In The

Supreme Court of the United States

HECLA MINING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA
AND THE STATE OF IDAHO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 11, 2006

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(5) authorizes a district court to grant relief from a judgment on grounds that it is no longer equitable for the judgment to have prospective application. Did the Ninth Circuit impermissibly limit the district court's authority to administer its consent decrees in concluding, based on *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), that this Court intends for such relief to be governed by a limited checklist of factors to the exclusion of other considerations, with the admissible evidence defined by the "four corners" of the decree, like a contract?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

In addition to the parties named on the caption, ASARCO Incorporated ("Asarco") was a party to the proceedings at the United States District Court for the District of Idaho and the Ninth Circuit Court of Appeals. Asarco filed a petition for relief under Chapter 11 of the Bankruptcy Code on August 9, 2005 in the United States Bankruptcy Court in the Southern District of Texas. Asarco has not joined in this petition.

Coeur d'Alene Mines Corporation, Callahan Mining Corporation, Sunshine Precious Metals, and Sunshine Mining Company, were parties to the consent decree which is central to this petition. These parties have not joined in this petition, or any of the district court or Ninth Circuit proceedings leading up to this petition.

Hecla Mining Company has no parent corporation. As of March 2006, Royce & Associates, LLC, investment advisor to The Royce Funds under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*, held 10.8% of the common shares of Petitioner. No other person or entity owns 10% or more of Petitioner's common stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hecla Mining Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit, dated December 5, 2005, is published at 430 F.3d 972, App. 1a. The orders of the United States District Court for the District of Idaho in this case are not published, App. 23a-55a. Petitioner, Hecla Mining Company ("Hecla"), seeks review of the decision of the court of appeals on a writ of certiorari.

JURISDICTION

On January 18, 2006, Hecla timely filed a petition for rehearing or rehearing en banc in the court of appeals. On April 12, 2006, the court of appeals filed an order denying both, App. 56a. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of a federal court of appeals on a writ of certiorari.

RELEVANT RULES AND STATUTORY PROVISIONS

Federal Rule of Civil Procedure 60(b)(5) and relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), are set forth in the appendix, App. 59a-66a.

STATEMENT OF THE CASE

A. Overview.

This case involves promises made and then broken by the United States. It also involves one of the largest environmental cleanups ever to take place in this country, cutting a wide swath of disruption and impacts across multiple towns and residential neighborhoods in northern Idaho. Soil cleanups like this one present tremendous challenges to federal and state environmental agencies because they necessarily involve a highly intrusive process requiring the destruction, and then the reconstruction, of yards, gardens, school yards and parks, plus extensive face-to-face negotiation with hundreds or, in this case, thousands of property owners and tenants. The exacting on-site details and the intrusiveness of the process, multiplied thousands of times, explains why the United States Environmental Protection Agency, short of friends and supporters in the Coeur d'Alene Basin to begin with,[1] was so anxious that Hecla and the other mining companies,

[1] By way of example, in 2001, then Idaho governor, the Hon. Dirk Kempthorne, demanded that EPA step aside and leave further cleanup to the "good people of Idaho." Testimony of Governor Dirk Kempthorne before a United States Environmental Protection Agency hearing on the Coeur d'Alene Basin Cleanup, November 13, 2001. App. 67a.

undertake the massive soil cleanup contemplated for the Bunker Hill Superfund Site. It also explains why EPA offered significant inducements to Hecla and others to enter into the consent decree in question. The district court found that these inducements were made, that they were reasonably relied upon by Hecla and the other private party signatories, that the United States subsequently reneged on the promises, and that this represented a significant change in the factual circumstances warranting a modification of the consent decree. The Ninth Circuit disagreed and reversed.

