

# State Storage Tank Trust Fund: South Dakota Supreme Court Addresses Cost Recovery Action for Prior Payments to Oil Company



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

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The Supreme Court of the State of South Dakota (“Court”) addressed in an August 12th opinion an action by the State of South Dakota and the South Dakota Petroleum Release Compensation Fund (“Fund”) action to recover payments made to the predecessor and subsidiary companies of BP plc (collectively “BP”). See *State of South Dakota, South Dakota Petroleum Release Compensation Fund v. BP plc, BP America, Inc. et al.* 2020 S.D. 47.

The action relates to monies paid from the Fund for the costs of cleaning up environmental contamination from underground storage tanks (“UST”) located at:

- 27 BP sites in South Dakota
- 19 other UST sites in South Dakota (that BP allegedly previously owned or operated)

Many facilities either currently or have in the past used petroleum USTs to store and dispense motor fuel or other petroleum products. Some USTs have suffered leaks or spills (generically known as “releases”).

A comprehensive set of federal (Resource Conservation and Recovery Act) and state regulations dictate minimum requirements for the USTs’ design and maintenance, along with the required response (reporting, investigation, corrective action) in the event of a leak or spill (i.e., “release”). The federal and state rules also require UST owners and operators to meet certain financial assurance requirements that enable them to prove they can address remediation and/or third party property damage and bodily injury claims.

In the late 1980s and early 1990s many states (including Arkansas) created UST trust funds that provide owners and/or operators of eligible USTs reimbursement for corrective action (i.e., remediation of leaks and spills) and third party claims.

The UST’s eligibility for trust fund reimbursement is typically predicated on a determination that certain statutory prerequisites have been met. These often include criteria such as the UST’s compliance with the relevant regulations, timely notice provided for a release and UST registration with the state agency.

The South Dakota legislature created its own UST trust fund in 1988. The Fund is administered by the South Dakota Department of Environment and Natural Resources (“DENR”). It provides reimbursement up to one million dollars (minus a \$10,000 deductible) for remediation costs for eligible UST sites.

Reimbursement for such costs from the South Dakota Fund require that the owner or operator:

- Submit an application to the Fund
- Disclose any available insurance coverage for the contamination
- Execute a subrogation assignment that transfers to the Fund the applicant's rights of action in claims which the applicant may have against any party (including insurers), who may be liable to indemnify any remediation costs at a UST site

The owner or operator must also certify that no settlement or release has been or will be made with any party responsible for the cleanup costs without the written consent of the South Dakota Fund.

The Court states that between 1990 and 2002 BP submitted applications to the Fund. It received approximately \$3.1 million in total payments for cleanup costs of 27 UST sites in South Dakota.

BP's applications are also stated to have indicated there was no insurance coverage to indemnify the cleanup costs. The company also submitted letters with the applications representing it was self-insured for UST contamination events for which reimbursement was sought.

A 1992 BP letter is stated to have indicated, for seven sites, that liability insurance:

. . . does not provide coverage for the referenced site as, inter alia, remediation expenses do not exceed the policy deductible.

BP is stated to have been reimbursed by the Fund without further inquiry or investigation into possible insurance coverage.

The Court undertakes a review of insurance policies purchased for liabilities arising from BP's operations. Noted is the fact that beginning in 1973 that its commercial general liability ("CGL") policies had pollution exclusions for liability arising from gradual releases of pollutants. Also referenced are "owned property exclusions" precluding coverage for damage due to an occurrence on BP's property.

In the 1990s various insurers are stated to have initiated coverage actions against petroleum companies (including BP) to "quantify and reduce their exposure under these policies." BP sued insurers seeking a declaration of coverage for pollution costs at 23 large industrial sites under CGL policies issued between 1959 and 1985. None of the sites are stated to have included USTs or gas stations. Further, none of the sites were located in South Dakota.

BP's lawsuit with its insurers was apparently settled. The settlement is stated to have been conditioned on a buy back by the insurers of all estimated liabilities under the CGL insurance policies purchased by BP during this time period.

