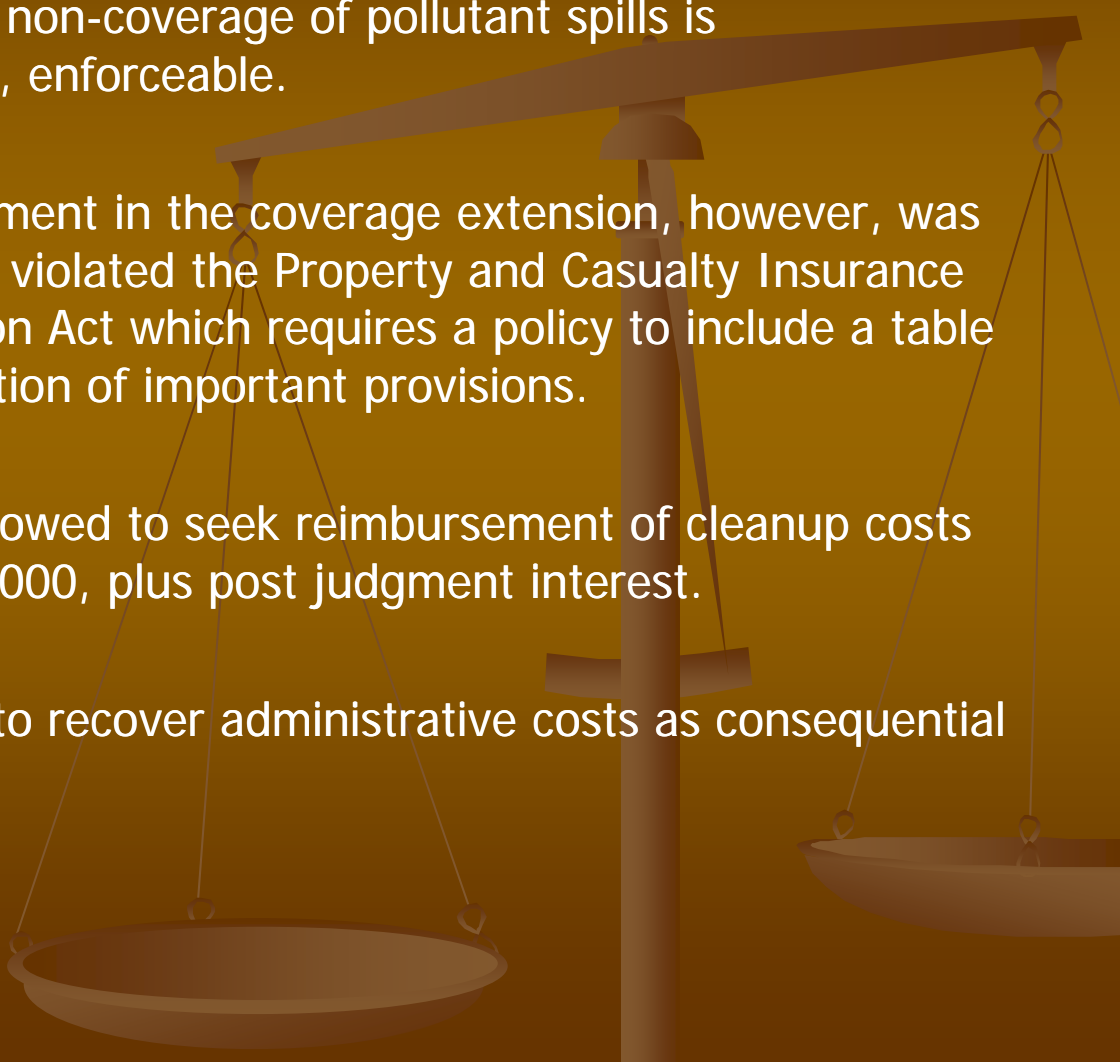
- When the leak occurred the owner's liability insurer denied coverage based on the failure to notify within 120 hours.
  - The PTRC reimbursed the owner for the corrective actions, and then sought reimbursement from the liability insurer.
  - The Supreme Court of Montana held that requiring the owner to sign a subrogation agreement was valid.
  - The law in Montana required the Board to deposit money received from insurers through subrogation, in order to replenish the funds used to pay for cleanup.
  - Montana law also gave the Board the right to take legal action.
  - The PTRC is also authorized by law to adopt rules governing the submission of claims and rules necessary for the administration of these claims.
- 

# Montana Petroleum Tank Release Comp. Board v. Crumley's

Supreme Court of Montana

*174 P.3d 948*

January 3, 2008

- The Court also held that the non-coverage of pollutant spills is unambiguous and, therefore, enforceable.
  - The 120-hour notice requirement in the coverage extension, however, was void and unenforceable as it violated the Property and Casualty Insurance Policy Language Simplification Act which requires a policy to include a table of contents and a notice section of important provisions.
  - Therefore, the Board was allowed to seek reimbursement of cleanup costs from the insurer up to \$100,000, plus post judgment interest.
  - The PTRC was also allowed to recover administrative costs as consequential damages.
- 