B. The Site.

The Bunker Hill Superfund Site ("Site") is one of the oldest and largest Superfund sites in the nation, located in a historic mining district, known as the "Silver Valley," in northern Idaho. *See* Bunker Hill Mining and Metallurgical Complex Operable Unit 3 Record of Decision, September 2002, Figure 1.0-1, Basin Study Area (map showing the Bunker Hill Superfund Site and Coeur d'Alene Basin), App. 75a. The original NPL site, a 21 square mile area known as the "Box," was among the first sites listed on CERCLA's National Priorities List ("NPL") in 1983. The Box is the area maximally impacted by emissions from the historic Bunker Hill smelter complex located in the center of the Box.[2] The area was also impacted by the discharge of "tailings," which are wastes generated from the milling of ore, that historically were carried downstream fluvially

[2] None of the defendant signatories to the consent decree at issue here ever owned or operated the smelter complex. The then owner of the smelter complex filed for bankruptcy in October 1993.

from upstream mining areas proximate to the drainage of the South Fork of the Coeur d'Alene River.

C. The Consent Decree.

The 1994 Consent Decree, which is at the heart of this dispute, was entered by the district court on November 17, 1994, pursuant to its authority and jurisdiction under 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331 and 1345. The 1994 Decree was intended to address the cleanup liabilities, under CERCLA and within the original NPL site, of the following defendant signatories: Asarco, Hecla, Coeur d'Alene Mines Corporation, Sunshine Precious Metals and Sunshine Mining Company.[3] Coeur d'Alene Mines' obligation under the consent decree was limited to a one-time cash payment. The remaining companies agreed to undertake EPA's massive soil cleanup program along the river and through the small towns scattered through the Box. The original cost estimate for this work was $40 million. By 2003, when the district court entered final relief on Hecla's motion to modify, the companies had already spent $44.7 million on the program, and estimated an additional $18 million in expenditures to finish the job. *See* District Court Order Granting in Part and Denying in Part Hecla's Request for Final Relief (Nov. 18, 2003), App. 41a, 44a n.3. (*hereinafter*, November 2003 Order). When the program is complete, over 2,500 residential yards, plus many other

[3] The then extant Sunshine Mining corporate interests filed for bankruptcy on August 23, 2000. Sunshine Mining's liabilities under the 1994 Consent Decree, and in the Coeur d'Alene Basin more generally, were resolved by the district court's approval, by order dated January 22, 2001, of a consent decree among the United States, the Coeur d'Alene Tribe, and the various Sunshine Mining entities, resolving all of Sunshine's outstanding Box and Basin liabilities.

non-residential properties, will have been remediated. Not surprisingly, given its breadth and cost, the program has had a significant impact on the Silver Valley's social and economic fabric.

By 2003, when the district court issued its final ruling, it had been administering the 1994 Consent Decree for almost a decade.[4] The district court also was well aware of the many bankruptcies, and other circumstances, that were shrinking the already small pool of potentially responsible parties in a position to help fund Superfund cleanup at the Site. *See* notes 2 & 3, *supra*; note 8, *infra*; District Court Order Granting in Part and Denying in Part Hecla's and Asarco, Inc.'s Motions to Modify Consent Decree (Sept. 30, 2001), App. 31a (*hereinafter*, September 30, 2001 Order).

A key inducement for both Hecla and Asarco in entering into the 1994 Consent Decree was the United States' repeated assurances not to expand the NPL listing beyond the already huge, 21-square mile Box. In 1991, for example, then EPA Regional Administrator Dana Rasmussen wrote to the Idaho Congressman Larry LaRocco:

> Let me state unequivocally that is *not* EPA's intention to expand the boundaries of the site. We recognize that there are many other regulatory

[4] The Honorable Judge Harold L. Ryan entered the consent decree and presided over its initial administration. Judge Ryan passed away in April 1995. The Honorable Judge Edward J. Lodge took over further administration of the consent decree from the Hon. B. Lynn Winmill in February 2001. Judge Lodge, continues to preside over Bunker Hill related matters, as described herein.

> tools besides Superfund legislation to affect environmental improvements.[5]

November 7, 1991 Letter from United States Environmental Protection Agency Regional Administrator Dana A. Rasmussen to Idaho Congressman Larry LaRocco, App. 76a. (emphasis in original). As the district court found, this and similar assurances were an essential "trade off," on which the companies reasonably relied to determine "how far their dollars would reach and what could be done to keep the company afloat." September 30, 2001 Order, App. 29a.

