No. 06-61

In the Supreme Court of the United States

HECLA MINING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court abused its discretion in modifying a consent decree when the terms of the decree show that the parties anticipated the circumstance that prompted the motion to modify, and petitioner failed to satisfy its burden of justifying such a modification.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 430 F.3d 972. The orders of the district court (Pet. App. 23a-35a, 36a-38a, 39a-50a, 51a-55a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2005. A petition for rehearing was denied on April 12, 2006 (Pet. App. 56a-58a). The petition for a writ of certiorari was filed on July 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42

U.S.C. 9601 *et seq.*, authorizes the President to respond to releases of hazardous substances, pollutants, or contaminants by undertaking "removal" and "remedial" actions. 42 U.S.C. 9604(a)(1). "Removal actions" are actions to monitor, assess, evaluate, minimize, or mitigate danger to public health or the environment that may result from a release of hazardous substances. 42 U.S.C. 9601(23). "Remedial actions" are actions consistent with a permanent remedy taken instead of or in addition to removal actions. 42 U.S.C. 9601(24). Removal and remedial actions are both "response actions." 42 U.S.C. 9601(25).

Before a remedial action is selected, the Environmental Protection Agency (EPA) generally conducts a remedial investigation and feasibility study (RI/FS). 40 C.F.R. 300.430. Once the RI/FS is completed, EPA selects a remedial action in a Record of Decision. When the federal government has used Superfund money to implement a response action, the United States may bring an action against potentially responsible parties (PRPs) to recover the government's costs. 42 U.S.C. 9607(a).

2. For many years, EPA and the State of Idaho have made concerted efforts to clean up the Coeur d'Alene River Basin (Basin) in northern Idaho. Pet. App. 3a-8a. One area of particular concern has been a 21 square-mile area of the Basin known as "the Box." *Id.* at 3a.

In 1994, the United States and the State entered into a consent decree with various mining companies, including petitioner, requiring the mining companies to perform cleanup activities in the Box. Pet. App. 3a. In the Decree, the United States preserved its authority to sue the mining companies for liability outside the Box; it retained all authority to take any and all response

actions authorized by law; and it granted a covenant not to sue the mining companies, but only with respect to the Box. *Id.* at 7a.

During negotiations, EPA informed the mining companies that its current plan was not to use its CERCLA remedial authority outside the Box. Pet. App. 6a. Instead, EPA intended to address clean-up outside the Box through the Coeur d'Alene Basin Restoration Project (Basin Restoration Project), a long-term cooperative venture involving a wide range of participants, including the mining companies. *Id.* at 6a-7a. During negotiations, petitioner "consistently sought a binding commitment" from EPA that it would not exercise CERCLA remedial authority outside the Box. *Id.* at 27a. The United States "consistently rejected such broad relief," however, and such a provision was not included in the Decree. *Ibid.*

3. In 1998, EPA announced that it would exercise its CERCLA remedial authority to conduct an RI/FS for the areas outside the Box. Pet. App. 8a. In 2001, petitioner filed a motion to modify the Decree on the ground that EPA's decision to invoke CERCLA remedial authority outside the Box was an unanticipated change in circumstance that made compliance with the Decree more onerous. *Ibid.*

After a hearing, the district court granted petitioner's motion to modify. Pet. App. 23a-35a. The court held that the Decree clearly and unambiguously reserved to the EPA authority "to apply remedial CERCLA authority outside the Box and hold the potentially responsible parties ('PRPs') liable for alleged injury outside the Box." *Id.* at 27a. Relying on statements by EPA that it intended to use the Basin Restoration Project to address contamination outside the Box,

however, the court concluded that the United States' assertion of CERCLA remedial authority was an unanticipated change in circumstances warranting modification of the Decree. *Id.* at 27a-28a. In a later order, the court concluded that the petitioner's and Asarco's joint obligation under the Decree should be reduced by $7 million. *Id.* at 44a.

4. The court of appeals reversed. Pet. App. 1a-22a. Applying this Court's decision in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the court of appeals held that petitioner failed to satisfy the applicable standards for modifying a consent decree. In particular, the court held that (1) petitioner anticipated that EPA might use its CERCLA authority outside the Box, Pet. App. 13a-20a, and (2) petitioner failed to satisfy the heavy burden that applies to a party seeking a modification based on an anticipated circumstance. *Id.* at 20a-22a.

In holding that petitioner anticipated the possibility that the EPA would use CERCLA remedial authority outside the Box, the court of appeals relied on the plain language of the Decree. Pet. App. 13a. In particular, the court referred to the provision in the Decree expressly stating that the United States "retain[ed] all authority and reserve[d] all rights to take any and all response actions authorized by law." *Ibid.* (brackets in original).