# Qui Tam Recovery

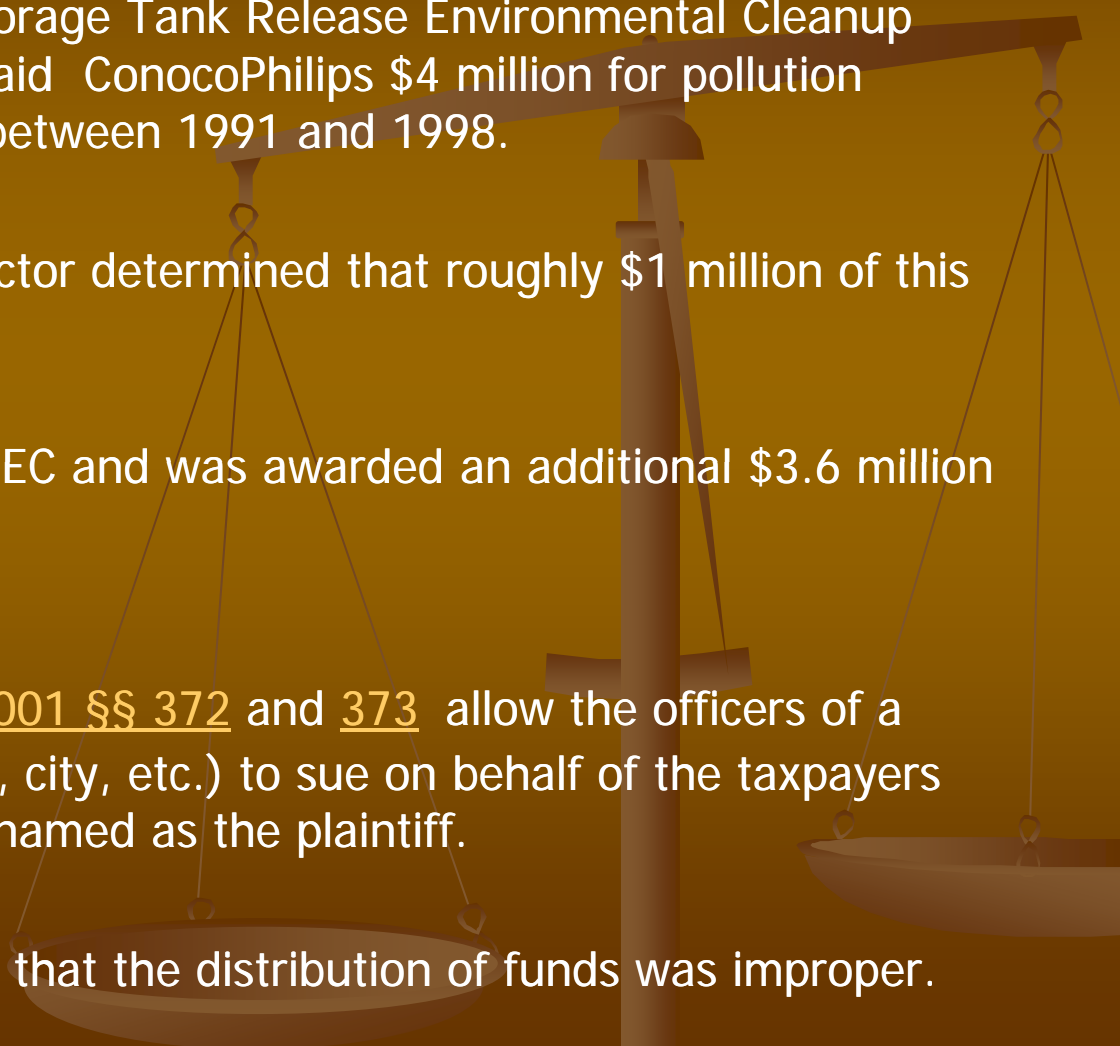


# State ex rel. Wright v. Oklahoma Corporation Commission

Supreme Court of Oklahoma

170 P.3d 1024

October 2, 2007

- The Oklahoma Petroleum Storage Tank Release Environmental Cleanup Indemnity Fund (PSTREC) paid ConocoPhillips \$4 million for pollution reimbursement claims filed between 1991 and 1998.
  - The State Auditor and Inspector determined that roughly \$1 million of this was overpayment.
  - ConocoPhillips pressed PSTREC and was awarded an additional \$3.6 million for cleanup.
  - Oklahoma statutes 62 O.S.2001 §§ 372 and 373 allow the officers of a governmental entity (county, city, etc.) to sue on behalf of the taxpayers with the State of Oklahoma named as the plaintiff.
  - The taxpayers sued, stating that the distribution of funds was improper.
- 