D. Site Expansion.

In March 1996, eighteen months after entry of the 1994 Consent Decree, the United States did an about face, reneged on its assurances not to expand the Site, and filed a major lawsuit in federal court in Idaho seeking to recover millions, if not billions of dollars in response costs and natural resource damages for alleged hazardous substance releases throughout the Coeur d'Alene Basin. *See* March 22, 1996 Press Release from the United States Department of Justice, App. 78a. The new Superfund Site boundaries embraced the entire Coeur d'Alene drainage,

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[5] The parties to the consent decree recognized that EPA might utilize Superfund authorities to a limited degree as part of the multi-media cleanup initiative envisioned by the consent decree. *See* September 30, 2001 Order, App. 27a-28a & n.1. None of the parties anticipated that the multi-media cleanup initiative would fail. *Id.* The 1994 consent decree does not specifically incorporate EPA's assurances and expectations on this issue. However, the definition of the "Site" is limited to the Box. Plus, EPA did not reserve to itself anywhere in the consent decree the authority to expand the Bunker Hill NPL Site. *See infra* at page 16.

from the Idaho-Montana border on the East, through Idaho and then on into Washington, down the drainage of the Spokane River, west of the City of Spokane – an enormous area covering thousands of square miles. *See also United States v. ASARCO, Inc.*, 214 F.3d 1104 (9th Cir. 2000). Any question about the United States' intent to "Superfund" the Basin and expand the NPL site was answered unequivocally by EPA's announcement in early 1998 of its undertaking a full-blown Superfund cleanup study for the entire Basin.[6] *See* September 30, 2001 Order, App. 30a-31a & n.2.

The 1996 Basin lawsuit, the so-called "Basin Case," was assigned to Judge Lodge. In early motion practice in 1998, involving a statute of limitations question, Judge Lodge addressed the site expansion issue for the first time, finding that, in fact, EPA had impermissibly expanded the Bunker Hill NPL Site from the 21-square mile Box, to include the entire Basin. *United States v. ASARCO, Inc.*, 28 F. Supp. 2d 1170, 1180-81 (D. Idaho 1998).[7]

Trial of the liability phase of the Basin case took place over a six-month period in 2000. Judge Lodge heard testimony from close to 100 witnesses during more than 78 days of trial and reviewed 8,695 exhibits. The trial transcript

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[6] EPA claims approximately $60 million in CERCLA study and other costs in the Basin as of August 30, 2003. The Department of Justice claims an additional $16.7 million in litigation costs as of September 30, 2003.

[7] The Ninth Circuit reversed, finding as a matter of law that the expansion was permissible under the Administrative Procedure Act. *United States v. ASARCO, Inc.*, 214 F.3d 1104 (9th Cir. 2000). The Ninth Circuit did not, however, question Judge Lodge's factual findings on the United States' about-face decision to Superfund the Basin and expand the Site.

runs to over 16,000 pages. In September 2003, Judge Lodge issued an order assigning substantial liability to Hecla and Asarco for at least some parts of EPA's claims. *Coeur d'Alene Tribe v. ASARCO, Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003). The extent of that liability, and the companies' liability for natural resource damages, plus certain defenses, were left to a Phase II Basin case trial that has yet to occur.[8]

E. The Motion to Modify.

On January 16, 2001, Hecla filed a motion pursuant to the 1994 Consent Decree, ¶ 114 (App. 91a), and Federal Rule of Civil Procedure 60(b), to modify the 1994 Consent Decree, in light of the changed circumstances associated with the expansion of the Bunker Hill NPL Site. Rule 60(b) of the Federal Rules of Civil Procedure authorizes a federal district court to modify a consent decree finalized and entered by the court if, among other reasons, "it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5).

Judge Lodge held a two-day evidentiary hearing on the motion in mid-September 2001 and issued an initial ruling 11 days later, on September 30, 2001. This was after completion of the Phase I Basin case trial, but before issuance of his written, September 2003 Basin case order.