The court of appeals rejected petitioner's effort to show, based on extrinsic evidence, that it did not anticipate EPA's reliance on CERCLA authority outside the Box. Relying on this Court's decision in *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), the court of appeals held that extrinsic evidence is not relevant when, as here, the terms of a consent decree unambiguously

resolve an issue. Pet. App. 14a-15a. The court further concluded that, in any event, the extrinsic evidence did not support petitioner's argument. *Id.* at 19a-20a. The court explained that the evidence showed that EPA relayed only its present intent not to use CERCLA authority, and that EPA never gave any assurances that it would not use such authority in the future. *Ibid.*

The court of appeals further held that petitioner failed to satisfy the heavy burden that applies under *Rufo* when a party seeks a modification of a decree based on an anticipated circumstance. Pet. App. 20a-22a. The court noted that petitioner relied on an assertion that EPA's use of CERCLA authority significantly affected its financial position. *Id.* at 22a. The court concluded that petitioner's claim of financial harm was speculative because it is unclear what liability petitioner faces compared to what it would have faced under the Basin Restoration Project. *Ibid.*

ARGUMENT

The court of appeals' decision is correct. It does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 18) that the decision below conflicts with this Court's decision in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). That contention is without merit and does not warrant review.

In *Rufo*, the Court held that, in general, a district court has flexibility to modify a consent decree in response to a significant change in circumstances. 502 U.S. at 383. At the same time, however, the Court made clear that "[o]rdinarily, * * * modification should not be granted where a party relies upon events that actually

were anticipated at the time it entered into a decree." *Id.* at 385. The Court specifically held that when a party seeks a modification based on a circumstance that was anticipated when the decree was entered, that party "would have to satisfy a heavy burden to convince a 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)." *Ibid.*

Thus, under *Rufo*, the applicable modification standard depends on whether the circumstance upon which the party relies in seeking a modification is anticipated or unanticipated. If the change is unanticipated, a district court has discretion to modify the decree provided that the change is significant. On the other hand, if the change is anticipated, a modification would be warranted only if the party seeking a modification satisfies a "heavy burden" of showing that it should be relieved of the undertaking to which it agreed.

The court of appeals followed the approach required by *Rufo* here. It first determined that the change in circumstance on which petitioner relied—EPA's invocation of CERCLA remedial authority outside the Box—was anticipated. Pet. App. 13a-20a. It then determined that petitioner failed to satisfy the heavy burden of showing that it should nonetheless be relieved of the obligation to which it agreed. *Id.* at 20a-22a. Those rulings are fully consistent with *Rufo*.

2. Petitioner contends (Pet. 18-21) that the court of appeals erred in ruling that the parties anticipated that EPA might invoke its CERCLA remedial authority outside the Box. The court of appeals' ruling, however, is supported by the plain language of the Decree. The Decree expressly authorizes EPA to bring an action against the defendants for "liability for response costs in-

curred and/or response actions taken outside of the [Box]." Pet. App. 88a. The Decree also preserves EPA's authority to "take any and all response actions authorized by law." *Id.* at 89a. And nothing in the Decree places any limitation of EPA's authority to take remedial action outside the Box. To the contrary, petitioner conceded below that EPA retained the right "to exercise CERLCA authorities outside the Box," and that "the Decree's reservation of rights confirms the parties' expectation that the EPA *might* take such action." *Id.* at 13a. In those circumstances, the court of appeals correctly concluded that the terms of the Decree make clear that the parties anticipated that EPA might invoke its CERCLA remedial authority outside the Box. In any event, the question whether the court of appeals correctly interpreted the particular Decree in this case is not one of recurring importance, and therefore does not warrant review.

Petitioner contends (Pet. 18) that the court of appeals erred in resolving the question whether the parties anticipated EPA's invocation of CERCLA remedial authority based solely on the terms of the decree. In petitioner's view, the court should have considered certain statements made by EPA to petitioner. Petitioner's arguments are without merit. The court of appeals' approach is consistent with this Court's decisions in *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), and *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975). Under those decisions, a court must interpret the meaning of a consent decree based on its language, and it may consult extrinsic sources only when the language in the decree is ambiguous. *Armour*, 402 U.S. at 682-683; *ITT*, 420 U.S. at 238. There is no reason that the same approach should not govern the question

whether the parties anticipated a particular circumstance when they entered into a consent decree.

Here, as discussed above, the language of the Decree unambiguously shows that the parties anticipated the possibility that EPA would invoke CERCLA remedial authority outside the Box. The court of appeals therefore correctly based its determination on the language of the Decree without consideration of extrinsic evidence.

Petitioner argues (Pet. 18-19) that the court of appeals' holding that the unambiguous language of a decree may not be contradicted by extrinsic evidence conflicts with *Rufo*. But *Rufo* simply did not address that issue. In those circumstances, the court of appeals properly followed the guidance provided by this Court's decisions in *Armour* and *ITT*.