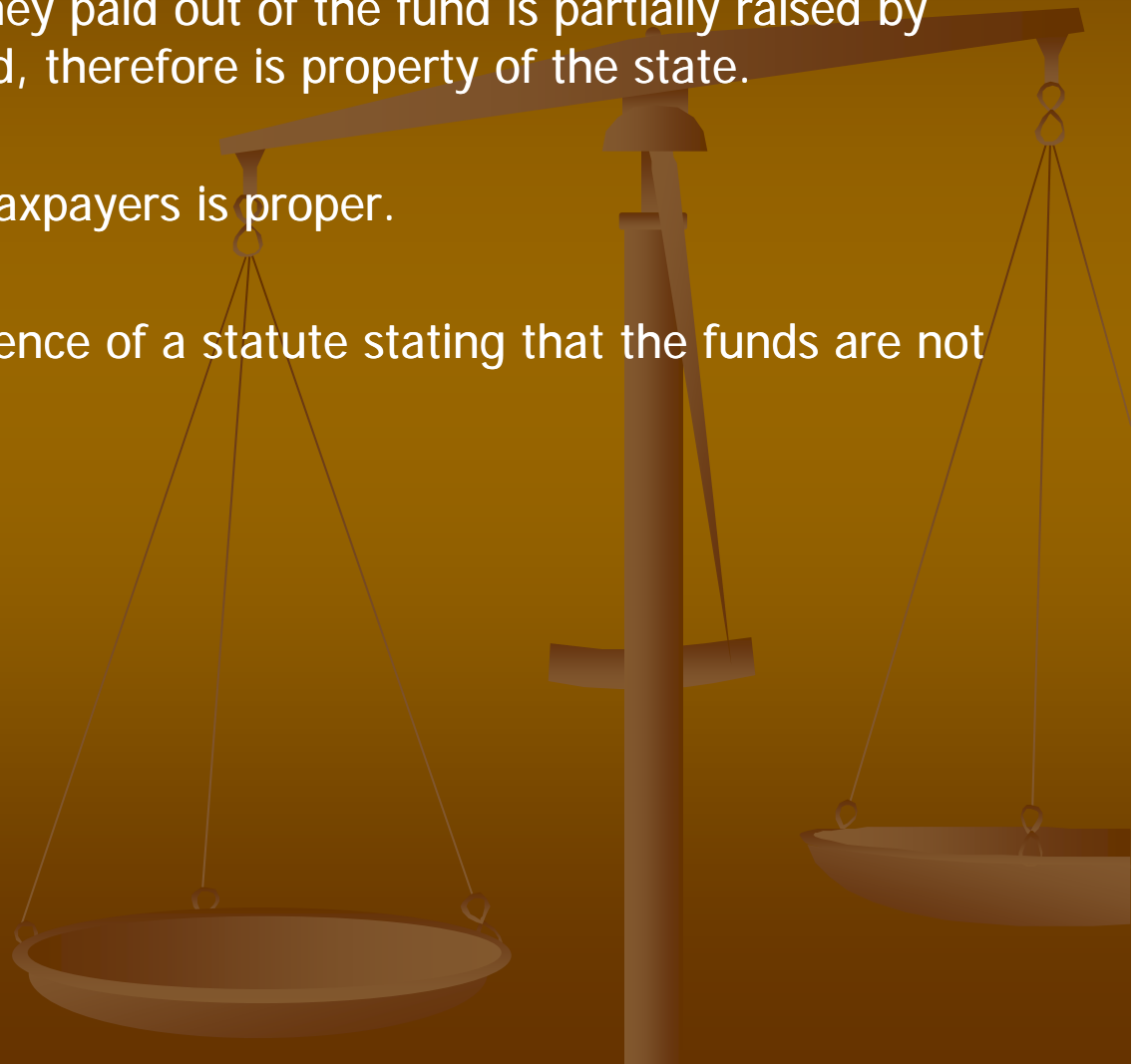
# State ex rel. Wright v. Oklahoma Corporation Commission

Supreme Court of Oklahoma

170 P.3d 1024

October 2, 2007

- The Court held that the money paid out of the fund is partially raised by motor vehicle fuel taxes, and, therefore is property of the state.
- Thus, a Qui Tam action by taxpayers is proper.
- This is true despite the presence of a statute stating that the funds are not property of the State.



# Looking Ahead

- The Environmental Protection Agency has expressed concerns with Underground Storage Tanks and the use of Alternative fuels such as ethanol and biodiesel.
- It is unknown whether the tanks, piping, linings, and seals will corrode or degrade differently when these alternative fuels are used.
- Ethanol may complicate clean-ups by changing the behavior and migration of a spill.