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[8] The Court's September 3, 2001 Order set a Phase II trial date of May 11, 2004. That date was rescheduled several times before Judge Lodge vacated the Phase II trial altogether, pending resolution, now that Asarco is in bankruptcy, of the issues of the applicability of the automatic stay and the Idaho District Court's jurisdiction at this point to try the Phase II case as to Asarco. Asarco filed for bankruptcy protection on August 9, 2005.

Judge Lodge held that modification of the 1994 Consent Decree was warranted under Federal Rule of Civil Procedure 60(b)(5) and this Court's decision in *Rufo v. Inmates of Suffolk County*, 502 U.S. 367 (1992). The district court found, based on extensive testimony and written evidence, that expansion of the Bunker Hill NPL Site constituted "a significant change in factual circumstances and these changes were not reasonably anticipated by the Defendants at the time the Consent Decree was signed." September 30, 2001 Order, App. 30a.

The district court next addressed whether this change in circumstances had, under *Rufo*, made compliance with the 1994 Consent Decree "substantially more onerous." "Based on the Court's familiarity with EPA's plans for the Basin," explained Judge Lodge, "the Court believes the overall liability under the RI/FS for the area outside the Box will be substantial." September 30, 2001 Order, App. 32a. The court deferred a final decision on how onerous the change in circumstance might be, and the appropriate relief, until after EPA completed its RI/FS and issued its remedy determination.

The EPA issued its remedy determination, known as a "Record of Decision" or "ROD," in September 2002. The ROD calls for a $360 million cleanup in the Basin. In November 2003, Judge Lodge issued his final decision on Hecla's motion to modify, finding that "the Defendants . . . now also have significant and real liability for the cleanup and restoration of the Basin." November 18, 2003 Order, App. 41a. The court then reduced the companies' remaining obligations under the consent decree by approximately twenty percent (20%) or $7 million dollars. November 18, 2003 Order, App. 44a & n.3. By order dated April 16, 2004, the district court approved the parties'

agreed upon crediting of the $7 million, subject to rights of appeal. *See* District Court Order Granting the Joint Recommendation of the Parties to Modify the Consent Decree (Apr. 16, 2004), App. 51a-53a.

The United States appealed the November 18, 2003 Order and the April 16, 2004 Order to the Ninth Circuit. The two appeals were consolidated. The United States claimed that the district court had abused its discretion in finding that the expansion of the Superfund Site was an unanticipated change in circumstances that had made compliance with the 1994 Consent Decree substantially more onerous. The United States also complained that the $7 million credit was not suitably tailored to the changed circumstances found by the district court.

The Ninth Circuit agreed with the United States and reversed the district court's decision. The Ninth Circuit held that a district court's authority in equity to modify a consent decree under Rule 60(b)(5) is limited by contract principles and whether the changed circumstance at issue was anticipated in the contract.[9] *See* Court of Appeals Opinion, *United States of America v. ASARCO, Inc.*, App. 13a-15a. The Ninth Circuit also found that, even if the district court was allowed to consider extrinsic evidence, the evidence was conflicting, and therefore, not sufficient, in the Ninth Circuit's view, to support modification of the 1994 Consent Decree. *Id.*, App. 19a-20a. Based on its reading of *Rufo*, the Ninth Circuit also raised a new issue as to whether the companies had made a reasonable effort

[9] The Ninth Circuit found that the 1994 Consent Decree did anticipate site expansion. For the reasons noted in note 5, *supra*, Hecla contends that this finding is erroneous.

to comply with the 1994 Consent Decree. This question was not considered by the district court and therefore no evidence on the issue was presented below. Nonetheless, the Ninth Circuit found that the companies had not made a reasonable effort to comply.

The Ninth Circuit denied Hecla's Petition for Rehearing or Rehearing En Banc by Order dated April 12, 2006. This petition follows.