In addition, the company had retained a team of consultants to prepare a Settlement Report to quantify BP's total environmental contamination exposure before absolute pollution exclusions were introduced into CGL policies in 1985. This report primarily discussed the liabilities of the 23 industrial sites. However, it did reference potential contamination at the company's "gas stations, terminals, and bulk plants, which BP referred to as its marketing system."

The Court's opinion further notes:

Because the cleanup costs for USTs at these sites generally did not exceed the SIRs in BP's policies, the report discussed a "single occurrence theory" in an effort to aggregate the cleanup costs for all USTs into a single occurrence. This theory posited that the single occurrence was BP's decision in 1917 to sell refined petroleum products at retail by storing and selling these products from company-owned above ground tanks and USTs. BP calculated the potential cleanup costs for thousands of retail outlets, over many decades, by estimating a per-station figure and multiplying it by the total number of BP gas stations, so that the total cleanup costs for USTs owned and operated by BP exceeded the SIRs. These calculations only included pollution at UST sites that occurred prior to the introduction of the absolute pollution exclusions in the CGL policies on June 1, 1985.

The insurers are stated to have rejected BP's "single occurrence theory" for the USTs. Nevertheless, the litigation was settled for as much as \$205 million for the 23 large-dollar industrial sites. The Settlement Agreement is stated to have provided that the payments did not include amounts BP had received or might receive in the future from state or federal UST reimbursement funds.

The Fund filed suit against BP in 2010 seeking to recover 3.1 million previously paid for cleanup costs at the 27 sites in South Dakota. It alleged that the settlements between BP and insurers were made in violation of the Fund's subrogation rights. It further alleged that BP engaged in fraud by failing to disclose the coverage lawsuits and settlements.

An Amended Complaint was subsequently filed addressing the "indirect claims" where it had reimbursed third parties for cleanup costs at 19 sites in South Dakota. This was based on a strict liability theory because BP had previously owned or operated the sites.

BP's Motion for Summary judgment based on application of the statute of limitations and the Fund's Motion for Sanctions alleging a BP witness had destroyed a document were rejected.

The lower court did grant BP's Motion for Summary Judgment determining there was no insurance coverage or insurance proceeds received by BP to indemnify it for cleanup costs at the 27 sites.

The Court on Appeal noted that the Fund's statutory right of subrogation was predicated on the availability of insurance coverage for environmental cleanup costs. In other words, a subrogated insurer stands in the shoes of an insured, and has no greater rights than the insured. As a result, the Fund could only prevail on its subrogation claims if BP had a right of recovery, or actually recovered from the insurers for the cleanup costs at any of the UST sites. Also, as to the alleged failure to disclose, the Court noted that if no insurance coverage existed the Fund could not as a matter of law establish damages for the alleged wrongful conduct.

The Court held that the Fund had the burden to show that coverage existed under the BP CGL policies. It held that the Fund failed to identify any CGL policy that would have indemnified BP for cleanup costs at any of the sites. Also noted was the fact that the earlier CGL policies had a SIR of at least \$500,000. This increased to \$2.5 million a year later and subsequently increased to \$5 million.

The lower court was stated to have correctly observed that the Fund had an "insurmountable math problem." It further rejected the Fund's argument that the single occurrence theory BP presented to the insurers "suggest the possibility of coverage."

The Court also rejects the Fund's argument that the lower court abused its discretion in concluding that evidence of settlement discussions and negotiations was inadmissible. In fact, the lower court was deemed to have considered the settlement evidence to determine whether a genuine issue of material fact existed for summary judgment purposes.

The Court affirms the lower court and holds that questions of fact do not exist as to whether settlement proceeds received by BP included payment for the 27 UST sites.

Finally, as to the 19 sites in which there were alleged to be indirect claims against BP, the Court notes that the Fund does not dispute that they were subject to a six-year statute of limitations. It agreed with BP that the statute of limitations begins to run when the contamination at each site was reported and the Fund became aware of the UST releases. Also discussed were certain sites in which the lower court determined BP had no responsibility for cleanup costs because it owned them prior to 1985. No reported UST leaks were reported at such site until 2004.

The Fund's Motion for Sanction is also denied in regards to an allegation that the 1990 document was improperly destroyed.

As a result, the Court upheld the lower court's entry of Summary Judgment for BP.

A copy of the Opinion can be downloaded [here](#).