The court of appeals' holding is also consistent with that of the only other circuit that has addressed the question. In *Thompson* v. *United States Department of Housing & Urban Development*, 220 F.3d 241 (4th Cir. 2000), the district court modified a decree that required the building of housing in certain areas based on the asserted need for the housing in another area. The Fourth Circuit reversed, explaining that a provision in the decree "makes it clear that the parties contemplated that new construction would be required or desired during the life of the Consent Decree." *Id.* at 247. No other circuit has taken a contrary view.

Petitioner errs in contending (Pet. 19) that the decision below conflicts with the decisions of other circuits. In *Building & Construction Trades Council* v. *NLRB*, 64 F.3d 880, 889 (1995), the Third Circuit assumed arguendo, based on an affidavit submitted by the party seeking a modification, that the party had not violated

the consent decree. It went on to hold that compliance with a consent decree is not a sufficient basis for obtaining a modification of a decree. *Ibid.* In *Alexis Lichine & Cie* v. *Sacha A. Lichine Estate Selections, Ltd.*, 45 F.3d 582, 584 (1995), the First Circuit noted that the district court had held a four-day hearing on the motion to modify. The court concluded that most of the evidence was not relevant to the question whether a modification was warranted. *Id.* at 587. In *Waste Management of Ohio, Inc.* v. *City of Dayton*, 132 F.3d 1142, 1146 (1997) (citation and emphasis omitted), the Sixth Circuit held that a court is not "bound under all circumstances by the terms contained within the four corners of the parties' agreement." In particular, the Sixth Circuit explained that a court may modify the terms of a decree when it is "satisfied that the decree has been turned through changing circumstances into an instrument of wrong." *Ibid.* (citation and internal quotation marks omitted).

None of those decisions addresses the relevance of extrinsic evidence when the language of the decree unambiguously makes clear that a change was anticipated. Indeed, none of the cases involved the question whether a change was anticipated or unanticipated. There is therefore no conflict between those decisions and the decision below.

Review of the question whether extrinsic evidence may be considered when the decree unambiguously shows that a change was anticipated is also unwarranted because petitioner could not benefit from a rule allowing consideration of extrinsic evidence. As the court of appeals explained, the extrinsic evidence shows only that EPA informed petitioner that it did not have a current intent to use its CERCLA remedial authority outside

the Box. EPA never gave petitioner any assurances that it would not invoke such authority in the future. Pet. App. 19a-20a. Indeed, during negotiations, petitioner sought a commitment from EPA that it would not exercise CERCLA remedial authority outside the Box, the United States refused to provide that commitment, and no such commitment was included in the Decree. *Id.* at 27a. Because petitioner could not benefit from a ruling that allowed consideration of extrinsic evidence, this case is not an appropriate vehicle for resolving that issue.

3. Finally, petitioner contends (Pet. 21) that the court of appeals failed to properly apply the abuse of discretion standard in reviewing the district court's judgment. That contention is without merit and does not warrant review.

In reviewing the district court's decision, the court of appeals expressly invoked the abuse of discretion standard. Pet. App. 9a. Applying that standard, the court of appeals correctly concluded that the district court abused its discretion in granting the motion to modify. "A district court by definition abuses its discretion when it makes an error of law." *Koon* v. *United States*, 518 U.S. 81, 100 (1996). Here, the district court committed an error of law when it failed to resolve the question whether the parties anticipated that EPA might use its CERCLA authority outside the Box based on the unambiguous language in the Decree. It further erred as a matter of law when, as a result of that error, it failed to require petitioner to satisfy the heavy burden that applies when a party seeks a modification based on an anticipated circumstance. See *Rufo*, 502 U.S. at 385.

In any event, this is not a case in which the result turns on the standard of review. As discussed above, the

Decree clearly shows that the parties anticipated the possibility that EPA might use its CERCLA remedial authority outside the Box, and the extrinsic evidence does not indicate otherwise.

Petitioner contends (Pet. 21-23) that the court of appeals should have remanded the case to the district court to determine whether petitioner satisfied the heavy burden that applies when the party seeking a modification relies on an anticipated circumstance. Because the record permitted only one resolution of that issue, however, there was no need for the court of appeals to remand the case. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982). In seeking a modification, petitioner asserted that the financial impact of EPA's decision to invoke CERCLA authority outside the Box warranted a modification of the Decree. As the court of appeals explained, however, petitioner's allegations are speculative because it is unclear what liability petitioner faces compared to what it would have faced under the Basin Restoration Project. Pet. App. 22a. In any event, the question whether a remand was warranted is fact-bound and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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