REASONS FOR GRANTING THE WRIT

A. The District Courts Administer Thousands of Long-Lived Consent Decrees and Must Have the Discretion and Flexibility to Modify These Decrees as Circumstances Change.

1. The Ninth Circuit's decision triggers the need for this Court to exercise its supervisory power to ensure the district courts' equitable discretion in the administration of consent decrees.

The district courts have continuing jurisdiction over thousands of consent decrees and judgments involving issues of vital public interest and enormous social and economic impacts, including decrees addressing "institutional reform" (*i.e.*, prison overcrowding, school desegregation, voting and public housing cases are examples), antitrust and other business or trade practices, environmental protection, employment and labor relations, patent and trademark and securities regulation. Such decrees often involve goals the implementation of which may take years to achieve. As a result, these consent decrees often remain in place for extended periods of time. In many

cases, the complexity of the decree, the timeframe for implementation and the fact that circumstances change over time require the district courts to exercise broad discretion to properly and effectively administer and, as necessary, modify these decrees while they remain operative.

The environmental decree at issue in this case is a good example of judicial settlements which are of enormous public significance and likely to require modification during their long lives in order to do justice to the parties and the public. *See supra* at page 1, Overview.

Thanks in no small measure to the knowledge that they may seek appropriate modification if circumstances change, defendants like Hecla have entered into long-lived environmental consent decrees with the United States by the hundreds if not thousands. In most instances, the full nature and extent of the work to be undertaken pursuant to the decree is not known – or even knowable – when the decree is entered. Thus, the defendant must rely upon its ability either to negotiate changes with EPA or to go to the district court for an appropriate modification should circumstances dictate. The Ninth Circuit's decision effectively eliminates this second option and, in so doing, will have a chilling effect on consent decrees as an effective vehicle for maximizing cleanups and, in turn, minimizing litigation.

The voluntary participation by potentially responsible parties ("PRPs") in the cleanup of contaminated sites is critical to the success of both EPA and state remediation programs. EPA has identified 44,000 potentially hazardous waste sites and continues to discover about 500 additional sites per year. EPA places what it considers the most

seriously contaminated sites on the NPL. At the end of fiscal year 2002, there were 1,233 sites on the NPL. *See* U.S. General Accounting Office, *Superfund Program: Current Status and Future Fiscal Challenges* (GAO-03-850, July 31, 2003), App. 93a. According to EPA, PRPs have undertaken the work and funded more than 70 percent of the remedial actions begun at sites other than federal facilities in fiscal years 2000 through 2002. *Id.*, App. 97a. Since the inception of the Superfund program through 2002, PRP commitments have exceeded $20 billion. *Id.*, App. 94a. EPA has repeatedly emphasized its "continued commitment to maximize PRP involvement in financing and conducting cleanups" and that "in the past few years, PRPs have led the majority of new remedial actions, accelerating the pace of Superfund cleanups. Early involvement of PRPs also kept transaction and cleanup costs at a minimum." U.S. Environmental Protection Agency, Office of Emergency and Remedial Response: *Progress Toward Implementing Superfund, Fiscal Year 1998*, App. 102a, 105a.

The language of CERCLA itself reflects Congress' intent to ensure cooperative efforts between EPA and PRPs in cleaning up contamination. Section 122, 42 U.S.C. § 9622, for example, details over multiple pages the importance and key elements of CERCLA settlements. Section 122(d)(1)(A), 42 U.S.C. § 9622(d)(1)(A) provides that agreements between EPA and PRPs under this section "shall be entered in the appropriate United States district court as a consent decree." The importance of these consent decrees, their flexibility and that they can be modified to accommodate changed circumstances were underscored by former Assistant Attorney General of the Environment and Natural Resources Division of the

United States Department of Justice, Lois J. Schiffer, in July 19, 2005 testimony before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee:[10]

> [S]ettling environmental cases with consent decrees provides far more *flexibility* to the parties in establishing what the state or local government must do to come into compliance with the environmental law. The parties, rather than the court, set the schedule. Each party compromises to come up with a more workable solution than a judge-decided ruling may provide. Moreover, a component of consent decree flexibility is that consent decrees can be modified. While both court-established remedies and consent decrees may be modified, courts may well be more willing to change an order not crafted by the judge. With consent decrees, there are effective tools for dealing with *changed circumstances*, including changed financial circumstances, in a state or local government.

A Review of Federal Consent Decrees, S. Hrg. 109-181, Before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee, 109th Cong. 97, 100 (2005) (testimony of Lois Schiffer, former Assistant Att'y Gen. of the United States) (emphasis in original), App. 109a.[11]

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[10] Ms. Schiffer's remarks were particularly addressed to the effect of consent decrees on state and local governments, but are equally germane to decrees where the U.S. government settles with private parties.

[11] The consent decree in this case specifically provided: "Nothing in this Decree shall be deemed to alter the Court's powers pursuant to Federal Rules of Civil Procedure 60, or otherwise." Consent Decree, ¶ 114. App. 91a.

Affirming the federal district court's discretion in modifying consent decrees is also critical vis-à-vis this Court's supervisory powers over both the circuit and district courts. If the appellate courts can second-guess the district courts without restraint, consent decree modifications will be routinely appealed by the losing litigant wanting to second-guess the district court's opinion. This will only clog the appellate courts with matters properly left to the district courts' fact finding role and discretion.

The Ninth Circuit's usurpation of the district court's role in determining Rule 60(b)(5) motions is inconsistent with this Court's rulings, as well as decisions of other courts of appeal. It is critical that this Court ensure that the courts of appeal understand the proper relationship between the district courts and the circuit courts with respect to Rule 60(b) motions:

> If the District Court takes into account the relevant considerations [all of which are not likely to suggest the same result][12] and accommodates them in a reasonable way, then the District Court's judgment will not be an abuse of its discretion, regardless of whether an appellate court would have reached the same outcome in the first instance. Cf. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow").

Rufo, 502 U.S. at 394 (Justice O'Connor, concurring).

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[12] In contrast, the Ninth Circuit seized upon the fact that the evidence below was conflicting, as somehow justifying its substituting its view of the facts for the findings of the district court.

Certiorari is therefore appropriate on this matter to ensure the proper administration and supervision of the federal courts.

2. The Supreme Court should settle the issue of the scope and applicability of Rule 60(b)(5) after *Rufo*.

Historically, relief from judgments was available in federal courts through a variety of remedies such as *coram nobis*, *coram vobis*, *audita querela*, or bill of review. *See*, Moore & Rogers, *Federal Relief from Civil Judgments*, 1946, 55 Yale L.J. 623, 659-682. In *United States v. Swift & Co.*, 286 U.S. 106 (1932), this Court recognized "the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent." *Id.* at 114. In that case, however, the motion for modification was denied, the Supreme Court holding: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Id.* at 119. In 1946, Rule 60(b)(5) was promulgated.

In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), this Court construed the district courts' power to modify consent decrees when "it is no longer equitable that the judgment should have prospective application," in accordance with Federal Rule of Civil Procedure 60(b)(5). The Court noted that *Swift* did not represent a hardening of the traditional flexible standard for modification of consent decrees. *Id.* at 379. It went on to state that the "grievous wrong" standard was not intended to take on a "talismanic quality, warding off virtually all efforts to modify consent decrees." *Id.* at 380. Instead, the language

of Rule 60(b)(5) "permits a less stringent, more flexible standard" for relief from a final judgment and allows a court to decide when "it is no longer equitable that the judgment has prospective application." *Id.*

The *Rufo* Court then turned to the case before it, an institutional reform dispute, and outlined a set of principles to be followed by the district courts in determining motions to modify in such cases. According to the Supreme Court, the relevant factors are:

> (1) Whether a significant and unanticipated change in circumstances exists;
>
> (2) Whether the changed circumstances have made compliance with the decree substantially more onerous;
>
> (3) Whether the proposed modification to the decree is suitably tailored to the changed circumstances; and
>
> (4) Even if the changed circumstances were anticipated, whether the movant agreed to the decree in good faith, made reasonable efforts to comply with the decree and it would be inequitable to deny relief.

Id. at 383-385.

These considerations are not a rigid prescription, but rather are to be applied in a flexible manner, within the broad, equitable discretion of the district court. As recognized by the Third Circuit Court of Appeals:

> We believe that the generally applicable rule for modifying a previously issued judgment is that set forth in Rule 60(b)(5), *i.e.*, "that it is no longer equitable that the judgment should have prospective

> application." It would be a mistake to view either *Rufo* or *Swift* as encapsulating a universal formula for deciding when that point has been reached. Instead, each of those cases represents a response to a particular set of circumstances. A court of equity cannot rely on a simple formula but must evaluate a number of potentially competing considerations to determine whether to modify or vacate an injunction entered by consent or otherwise.

Building and Const. Trades v. N.L.R.B., 64 F.3d 880, 888 (3rd Cir. 1995). "[D]ifferent considerations may have greater or lesser prominence in different cases, not because the cases are characterized one way rather than another but because equity demands a flexible response to the unique conditions of each case." *Id.*

In this case, the Ninth Circuit rejected *Rufo*'s flexible discretion standard and reverted to a very limiting approach, with an impossibly high bar, reminiscent of *Swift*.

First, the Ninth Circuit incorrectly placed a new threshold burden on Rule 60(b)(5) motions by holding that consent decrees are contracts and that absent ambiguity, what the defendants did or did not anticipate must be discerned within the consent decree's four corners. Ninth Circuit Court of Appeals Opinion, *United States of America v. ASARCO, Inc.*, App. 13a-20a. This new, threshold requirement is inconsistent with *Rufo*'s "less stringent, more flexible" approach. "A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforced as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees."

Rufo, 502 U.S. at 378. In fact, in *Rufo*, this Court stated that, on remand, it expected the district court to determine the issue of what the movant did or did not anticipate on a "fully developed record." *Id.* at 386 & n.10. Likewise, in *Agostini v. Felton*, 521 U.S. 203, 215 (1997) this Court stated: "The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong."

Other courts of appeal, and even the Ninth Circuit in cases prior to this case, have agreed that the district court may consider extrinsic evidence with respect to the issue of whether the movant anticipated the changed circumstances. *See, e.g.*, *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1258 (9th Cir. 1999) ("Instead the *Rufo-Agostini* approach allows courts to fulfill their traditional equity role: to take all the circumstances into account in determining whether to modify or vacate a prior injunction or consent decree"); *Building and Const. Trades v. N.L.R.B.*, 64 F.3d 880, 889 (3rd Cir. 1995) (consideration of affidavit); *ALC v. Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 584 (1st Cir. 1995) (four-day evidentiary hearing); *Waste Management of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1146 (6th Cir. 1977) ("Case law clearly suggests that a district court is not required to remain blind to all but the words contained in the four corners of a consent decree . . . "). By limiting Rule 60(b)(5) modification to a "four corners" review, the Ninth Circuit stripped the district courts of their authority in equity and the flexibility *Rufo* dictates for consent decree modification.

This case presents a good example of how limiting review to the "four corners" of the consent decree can lead to an erroneous result. The district court had years of

experience in administering this consent decree and addressing related disputes. The district court held a two-day evidentiary hearing on the motion to modify, which included live testimony from six witnesses and deposition testimony by a seventh. Based upon the totality of the evidence, including the language of the consent decree itself, the district court made the following finding of fact: "[T]he Court finds at the time the consent decree was entered, the Defendants did not anticipate the EPA using its remedial CERCLA authority to clean up the Basin." September 30, 2001 Order, App. 28a.

The Ninth Circuit chose to disregard this finding and the evidence and limited its review to the "four corners" of the consent decree. It concluded that the United States had expressly reserved its right to "Superfund" the Basin in the consent decree and, therefore, that the defendants actually anticipated the change. Nowhere in the consent decree, however, did the United States reserve the right to "Superfund" the Basin. EPA's authority to place a site on the NPL (i.e., make it a Superfund site) is contained in CERCLA § 105(c), 42 U.S.C. § 9605(c). The consent decree contains no reservation of rights with respect to CERCLA § 105. *See* Consent Decree, ¶¶ 85, 86, & 90 (reservation of rights); ¶ 4.AD (definition of "site"), App. 83a, 84a, 87a. Moreover, listing a site on the NPL does not come within the definition of "response action," *see* CERCLA § 101(25), 42 U.S.C. § 9601(25), nor does it have anything to do with "liability." *See Honeywell International, Inc. v. E.P.A.*, 372 F.3d 441, 443 (D.C. App. 2004). Without NPL listing authority, EPA is, by statute, 42 U.S.C. § 9604(c)(1), limited to short-term response actions. EPA could never have developed a $360 million Basinwide CERCLA remedy, and demanded

Hecla pay for it, without reneging on its commitment to not list the site on the NPL.

The Ninth Circuit also ignored that the consent decree itself anticipates an approach to Basin cleanup without an NPL listing. While the district court found that EPA had reserved CERCLA remedial authorities in the consent decree, it also found that EPA had agreed to forego a singular reliance on its "remedial authority" under CERCLA, based in part on the consent decree itself. Both the 1991 and 1992 Records of Decision, "which it is undisputed are an enforceable part of the Consent Decree," *see* September 30, 2001 Order, App. 28a, specifically endorse the "multi-media approach" to a Basinwide CERCLA remedy. *Id.* The Ninth Court erred in finding that the language of the consent decree did not anticipate this alternative to "Superfunding" the Basin.

In addition to restricting the scope of the evidence which a district court may consider with respect to a motion to modify, the Ninth Circuit impermissibly substituted its judgment for the wide-ranging discretion of the district court in deciding Rule 60(b) motions. Appellate courts review rulings on Rule 60(b) motions for abuse of discretion. *See Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 263, n.7 (1978). "Determining what is 'equitable' is necessarily a task that entails substantial discretion . . . As a result, an appellate court should examine primarily the *method* in which the District Court exercises its discretion, not the substantive outcome the District Court reaches." *Rufo*, 502 U.S. at 393-394 (Justice O'Connor, concurring) (emphasis in original).

In this case, the Ninth Circuit disregarded the district court's findings of fact based on the evidence adduced at

the court's two-day hearing and came to its own conclusion as to whether it was "equitable" to grant the motion to modify. In doing so, it disregarded *Rufo*'s admonition that even if the movant *did* anticipate the changed circumstances, the motion to modify could still succeed if the movant were able to "convince the court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Rufo*, 502 U.S. at 385. The Ninth Circuit acknowledged that the district court had not reached this issue, but declined a remand, stating that the Panel had "a fully-developed record to review." *See* Ninth Circuit Court of Appeals Opinion, App. 21a.

> We do not accept that Defendants have made reasonable efforts to comply with the decree, or have met their heavy burden in this case, where the cost of compliance is unknown and the proper baseline against which to measure any increase in liability remains indeterminate.

Id., App. 22a.

Nothing in the record supports the Ninth Circuit's conclusion on this point. In the proceedings before the district court and on appeal, neither the United States nor the State of Idaho ever took the position or produced evidence that the defendants had failed to make reasonable efforts to comply with the decree. To the contrary, in an early ruling on the motion to modify, the district court ordered the defendants to "fully comply with all obligations under the Consent Decree for 2002 and beyond until further order of this court." District Court Order Granting the United States' Emergency Request for Clarification or Modification of the September 30, 2001 Order (Oct. 15, 2001), App. 37a. Then, two years later, in issuing its final

order, the district court modified the decree so as to "allow for almost all of the required work to be completed while still achieving the goals necessary to safeguard and monitor human health and to protect the environment." November 18, 2003 Order, App. 45a. These quotations in fact suggest that compliance with the consent decree was ongoing and not an issue. If this is now the decisive issue in the case, the matter should be remanded to the district court for decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 11, 2006

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